TEPAV Constitution Studies
Working Paper

CONTROLLING AND BALANCING POLITICAL POWER and CONSTITUTIONS

Assoc. Prof. Levent Gönenç

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INTRODUCTION

Political power is the most comprehensive and supreme power in a society and hence has immense significance for the maintenance of unity and order in a given society. Besides, the fulfilment of the tasks and the services necessary to meet basic social needs is possible with the utilization of the political power. As much as political power is an indispensable element of social life in this respect, also intrinsic to it is a grave danger in terms of social life, as indicated by the well-known and oft-cited saying by Lord Acton: "Power corrupts, absolute power corrupts absolutely." Unless power is constrained, it can be abused. When political power is abused, i.e. the parties that hold that power use it arbitrarily to the disadvantage of those who do not hold it, power can translate into a means of pressure, leading to the possible exclusion, oppression and even the destruction of those who do not hold power. **(See Detailed Information 1)**.

"The question then is, how can liberties be protected without debilitating political power?
or
"How can political power be rendered effective without hurting freedoms?"

"Constitutional engineering" is the answer to these questions. Constitutions set up mechanisms that "control" and "balance" political power, which must be designed in order to enable the utilization of political power on the one hand, and constrain it on the other. In other words, an ideal constitution must defuse political power as a threat without paralyzing it. "Constitutional engineering" equips us with the legal and political instruments that enable us to attain both goals at the same time.

The most significant aspect to constitutional controlling and balancing mechanisms is that they are comprehensive. Every element that constitutes these mechanisms must be designed in a way that takes into consideration its impact on one another. Otherwise, the emergence of malfunctions in the democratic regime becomes inevitable.

CONCEPT:
Constitutional engineering

Constitutional engineering rests on the idea that constitutional institutions will determine the success or the failure of a political system. In this sense, constitutional engineering defines the making of constitutions by taking into consideration how constitutions do or should function (SARTORI, 1997: 257). Furthermore, constitutional engineering is not only an activity reserved for a definitive timeframe during the constitution making stage, but an ongoing one. When chronic difficulties emerge in the political system, institutions are revised in order to tackle problems (WIARDA, 2005: 418-419).

I-Basic Concepts Used in the Text

Legislative
Executive
Judiciary
Government system
Rule of law
Separation of powers

In order to define the concepts above, we need to first point out the four features of modern democratic regimes relevant to the topic we have at hand.

In modern democratic regimes:

The state has three basic constitutional functions: "enacting legislations", "implementing legislations" and "ensuring that legislations are made and implemented in conformity with law and the constitution".
These functions are performed by the state organs that use part of the political power, namely the "legislative", "executive" and "judiciary" organs. ("Separation of powers")
Legislative, executive and judiciary organs are bound by law. ("Rule of law")
In all democratic government systems, the legislative (parliamentary system, presidential system, semi-presidential system) organ is elected by the people. In some government systems, the executive (presidential system) or a pillar of the executive (semi-presidential system) is also elected by the people. ("Self-government")

Now let's take a closer look at the basic concepts to the used in this text within the context of these features:

In modern democratic regimes, the invariable defining element is the **"people"**, **"citizens"** or the **"electorate"**. In order to be able to speak of a democratic regime, the rulers must be determined by "elections" in line with the will of the people. The concept of "rulers" first and foremost refers to the legislative organ, i.e. the parliament which holds the power to enact legislations. In all democratic

regimes, the legislative organ is constituted in line with the majority of citizens via "free and fair elections".

The executive organ, in its widest sense, is the organ responsible for the implementation of the laws enacted by the legislative organ as well as the policies that it has espoused. On another note, the influence of the executive organ today has long transgressed the confines of this conventional mission and the executive has become the primary political actor to determine the short- and long-term policies in the country. Hence, in numerous constitutional systems the executive organ has come to take the lead and perform the "primary governing function" in the system.

The structure of the executive organ in modern democratic regimes is wider in variety compared to the legislative organ **(Figure 1)**. The structure of the executive organ, as we will elaborate below, is by and large designated by the preferred "government system", i.e. the "web of relations between the legislative and executive organs". The executive organ is composed of two pillars in countries that have adopted a "parliamentary government system" as in the case of the UK or Germany. One pillar of the executive is the "Head of the State" while the other is the "Government", which in its turn is composed of the "Prime Minister", i.e. the "Head of the Government", and "Ministers". The occupier of the seat of the "Head of the State" depends on whether the state is a monarchy or a republic. The bearer of the title "Head of the State" is a "monarch", i.e. a "king" or a "queen" in a "parliamentary monarchy" like the UK, but a "President of the Republic" in "parliamentary republic" like Germany. If the government system is a parliamentary monarchy, the identity of the head of the state, i.e. the question of who will be king or queen, is defined by traditional rules of "heirship" or "dynasty". If the government system is a parliamentary republic, the head of the state, i.e. the president of the republic, is elected by the parliament Whether or not the head of the state is a king, a queen or a president of the republic, the authorities of the head of the state in a parliamentary government system are symbolic in nature. The organ that uses the executive authorities in actual practice is the government, i.e. the prime minister and the ministers. In the parliamentary government system as implemented in the UK or in Germany, the government that uses the actual executive authorities originates from within the legislative organ and remains in power as long as it has the confidence of a majority in the legislative organ. In other words, the government in the parliamentary government system is politically responsible against the parliamentary majority. The parliamentary majority that grants the government the "license to govern" in order to put into implementation its own political program can call the government to account if it fails to deliver its program.

In countries like the United States of America (USA) that have adopted a "presidential government system", the titles of the "Head of the State" and the "Head of the Government" are monopolized by the same person, i.e. the "President". In other words, in the presidential system, contrary to the parliamentary system, the president is alone in the executive seat. Regardless of the presence of "secretaries" along with the president, "secretaries" are appointees charged with aiding and subjected to the president and the primary executive powers are practiced by the president alone. Another significant difference between the presidential and the parliamentary systems is the direct election of the president by the people. As we have pointed out before, the government, which uses the primary executive powers in the parliamentary system, originates from within the legislative organ and is politically responsible against the parliamentary majority. In the presidential system,

however, the president, who is directly elected by the people, does not have a similar organic bond with the legislative organ. Therefore, in a presidential system, while there are a number of controlling and balancing mechanisms between the legislative and the executive organs, the legislative majority cannot call the president into account in political terms or remove the president from office via, for instance, a vote of non-confidence as in the parliamentary system.

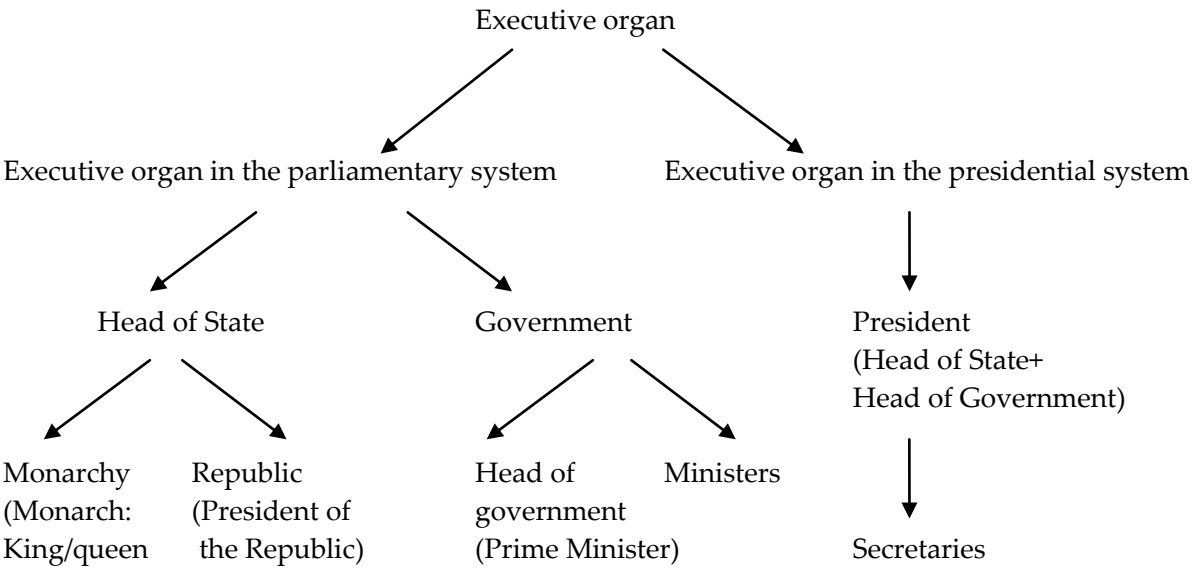

Figure 1: The Executive Organ by Governmental Systems

Within the framework of government systems, apart from the parliamentary system and the presidential system, the "semi-presidential" system also merits attention. This system, a typical example of which is prevalent in France, the executive organ has a two-prong structure: on the one hand is a president of the republic who is elected directly by the people and has no responsibility vis-à-vis the parliament, on the other hand is a government which originates from within parliament and is politically responsible against the parliamentary majority. This system cannot be termed a parliamentary system as the president of the republic, who also bears the title of the "head of the state," is elected directly by the people. Likewise, the system cannot be termed a presidential system either, as there is a government that originates from within the parliament and is politically responsible against the parliament. The semi-presidential system therefore is considered to be a "hybrid" system due to these qualities **(Box 1)**.

BOX 1:
The Government System in Turkey

The government system in Turkey stipulated by the original version of the current 1982 Constitution is a "parliamentary system". Nevertheless, the parliamentary system suggested by the original version of the 1982 Constitution is different from a classical parliamentary system in the sense that the authorities of the executive and within the executive, of the president of the republic are enhanced. Following a constitutional amendment adopted via a referendum in 2007, which stipulates that the president of the republic will be elected by the people, the nature of the government system current in Turkey has become controversial. Turkey's government system has evolved to a semi-presidential system according to some authors, while it is now a "parliamentary system with a president" (which emerges with the addition of a directly elected president of the republic into a classical parliamentary system) according to others.

The executive organ does not solely comprise of these elements, which can be termed as the "core executive" or the "political executive" constituents; there is also a "bureaucracy" or an "administrative" pillar. To cite Turkey as an example, the administration, which is primarily organized underneath ministries, is charged with the mission of bringing into practice the services and the policies that the legislative organ sets out with laws and the core executive solidifies with its decisions. For instance, education directorates at the province and district levels, which are subordinate to the "National Education Ministry" are "administrative" bodies in this sense. The administration is not confined to these bodies either: Other legal entities that perform certain public services, the decisive organs of some of which are elected by the people also feature within the administration. Examples include "special provincial administration", "ministries", "villages", "universities", "state economic enterprises", "Turkish Radio and Television", "bar associations" and "professional organizations."

The legislative and executive organs are political organs in essence, which means that majorities in the legislative organ, the president in the presidential system and the government in the parliamentary system all function to bring into practice a certain political programme. The **judiciary,** on the other hand, is not a political organ in this sense. In other words, the judiciary organ does not seek to implement a certain political programme. The raison d'être of the judiciary organ is to ensure that legislative and executive organs abide by the law as they perform their own missions. Therefore, the judiciary is not an organ that performs a political role, but one that monitors the organs that have a political role of their own.

In modern democratic regimes, the division of political power between these three organs, the utilization of political power by these three organs and the interaction and the division of labour between these organs are designed in accordance with the "separation of powers" principle. The "rule of law" principle, on the other hand, implies that these three organs have to abide by the law in their actions and

acts. The "rule of law" and the "separation of powers" principles constitute two dimensions of the notion of **"constitutionalism",** which seeks to constrain political power by "legal norms" and via "division across entities" **(Figure 2)**.

To conclude, we can render these concepts more concrete via an analogy: If we think for a moment that a modern democratic regime is a painting, law is the framework to this painting. All elements within such a regime exist within the framework drawn by law. However, these elements featuring in the painting, i.e. the people, the legislative, the executive and the judiciary can be positioned in different ways and their interrelationships defined in various manners. The positions of these elements within the composition are not the same in the UK, in Germany, in the US or in Turkey, but the "primary themes" of these paintings are one and the same: "constraint on power".

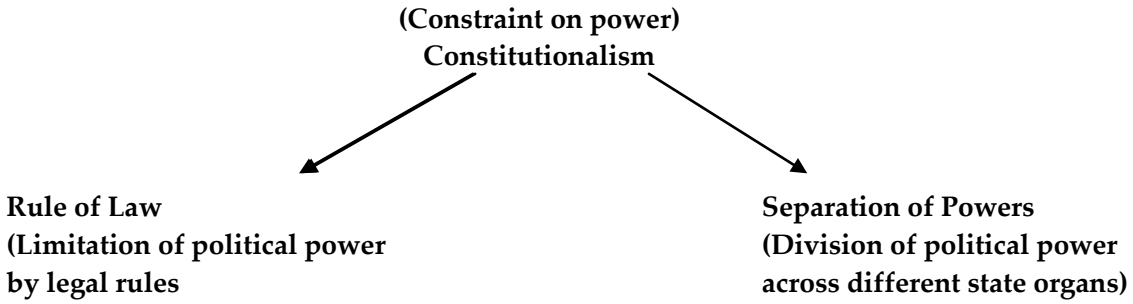

Figure 2: Constitutionalism

II- The "Rule of Law" Principle and Controlling and Balancing Political Power

In order to be able to speak of the rule of law, first of all we need to observe the existence of a "legal system" made up of general, abstract, predictable, comprehensible and relatively stable rules. But that in itself is not adequate; the legal system has to be binding for the governing, i.e. the state organs using political power, and the governed, i.e. the people, alike. If we say that political power is a fiery river which can sweep away whatever it encounters, one of the ways to make sure that this river does not overflow and damage its surroundings is to build banks and barriers before this river. These banks and barriers are constitutions and legal norms. In this sense, the rule of law principle signifies the need for legislative, executive and judiciary organs to abide by the law in their actions and acts.

So what happens if these organs violate the law, exceed or abuse their powers?

Unless a satisfactory answer is provided to this question, the legal boundaries set by the constitution are rendered meaningless. Hence, it is mandatory that mechanisms be set up within the constitutional system to monitor the obedience to such rules in the system and to help implement the

"supremacy of the constitution" principle. Now let's examine these mechanisms one by one in terms of legislative, executive and judiciary organs.

As a rule, the fundamental legal text that binds the **legislative organ** which has the authority to make the laws within a constitutional system is the constitution. The formation, structure, functioning, powers and responsibilities of the legislative organ are laid out by the constitution. In Turkey, the legislative organ, i.e. Turkish Grand National Assembly (TGNA) utilizes its constitutional powers primarily via two legal processes: "legislation" and "acts of parliament". Acts of parliament are concerned with the internal workings and the order of the legislative organ as well as its relations to other organs. Within this framework, "TGNA House Regulations" are a typical form of acts of parliament from a legal point of view. In the Turkish constitutional system, as a rule, parliament acts other than the TGNA House Regulations, acts that lift legislative immunities and acts removing deputy statuses are not subject to the review of the Constitutional Court. In fact, such a review is not needed, considering the fact mentioned above that such acts are concerned with the internal workings and order of the TGNA as a rule. The norms that need to be subject to review from the vantage point of the rule of law principle are legislations. TGNA, via legislations, puts into place general and abstract legal norms binding for all citizens. Legislations should on the one hand be ratified and brought into force in accordance with the formal conditions stipulated by the constitution, and on the other exclude clauses that violate the basic rights and liberties guaranteed by the constitution. In order to ensure that both of these requisites are fulfilled, mechanisms that review the constitutionality of statutes have been established in modern democracies **(Table 1)**.

CONCEPT
The supremacy of the constitution

The "supremacy of the constitution" principle implies that the constitution is supreme in two senses: First, according to this principle, the authorities and responsibilities of all state organs are defined by the constitution. Hence the legislative, executive and judiciary organs must act within the boundaries drawn by the constitution. Second, modern law systems are structured in a "hierarchical", i.e. an "incremental" manner, and a lower-level norm cannot be incompatible with a higher-level norm. The constitution is at the very top in the hierarchy of norms. Therefore, all the rules in the law system must be compatible with the constitution. According to Article 11 of Turkey's current Constitution adopted in 1982 titled " Supremacy and Binding Force of the Constitution": " The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. / Laws shall not be in conflict with the Constitution." Similar provisions can be found in the constitutions of numerous states today.

Political Review	Judicial review
Carried out by political organs	Carried out by the judicial organ
Can delay the enactment of an unconstitutional legislation but cannot ultimately prevent it	Can prevent the enactment of an unconstitutional legislation, can remove from the legal system or annul such a legislation already in the system
Has limited effectiveness due to the fact that it is a kind of "self-review"mechanism carried out by political organs	Is an effective mechanism due to the fact that it is carried out by the independent judiciary

Table 1: Review methods concerning the constitutionality of legislations

The first one of these mechanisms is the **"political review"** mechanism **(See Detailed Information 2)**. In this type of review, political organs, i.e. organs other than the judiciary carry out the review of the constitutionality of statutes. As commissions within the legislative organ inspect the legislations that they have been discussing in terms of constitutionality, or as the president of the republic returns the legislations submitted to his/her review to the legislative organ due to unconstitutionality, they carry out a political review. Political review is not a very effective method for it is carried out by political organs that are under the control of the governing party. More significantly, in political review in the way that is carried out in Turkey for instance, there are no sanctions to be implemented to prevent legislations that have been singled out as unconstitutional from going into force **(See Detailed Information 3)**. Therefore, in the majority of modern democracies, **"judicial review"** has been adopted as a more effective method. This type of review is carried out either by all courts at all levels as in the United States, or by constitutional courts, i.e. special courts authorized exclusively for such review as in numerous European countries. **(See Detailed Information 4)**. Legislations can be brought before the Constitutional Court for an inspection of their constitutionality through two ways: (1) Filing of lawsuits by political actors like the president of the republic, the governing party, the main opposition party or the members of the parliament within specified timeframes (**"annulment suit"**); (2) Sending of a legislation applicable in a lawsuit by the court handling that lawsuit to the Constitutional Court, without being subject to any time restrictions (**"appeal"**). In addition, some countries have adopted the **"constitutional complaint"** method, which allows individuals to apply directly to the Constitutional Court. Constitutional courts inspect the constitutionality of legislations in both **"form"** and **"essence"** terms **(See Detailed Information 5)**.

CONCEPT:
Constitutional complaint

The constitutional complaint allows individuals to apply to the Constitution Court directly with the claim that a personal basic right or liberty has been violated by an action or decision by the public authority. The review to be undertaken in the Constitutional Court upon the application is not an appeal or a cassation, but a review of constitutionality in essence. In this sense, the constitutional complaint is not only a way for a legal remedy for individuals, but also contributes to the interpretation and the implementation of the basic rights and liberties and hence the materialization of the rule of law principle (GÖZTEPE, 1988).

Within the framework of the rule of law, the executive organ, and particularly the administration, is also bound by law as is the legislative organ. The executive, in the sense that we pointed out above in the Concepts section, must abide by law from the president of the republic and the prime minister at the top, to a regular officer at the bottom. This principle has been openly stated in Article 125 of Turkey's current Constitution with the clause: "Recourse to judicial review shall be available against all actions and acts of the administration." Particularly in our era when the executive organ as a whole is gaining increasing strength **(See Detailed Information 6)**, the principle that "the actions and acts of the administration are subject to judicial review" in order to ensure that this organ acts in compliance with the law, has been adopted in all democratic regimes despite the existence of some nuances. In Turkey, the judicial review of the executive and the administration is carried out by the Council of State and regional administrative courts at the higher level and by administrative courts and tax courts at the lower level **(See Detailed Information 7)**. The position of **"ombudsmanship"** which has recently been adopted in a number of countries is another effective mechanism utilized to ensure that the actions and acts of the administration are in compliance with the law.

As a result, the judiciary organ is the primary organ that ensures that legislative and executive organs act in compliance with the law via the legal review that it carries out. In other words, it enables the materialization of the rule of law principle via its "constitutional review" for the legislative organ and the "administrative review" for the executive organ.

From the vantage point of constitutional mechanisms of controlling and balancing, we should touch upon the review of the judiciary as a final point. Within the realm of the rule of law, constitution and other relevant legal norms are binding for the judiciary organ, as they are for the legislative and executive organs. Under these circumstances, who monitors whether the judiciary organ, which reviews legislative and executive organs, has been acting in accordance with the constitution and the law itself? As the old saying goes: "Quis custodiet ipsos custodes?" (Who watches the watchmen?) This question is perhaps one of the most challenging ones in modern democratic regimes and gains even further significance particularly concerning higher judiciary institutions. To illustrate, the Constitutional Court for instance reviews the constitutionality of statutes ratified by the legislative organ, and annuls, or removes out of the legal system, the norms if and when unconstitutionality is detected. But how do we guarantee that the Constitutional Court acts in compliance with the constitution and, for example, does not exceed its own authority? It is hard to say that a satisfactory

CONCEPT:
Ombudsman

Ombudsman, which means "representative" or "safeguard" in the Swedish language, is used to denote "arbitrator" or "public auditor" in Turkey. Typically the parliament and sometimes president of the republic or the government appoints individuals to the post, but it is independent from the legislative, executive and judiciary in terms of its authorities and responsibilities. It acts as the mediator between the administration and the individuals that claim to have suffered a loss or damage due to the acts and the actions of the administration. The practice has been standing in numerous countries including Sweden, the Netherlands, Austria, Poland, Spain, Portugal and Romania and not only has a favourable impact on the functioning of public services, but also helps protect the basic rights and liberties of individuals vis-à-vis public authorities.

answer can be provided to this question in modern democratic regimes particularly in terms of the constitutional courts.

Leaving the higher judiciary and especially the constitutional courts aside, the judiciary organ typically reviews itself via mechanisms set up in its own framework. The "higher judiciary boards" that we encounter in a number of countries reviews whether judges perform their duties in accordance with the law and acts as the decision maker concerning the appointment and personal rights of judges **(See Detailed Information 8)**. While the existence of such boards is typically considered to be a requisite for "judiciary independence", references are also made to the risk that a "caste system" may emerge if the functioning and the monitoring of the judiciary is entirely left to such boards.

In connection to this last point, the position of the constitutional jurisdiction is also subject to controversy in modern democracies today. Courts that review constitutionality review legislations that the legislative organ ratifies in order to materialize certain political preferences and can even annul them and render them ineffective. In this case, the majority in the legislative organ is held politically accountable and perhaps pay heavily at the ballot for its failure to materialize a particular political programme; while the judges who annul those laws bear no accountability in this sense. There are references to **"judicial activism"** in countries where the judiciary intervenes (excessively) with the political preferences of the legislative and executive organs, and the judiciary organ is subject to criticism for acting like a **"judges government"** **(See Detailed Information 9)**. Today, we even witness severe controversies between governments and constitutional courts in some countries **(See Detailed Information 10)**. In this context, propositions are made that constitutional judges are linked indirectly with the electorate via the election of part or all of the judges by the legislative organ in order to ensure the democratic legitimacy of the constitutional jurisdiction.

CONCEPT:
Newtonian Democracy

Newtonian Democracy is a concept stemming from the adaptation of the physical world explained by Isaac Newton via mathematical interpretations to politics. Just as planets have definitive and foreseeable movements, in an order regulated by law, a democratic regime that produces foreseeable outputs can be founded by establishing quasi-mechanic relationships between the elements of this order. This notion particularly refers to the idea underlying constitutional mechanisms such as "the separation of powers" or "checks and balances" (ROBINSON, 1957).

III- The "Separation of Powers" Principle and Controlling and Balancing Political Power

Another method to be used in order to constrain political power is the division of power among different organs. If we return to the analogy we cited above, just as a river loses some of its flow rate when it is divided into branches, political power also loses its destructive character when it is divided between different state organs. The separation of powers principle stipulates the division of political power

among legislative, executive and judiciary organs rather than its accumulation in the hands of a single person or organ **(See Detailed Information 11)**. The separation of powers principle is applicable in two ways: **"hard separation of powers"** and **"soft separation of powers"**. In the presidential system, as is the case in the United States, hard separation of powers is the norm. In this government system, legislative, executive and judiciary organs are divided with precise lines. In such systems, as state organs are sharply distinguished, each organ lays a claim on its own responsibilities and authorities almost with jealousy and will not allow others to intervene in its own domain.

Does the fact that political power is divided across separate organs imply that there is no relationship of any kind between these organs?

No. The **"checks and balances"** system that has developed within the American constitutional tradition and has been inspired by the **"Newtonian Democracy"** approach complements the separation of powers principle. More precisely, it enables the materialization of this principle. While legislative, executive and judiciary organs cooperate on the one hand to maintain the functioning of the state apparatus, on the other, they balance each other by using their reciprocal authorities. The checks and balances system requires each organ to watch the others as it uses its powers and take into account the step that the others will take as it takes a step on its own. Such a balancing mechanism prevents one organ from becoming omnipotent and establishing dominance over others within the comprehensive constitutional system, hence averting the absolutization of political power. In the United States, the executive organ, i.e. the president, has the right vis-à-vis the legislative organ to return legislations to the legislature, i.e. a "veto" right. In return, the legislative organ has authorities that include overruling the president's vetoes, initiating the allegation procedures that may lead to the criminal liability on the part of the president (*impeachment*) and approving the budget. While the legislative organ has a say in the establishment of lower-level courts and the appointment of judges, the authority to appoint Supreme Court judges and bureaucrats with the proposal and the approval of the Senate belongs to the president. Finally, the legal review carried out by the judiciary organ is one of the most significant elements that complements the checks and balances system from the vantage point of the legislative and executive organs **(Figure 3)**. In addition to all of these, the **"bicameral"** system and **"federalism"**, two of the defining features of the United States Constitution reinforces the checks and balances system illustrated above **(See Detailed Information 12)**.

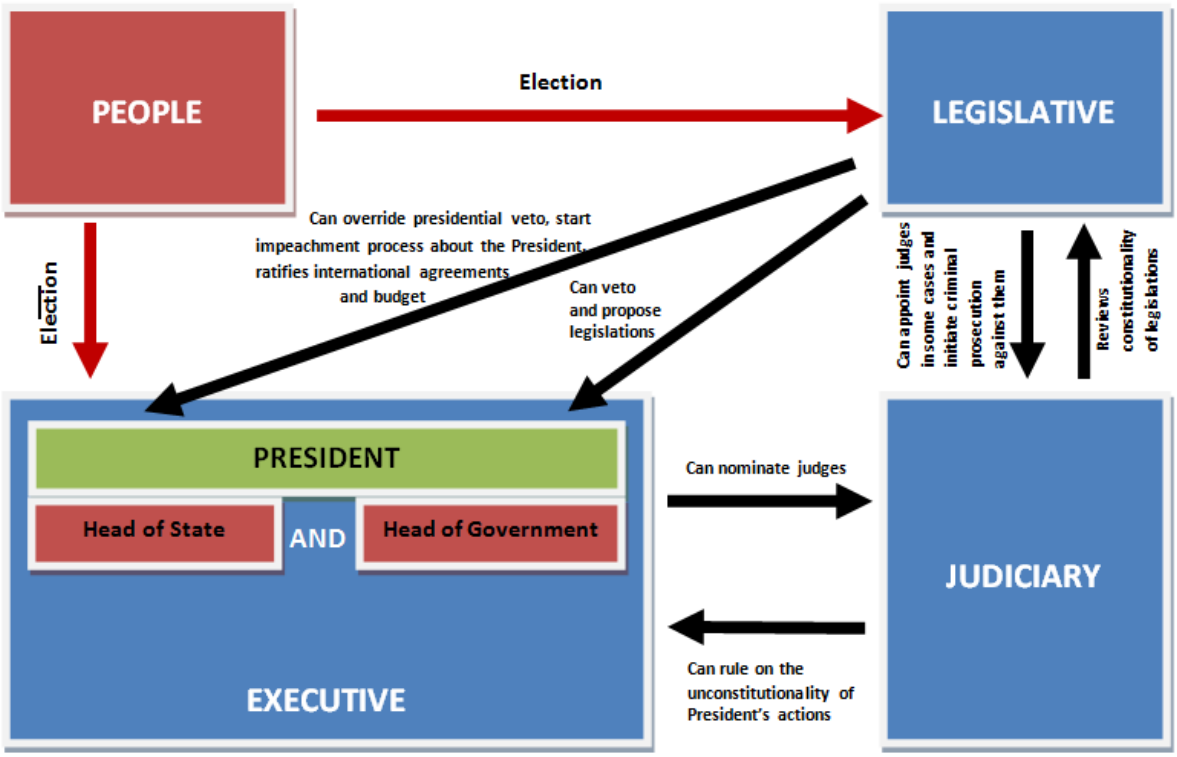

Figure 3: Controlling and balancing mechanisms in the US presidential system

In the parliamentary system, soft separation of powers is the norm. In this system, the executive organ originates from within the legislative organ and is subject to its vote of confidence. The legislative and executive organs are usually under the control of the same political party and the legislative majority and the executive act together due to strict "party discipline". All these render the distinction between the legislative and executive organs relatively ineffective and irrelevant. Nevertheless, a point that needs to be stresses concerning the parliamentary system is that the de facto identification between the parliamentary majority and the government does not imply the lack of constitutional instruments that allow the legislative organ to review the executive organ. In the parliamentary government system, the legislative organ always has the capacity to monitor the executive organ, which originates from within itself and to which it vests the licence to govern via constitutional instruments including question, parliamentary inquiry, parliamentary investigation, interpellation and censure motion **(Box 2)**. These instruments will primarily be used by the opposition in the parliament due to the "parliamentary majority-government" identification illustrated above. In the parliamentary system, against the backdrop of the authority granted to the legislative to monitor the executive and particularly its executory pillar, the government; the head of the state pillar of the executive is granted the authority to dissolve the legislative organ. Although this authority can only be used by the head of the state upon certain conditions, (e.g. under circumstances such as the failure to form a government within a specified timeframe despite consecutive attempts), it can be considered as a mechanism that balances the executive vis-à-vis the legislative organ **(Figure 4)**.

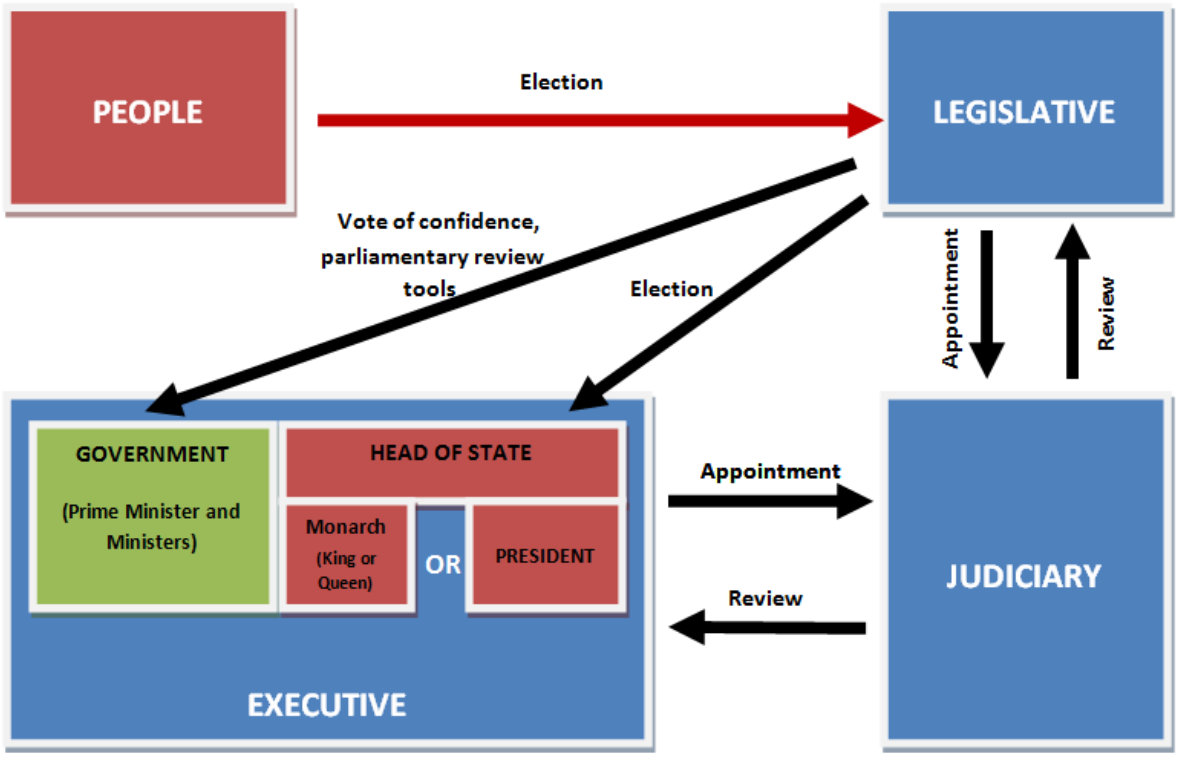

Figure 4: Controlling and balancing mechanisms in a parliamentary system

In the semi-presidential system, the separation of powers principle and the checks and balances system conveys a more complicated outlook. For instance, in this system as implemented in France, the president of the republic has considerable authorities. A defining feature for the government among these authorities is the power of the president of the republic to dissolve the parliament on his/her own initiative. Furthermore, authorities to appoint officers, to make legislations and to declare states of emergency make the president of the republic a significant force within the system. The president of the republic appoints the prime minister and the ministers, but lacks the power to dismiss them. The prime minister and the ministers are politically accountable to the parliament, and hence the government can be monitored by the parliamentary majority. The president of the republic can return legislations to the parliament, but can do so together with the prime minister. The constitutionality of statutes is primarily examined by the "Constitutional Council", whose members are selected by the president of the republic and the parliament chairs.

BOX 2:
Instruments for the parliament to review the government in Turkey

Question: Request for information from the prime minister or the ministers in the name of the cabinet to be replied in written or oral form.
General Debate: The discussion of a particular topic pertaining to the society of the state's actions in the TGNA plenary session.
Parliamentary inquiry: An inquiry made to get better information on a particular topic by commissions set up in the TGNA.
Parliamentary investigation: Investigations whereby the offences of the prime minister and ministers are investigated, a process that may result in filing a case at the Supreme Criminal Tribune.
Censure motion: The review mechanism which allows the dismissal of the cabinet or individual ministers, who are politically responsible against the parliamentary majority via a consequent vote of confidence.

The statements above mainly refer to the legislative and executive organs. How can we explain the constitutional status of the judiciary within the framework of the separation of powers principle?

The separation of powers principle is implemented in different terms in the presidential system and the parliamentary system, but the distinction and the independence of the judiciary from the other two organs is one of the primary features that render both systems democratic, for only an independent judiciary can deliver the rule of law principle. If the judiciary is linked organically to the legislative or the executive or both or if it is under the influence or control of these organs, it loses its capacity to monitor whether they act in compliance with the constitution or the laws, and to devise a sanction if there is a violation involved. Hence, the separation of powers principle, which allows the judiciary to exist as distinct from the legislative and the executive, is in a sense also a prerequisite of the rule of law principle.

The separation of powers principle, defined as the distinction and the independence of the judiciary from the legislative and the executive, is considered as a "sine qua non" condition in contemporary modern democratic regimes. Even in the United Kingdom where the judiciary traditionally has organic links to the legislative and the executive and a merging rather than a separation of powers is the norm according to some authors, the separation of powers principle has been redefined and reinforced via reforms carried out over the past decade. The remarks by the Supreme Court Chair at the opening ceremony of the newly founded Supreme Court are indicative in this sense: "For the first time, we have a clear separation of powers between the legislature, the judiciary and the executive in the United Kingdom. This is important. It emphasises the independence of the judiciary, clearly separating those who make the law from those who administer it." (*Daily Telegraph*, 1 October 2009)

IV- Controlling and Balancing Mechanisms Originating from the Nature and the Workings of the Democratic Regime

The mechanisms to keep political power in check in modern democracies are not confined to the mechanisms illustrated above. The controlling and balancing mechanisms originating from the nature and the workings of the democratic regime fulfil at least as significant a function. The most significant feature that distinguishes the two types of mechanisms is the fact that the people, i.e. the citizens, participate in the functioning of this second type.

A. Elections

The defining feature of modern democratic regimes is the election of the legislative organ, i.e. the organ that will make public decisions and enact laws in the name of the society, directly by the citizens. Elections are therefore one of the most significant control mechanisms for the legislative organ. Elected rulers must take into consideration the demands and expectations of citizens if they wish to receive votes again. This considerable might in the hands of the citizens, i.e. the right to vote, ensures that elected rulers pay attention to the steps they will take as they use their power. If elected rulers abuse the power that they possess, exceed legal boundaries or ignore the demands and the expectations of citizens, the citizens can penalize them at the ballot by not voting for them again **(See Detailed Information 13)**.

The connection of the executive organ to the citizens, i.e. the electorate, also varies by the government system. In parliamentary systems, as in the United Kingdom or Germany, the prime minister and cabinet, which use the primary executive powers, originate out of the legislative organ and is determined by it. Hence, in these systems the executive organ is not directly accountable vis-à-vis the electorate, but rather to the parliamentary majority. In the presidential system, as in the United States, on the other hand, the executive organ, i.e. the president, is elected by citizens. In these systems, elections bear a significant weight as a controlling mechanism, or rather a mechanism to call into account, as the president is elected for a term specified in the constitution, e.g. four, five or seven years. The president cannot be held politically responsible or removed from office via a mechanism like the "censure motion" as in the parliamentary system within this specified term. The presidential seat can only be vacated prematurely via "death", "resignation" or the *"impeachment"* mechanism

touched upon above **(Box 3)**. The checks and balances system (apart from the *impeachment* mechanism) helps balance and keep in check the president by other state organs as s/he uses his/her constitutional authorities in office; but does not provide an instrument to remove the president from office. Hence, in the presidential system, a politically failing president can only be penalized at the ballot in theoretical terms. The qualifier "in theoretical terms" should be underlined here, as the capacity of elections to function as a controlling mechanism in the presidential system depends on the provision of the possibility of at least a second presidential term by the constitution. If a person can only be elected president once according to the constitution, apart from very exceptional circumstances outlined above, s/he will complete his/her fixed term in office. Consequently, a president that does not have the chance constitutionally to be elected for a second term will not have concerns like "failing at the ballot box" or "failing to be elected again", thereby stripping elections from their capacity as a controlling mechanism where voters hold the president to account in political terms.

BOX 3:
Impeachment in US Constitutional History

The impeachment mechanism has been put into practice three times during United States constitutional history.
The first one was in 1868 against Andrew Johnson, who dismissed his war minister unlawfully, but the allegation process failed due to the failure to receive 2/3 majority with the want of a single vote. The second one was initiated in 1975 against Richard Nixon, but the process was ruptured with the resignation of Nixon upon his insight that he would be removed from office. The last one was in 1999 upon the allegation that Bill Clinton had a sexual relationship with one of the White House interns. The allegation on this occasion also failed with a vote of 50 in favour and 50 against, hence failing to achieve a 2/3 majority for penalization.

B. Political Parties, Non-governmental Organizations and the Media

While effective mechanisms for citizens to control elected rulers, are elections adequate in democratic regimes?

This question cannot be answered in the affirmative, as citizens participate in the electoral processes as individuals. Therefore, theoretically, the influence of each citizen on the political process is equivalent to the weight of that single vote. However, organized groups of citizens can influence and channel political processes more easily. Citizens organize mainly in two forms in modern democracies: "political parties" and "the civil society" **(See Detailed Information 14)**. Political parties serve a critical function in mobilizing citizens, shaping their preferences and expectations, bringing them together and expressing their voice particularly in election periods. Political parties also play a major role in controlling political power. Nevertheless, a point that needs to be underlined here is that political parties are organizations that compete to come to power themselves. Therefore, they fulfil their function of controlling power mainly while they are in the opposition rather than the power seat. Political parties can act as the opposition within or outside the parliament. Following this general remark, it may be worthwhile to examine the notion of "opposition" somewhat more closely.

"Opposition" emerges as one of the most indispensable elements of modern democratic regimes. In a democratic regime, "power" and "opposition" are defined in abstract terms, with their existence and function guaranteed by the constitution. In other words, power and opposition always co-exist in a democratic regime, but it is unknown in advance which political forces will be playing these roles. If it is known in advance who will be in power and who will be in opposition in a regime, that regime can no longer be identified as a democracy. According to renowned political scientist Adam Przeworski, "democracy" is "the institutionalization of uncertainty"; this implies that, in modern democracies, it is unknown in advance who will emerge as the winner in periodic elections and whoever wins electoral support at the ballot will come to power. The losers meanwhile will acquiesce to the rules of the game and continue their struggle in the "opposition" seat and within the constitutional system (PRZEWORSKI, 1992: 10-50). As a result, in a democratic regime, the political parties that assume the opposition role will on the one hand maintain their struggle with the hope and anticipation that they too will come to power someday, and fulfil a controlling function by watching, criticizing and if necessary, cautioning the party in power **(See Detailed Information 15)**.

Non-governmental organizations are groups of citizens organized around a particular goal outside the influence and the control of the state and in voluntary terms. They are distinct from political parties in the sense that they do not seek to come to power and do not formally participate in the power race, i.e. elections. These features allow the non-governmental organizations to perform a more effective controlling role than political parties on certain occasions **(See Detailed Information 16)**. Obviously, non-governmental organizations can advocate a particular worldview and support a particular political actor, but as they do not have an organic tie with the party in power in theoretical terms, they can watch, criticize and caution political power without reserves. In other words, as non-governmental organizations remain outside the "power game", they have to potential to play an opposition role no matter which party is in power. In this sense, non-governmental organizations can perform their controlling function by influencing political power not only in election periods but particularly between elections. It is one of the challenging questions in modern democracies as to how elected rulers will be controlled. Non-governmental organizations can respond to this requirement. Moreover, a vivid and effective civil society can help constitutional mechanisms like **"recall"** (the mechanism which allows citizens to dismiss elected rulers without having to wait for the next elections) to be rendered operational and effective **(See Detailed Information 17)**.

The media also has major significance in modern democratic regimes as a mechanism to control political power. The identification of the media as the "fourth estate" with a reference to the separation of powers principle underlines the significance of this monitoring role. Accordingly, it is essential that the media has independence guarantee like the legislative, executive and judiciary pillars, does not merge with any of these forces, and can maintain a distance with political power **(See Detailed Information 18)**.

Constitutions are vital to the foundation and the functioning of the mechanisms originating from the nature and the workings of the democratic regime elaborated above. First of all, in order for these mechanisms to function properly, the elections must be "free" and "fair". To this end, certain rights and liberties, such as "the right to vote", "the right to run in elections", "freedom of expression", "freedom of communication", must be guaranteed by the constitution, and more significantly, the management and the monitoring of the elections must be carried out by independent and impartial

organs. At this point, it is worthwhile to underline the importance of "the freedom to form political organizations". In democracies, citizens must be offered alternatives among which they can make a preference at the ballot box. The political parties are the formations that will formulate these alternatives and propose them to the people in the form of a political programme. While citizens have the chance to enter politics as independents, modern democracies are often termed "the democracy of parties" considering the effectiveness and the significance of political parties today. Indeed, political parties are not only organizations that compete to come to power, but at the same time serve functions like consolidating and expressing the interests of the groups that they represent, training political cadres, informing the public on political issues and creating awareness. Hence, the constitutional regulations concerning the political parties are elements that directly influence the quality and the functioning of the democratic regime. Media freedom and the regulation of the media in the constitution should also be taken into consideration in terms of controlling and balancing political power.

Along with the constitutions, the elections law and the political parties law are also important for the mechanisms originating from the nature and the workings of the democratic regime. Issues that merit attention within this framework include questions like which electoral system will be preferred ("wide district" "proportional systems" whereby more than one candidate is elected for each electoral district and political parties are represented in the parliament in proportion to the share of votes that they receive at the ballot or "narrow district" "pluralist" or "first-past-the-post" systems where a single candidate is elected for each electoral district and the candidate that receives the greatest number of votes or more than half of the votes is considered victorious, or hybrid systems) and whether thresholds will be employed in the electoral system.

V-International Monitoring Mechanisms

Today, the monitoring mechanisms set up by the constitutions in modern democratic regimes have moved beyond national boundaries. Particularly as a result of the developments in the sphere of human rights following World War II, the protection of basic rights and liberties is no longer the domain of domestic politics for states, as international organizations have adopted the role of rights protection over and beyond national boundaries thanks to the effective monitoring and sanctioning mechanisms that they have established.

European Court of Human Rights has been established by Article 19 of the European Convention of Human Rights drafted in 1954, to ensure that undersigning states abide by the commitments stated in the Convention and its Protocols. Accordingly, the Court is an international protection mechanism to protect particularly the human rights guaranteed by the Convention. According to Articles 33 and 34 of the Convention, not only undersigning states but also individuals can submit cases to the Court thanks to the right to individual application. Therefore the parties to a case heard in the Court can be two states or a state and (an) individual(s). The right to individual applications is one of the most significant elements that make the European Court of Human Rights an effective mechanism to protect human rights. The Convention, which has supremacy over domestic codes according to the amended Article 90 of the 1982 Constitution of the Republic of Turkey, has a complementary role in terms of the mechanisms to protect human rights in domestic law.

CONCLUSION

While legal texts in technical terms, constitutions serve a vital function in terms of the organization of the political system. Constitutions enable the use of political power on the one hand, but devise political and legal instruments to constrain that power on the other. If we draw an analogy between a political system and a machine that functions with contingent inputs and outputs, whether the system has stability, functions effectively and does not cause major breakdowns or disruptions will by and large depend on the design of the controlling and balancing mechanisms in the constitution "**in comprehensive terms"** and "**in the light of the successful models detected in comparative studies"**.

DETAILED INFORMATION

Detailed Information 1: Constrained Power and Absolute Power: Free and Unfree Countries Today

Absolute power has taken its most visible manifestation in history in absolutist regimes. The fundamental characteristic of such regimes that particularly dominated European politics prior to 18th century is that it equips the ruler with limitless power. Philosophers like Machiavelli, Bodin and Hobbes sought to explain the legitimacy of absolute power in its success in ending certain religious and political clashes. However, liberal streams of thought and thinkers who started to lay out the fundamentals of their thinking from the 18th century onwards criticized absolutist regimes and suggested answers, many of which remain current in contemporary democracies, to the questions as to why and how power should be constrained.

Nevertheless, an idea of the world where absolute power has entirely been replaced by constrained power with the advent of liberalism would be far from the truth. Today, absolute power is manifest in numerous authoritarian regimes. Chad in Central Africa, Iran in the Middle East, and North Korea in East Asia are contemporary examples of authoritarian regimes. In regimes based on constrained power, principles like the "rule of law", "separation of powers" and "equality before law" offer vital guarantees to citizens while in authoritarian regimes based on absolute power, widespread violations and injustices prevail in terms of "security of life and property," "freedom of expression," "free and fair elections", among others.

Several international non-governmental organizations monitor states in terms of freedoms, including the *Freedom House* based in Washington D.C., which was founded with the stated goal of defending and researching democracy, political freedoms and human rights around the world. The organization, renowned for its scientific research and political activism to help spread freedom in the world, was founded in 1941 to stress the need for the United States to break its silence against the dangerous spread of Nazism in Europe. The name is a pun on the name of the Nazi party headquarters, the *Brown House*.

The definition of "freedom" that the Freedom House grounds its work on is as follows: Freedom is opportunity to act spontaneously in a variety of fields outside the control of the government and/or other centres of potential domination. Freedom House measures freedom according to two broad

categories: political rights and civil liberties. Political rights enable people to participate freely in the political process through the right to vote, compete for public office and elect representatives who have a decisive impact on public policies and are accountable to the electorate. Civil liberties allow for the freedoms of expression and belief, associational and organizational rights, rule of law, and personal autonomy without interference from the state. As the scope of these rights and liberties indicate, Freedom House's definition of freedom is derived in large measure from the Universal Declaration of Human Rights.

One of the most important annual studies prepared by the organization is the *Freedom in the World*, which seeks to assess the global state of freedom for individuals. Freedom House states that the study concentrates on the rights and liberties of individuals rather than assessing the performance of states worldwide. Hence, the study not only addresses states but all groups and institutions that have an impact on individual rights and freedoms. As a result of the survey, the countries are categorized as "free", "partly free" and "not free". This categorization is determined by the replies to 10 questions addressing political rights and 15 questions addressing civil liberties. The political rights questions are grouped into three sub-categories: electoral process (3 questions), political pluralism and participation (4 questions), functioning of government (3 questions). The civil liberties questions are grouped into four sub-categories: freedom of expression and belief (4 questions), associational and organizational rights (3 questions), rule of law (4 questions), personal autonomy and individual rights (4 questions). Based on the responses to these questions, the freedom level in each country is rated between 1 and 7. Countries and territories with a combined average rating of 1 to 2.5 are considered "free"; 3 to 5 "partly free"; and 5.5 to 7.0 "not free". The 2009 data of the Freedom in the World survey ranks Turkey among "partly free" countries.

For More Information See
http://www.freedomhouse.org

Detailed Information 2: The Political Review of the Constitutionality of Statutes in Sweden

Two different and starkly distinct tendencies can be detected in the review of the constitutionality of statutes: On the one hand, there is the "judicial review" carried out by a central judiciary organ or by all courts around the country; on the other hand there is the "political review" carried out by various political organs.

Judicial review is a widely adopted type of review thanks to the techniques used in the functioning of this kind of review, the sanctioning power of judicial decisions, and the relative distance of judiciary organs from political concerns. Nevertheless, the existence of various political review instruments mobilized by political organs in certain countries is also well known. These instruments can be used alongside judicial review mechanisms in certain cases, and by themselves in others.

Sweden emerges as an interesting case which, in addition to a widespread review of constitutionality carried out by all the justice and administrative courts in the country (*The Instrument of Government*, Part 11, § 14), also has a "preliminary audit system" carried out with the participation of political organs and some high judges. Indeed, a board named the "Legislative Council" *(Lagrådet)*, composed entirely of Higher Court and Higher Administrative Court judges, is responsible for declaring an

opinion on draft legislations to be ratified in the parliament in certain areas stated by the constitution, upon the request by the government or the relevant committee in the parliament (*The Instrument of Government*, Part 8, § 18). The council's opinion includes an assessment of the submitted draft from the vantage point of basic laws and particularly the rule of law principle in addition to the other aspects of the issue, which therefore allows the recognition of a possible problem of unconstitutionality from the very beginning. On the other hand, in order to avoid delays in the legislative process or because the Council's decision is not considered as important due to the nature of the issue at hand, the method can be foregone even in areas stipulated by the constitution. Moreover, the fact that a particular draft has failed to receive a favourable assessment from the Council does not pose an obstacle to the enactment or the implementation of the legislation.

These qualifiers make it quite difficult to label this interesting mechanism in Sweden. Indeed, what we witness is a "review" mechanism initiated by political organs, carried out by judges but without using judicial techniques and has no sanctioning or binding capacity regarding its outcomes. However, the high prestige enjoyed by Legislative Council members in the Swedish practice and the great importance ascribed to their opinion allows us to consider this institution as a sui generis political review mechanism.

Another interesting method concerning the political review of the constitutionality of statutes in Sweden is the review carried out by the parliament chair. In accordance with "The Parliament Act" (*The Riksdag Act*) Part 2, § 9, if the parliament head comes to the conclusion that a draft legislation submitted to the parliament is in violation of the fundamental laws, s/he can refuse to open it for discussion in the plenary session along with his/her rationalization. If the parliamentary majority persists to the contrary, the issue is conveyed to the Constitutional Committee and an action is taken based on the reply to be received. Indeed, should the Constitutional Committee declare an opinion that the submitted draft is not in violation of the fundamental legal texts, the parliament chair has nothing else to do in terms of his/her political review authority, and is responsible for submitting the issue to the agenda of the plenary.

Detailed Information 3: The Political Review of the Constitutionality of Statutes in Turkey

In the Turkish constitutional system, the political review is carried out throughout the process of legislation. The legislation process is initiated by a "draft law" from the government or a "bill motion" from deputies. The first stage of the political review takes place during the discussion of these drafts or bills at the TGNA commissions. The drafts or bills are examined for unconstitutionality during the discussions at the commissions. At the next stage, the criticisms particularly voiced by the opposition in the plenary can contribute to the debate on unconstitutionality. Finally, with the ratification of the draft or bill at the TGNA and its submission to the president of the republic, another stage of the political review commences. The president of the republic can return the legislations to the TGNA to be debated again. At this stage, the president of the republic points out the issues that s/he considers unconstitutional as s/he explains his/her grounds for returning the text. Assessing political review as a whole, we cannot say that the review carried out at the TGNA stage, particularly within commissions under the control of the ruling party, is a very effective one. The review carried out by the president of the republic, while more effective than the review carried out at the TGNA stage, will not ultimately prevent a legal text that is allegedly unconstitutional from going into effect,

considering the fact that if the TGNA ratifies verbatim a legislation returned by the president of the republic, the president of the republic is obliged to approve the legislation and publish it in the Official Gazette.

Concrete Political Review Examples from Turkey

CASE 1: President Ahmet Necdet Sezer thus stated his unconstitutionality verdict as he returned to the TGNA the Code nr.5682, "Law on the Submission of Constitutional Amendments to Referenda", which shortened the periods for the referendum process:

"According to last clause of Article 67 of the Constitution added on 03.10.2001 with Code Nr. 4709, changes in the election laws cannot be implemented within one year from the date that they come into effect.

Considering the fact that referenda concerning constitutional amendments are subject to the election law as per the Constitution and the legal norms, the one-year inapplicability norm brought with the last clause of Article 67 undoubtedly applies to the Code nr.5682, which regulates the method of submitting laws on constitutional amendments to referenda.

Therefore, Code nr.5682 is incompatible with the last clause of Article 67 of the Constitution."
(B.01.0.KKB.01-18/A-10-2007-455 18 / 06 / 2007)

ÖRNEK 2: Within the scope of Turkey's "National Programme for the Adoption of the European Union Acquis", the "Draft Law on Amendments to Several Codes", which included amendments to the Code of Civil Procedure, the Code of Criminal Procedure and the Law on Associations, came before the Justice Commission of the TGNA on 01.01.2003. The commission approved the law after examining it and introducing some changes. A deputy who reported a dissenting opinion said in his rationalization that the regulation would pave the way for the European Court of Human Rights to give orders and directions to the Turkish courts and would block the implementation of the verdicts of Turkish courts. This is a violation of Article 138 of the Constitution, which regulates "The Independence of Courts" and Article 9, which regulates the "Judiciary Authority".

(TGNA Proceedings Journal, Term: 22, Legislative Year: 1, Volume: 3, Session: 26; 21.1.2003).

Detailed Information 4: Recent Developments in the Sphere of Constitutional Justice in France

Year 2008 has witnessed the modernization of the institutions of the Fifth Republic in France. Indeed, with the ratification of the Code nr.2008-724 on Constitutional Amendment, 33 out of the 89 articles of the 1958 French Constitution have undergone significant changes and almost all institutions of the Republic received their fair share from these significant amendments. The changes introduced novelties mainly in three areas: first, the regulation of the relationship between the president and the prime minister, second, the working order of the parliament, and third, citizens' rights and the restructuring of the Constitutional Council, the most effective protection mechanism for these rights (FABBRINI, 2008: 1299).

In its original form, the French Constitution Council was authorized to carry out an *a priori* and abstract review upon the application of particular political organs. Although the Council had incrementally increased its weight within the system via its jurisprudence and gained considerable prestige, these fundamentals remained unchanged. With the amendment introduced in 2008, the authority of the Constitutional Council to carry out the review of the constitutionality of statues has been transformed into an *a posteriori* review mechanism initiated with the pretext to resolve concrete incompatibilities. In other words, the amendment did not add a new method to the old system, but replaced it with a new system altogether.

This new system resembles the "concrete norm review" in the constitutional system of the Republic of Turkey, or in other words, "the detection of unconstitutionality by other courts" as regulated by Article 152 of the Constitution. Accordingly, if a doubt is raised that a norm to be applied for the solution of conflicts in cases being heard in French courts is unconstitutional for violating the rights and liberties of citizens, the issue will be brought to the attention of the upmost institutions in civil and administrative courts, i.e. the Court of Cassation and the Council of State. If as a result of the assessment carried out here a decision is reached that the unconstitutionality allegations coming from first-degree courts have merit, the relevant norm is ultimately submitted to the attention of the Constitutional Council (French Constitution Art. 61). A possible decision of annulment to be decreed by the Council will remove the relevant norm from effect from the date on which the decision is formally published onwards, unless a separate date is set by the Council (French Constitution Art. 62).

Some interpret this amendment adopted in the French constitutional system as the official recognition by political forces of the "judicial coup d'état" carried out by the Council in 1971 by importing a basic rights charter to the Constitution with a delay of 40 years (SWEET, 2007: 915; SWEET, 2008: 1). On another note, the fact that first degree courts cannot apply to the Council directly and that the process involves the intervention of civil and administrative supreme courts first brings along certain concerns over the efficiency of the review. Still, regardless of the concerns over the initiation of the review, the amendment is clearly a considerable revolution for the classical French political thought that is shaped around the notions of the supremacy of the parliament and the secondary position of the judiciary.

For More Information See

Sweet, Alec Stone, The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective, Oxford University Press, Oxford 1992.

Pasquino, Pasquale, "The New Constitutional Adjudication in France, The Reform of the Referral to the French Constitutional Adjudication in France", *Fondazione per l'Analisi, gli Studi e le Ricerche sulla Riforma delle Istituzioni Democratiche (ASTRID)*, Rassegna, No. 94, 2009.

Fombad, Charles Manga, "Constitutional Reforms in France and their Implications for Constitutionalism in Francophone Africa", *Open Society Institute Africa Governance Monitoring & Advocacy Project (AfriMAP)*, Working Paper, 2008.

Detailed Information 5: Unconstitutionality in Form and Essence

According to the current Turkish Constitution, the review of the constitutionality of statutes in form is confined to the question whether the final vote taken in the TGNA over the legislation is carried out by the majority stipulated by the Constitution. The review on essence, on the other hand, is concerned with whether the legislations are in violation of the principles guaranteed in the Constitution as well as basic rights and liberties in terms of the regulations that they contain. For instance, in a recent decision when a citizen who graduated from School of Nursing applied to the Council of State for failing to be appointed as a nurse due to being male, the Constitution Court ruled that the provisions of the "Nursing Law" which allowed only females to perform the profession were in violation of the "equality principle" guaranteed by Article 10 of the Constitution, hence annulling the relevant regulations (C. 2006/166, D. 2009/113, DD 23.7.2009).

Detailed Information 6: The Retreat of the Legislative and the Ascent of the Executive in Modern Democratic Regimes

The retreat of the legislative and the ascent of the executive stir different reactions around the globe. Some consider these developments as worrying in terms of the controlling and the balancing of political power, while others stress that for the modern democracies to function properly, the legislative organ need not be strong relative to the executive. Still in general terms, we can speak of such a trend throughout the 20th century whereby the legislative organ has retreated and grown weaker and the executive organ has taken the lead and grown stronger. According to Andrew Heywood, there are four main reasons for such a trend (HEYWOOD, 2007: 351-3):

The emergence of disciplined parties: As a result of the ascent of political parties as mass organizations particularly in the 20th century and in line with the party discipline requirement, party members have started to act with concerns like abiding by the party programme and maintaining party unity rather than representing their electoral region as an individual. This has in turn led to a case where representatives who were assigned with the task of representing the people as an outcome of elections to be more accountable to their own party rather than the parliament. In Heywood's words, parties have hijacked the essential representative role of the parliaments (HEYWOOD, 2007: 352). Especially in parliamentary systems, allegiance to the party that represents the majority and forms the government implies for many deputies an allegiance to the government rather than the parliament. The representatives in the legislative organ consider the legislative as an organ that supports rather than monitors the executive, due to their party-based relations.

The growth of the executive: Factors like population growth, the development of the idea of social welfare, the spread of public services among others have led to the growth of bureaucracy and hence the executive organ, which is there to implement laws. As social structure became more complicated, the executive has gained significance as the organ to devise and implement wide-ranging and comprehensive policies. The role of the legislative meanwhile retreated to a more passive one of ratifying the policies that "professional bureaucrats" have prepared in advance and the executive will put into implementation.

Lack of leadership: The executive organ, which can respond in a much more rapid and decisive way to the citizens' expectations for urgent solutions to their social and economic problems, has an obvious advantage against the legislative organ, which is composed of numerous equal representatives and does not allow for leadership in terms of its structure. The structure of the executive which allows room for individual leadership prompts the legislative organ, particularly in cases where an obvious majority party is present, conforms to this leadership and lets it function, which in turn weakens the monitoring function of the legislative over the executive.

The rise of non-governmental organizations and the media: Non-governmental organizations, which focus on a single public issue and encourage citizen participation at the local level, and the mass media, which rises as the primary venue of political debate, have weakened the nature of the parliaments as the traditional venue of political representation and debate, and hence indirectly contributed to the relative strength of the executive. The fact that non-governmental organizations primarily address the policies of the executive as the subject matter of their debate and criticism, and the attention paid to the government and state leaders by the communication media can be considered as the causes and the effects of the ascent of the executive at the same time.

Detailed Information 7: Different Tendencies in the Judicial Review of the Administration

The judicial review of the acts and actions of the executive power and of the administration writ large is one of the main prerequisites of the implementation of the rule of law principle. Indeed, in a different manner from the relationships between individuals, the relations between public authorities and citizens are characterized by an absolute power inequality. Therefore, it is indispensable that the individual is effectively protected and secured in the face of state power.

In order to fulfil this requirement, it is possible for the administration to monitor and review itself or be monitored by the civil society. However, due to the partiality problem to be faced in the self-review of the administration, it is not possible this way to ensure a protection level equivalent to judicial guarantees as a rule. Likewise, the monitoring of the administration by the civil society can only encourage the administration to take some general ameliorative measures, and cannot be expected to become operation in individual conflicts except for exceptional cases that concern the public as a whole or to offer an effective protection.

Hence, there is not a single case among modern democratic states of law where the acts and the actions of the administration are not subject to judicial review. We should add, however, that the judicial review of the administration displays a great variability both in terms of the scope of this review and the conditions sought for its initiation, and in terms of institutional setup. The first system that strikes the eye in this sense is the "judiciary partition" system adopted in Continental Europe as well as in Turkey whereby the acts and actions of the administration are reviewed by specialized courts that make up a separate pillar of the judiciary. Against this stands the "judiciary unity" system typically observed in countries from the Anglo-Saxon political tradition whereby the acts and the actions of the administration are reviewed by ordinary (civil) courts.

While there are advocates for both systems, the main point from the vantage point of the rule of law principle is the effective protection of the basic rights and liberties of citizens as well as other

interests of theirs which are legally worthy of protection vis-à-vis the administration. The question of how this will be organized around an institutional setup emerges as a lesser question here.

Detailed Information 8: High Judiciary Boards in the World

High judiciary boards emerge as a fundamental requirement being increasingly emphasized in various international documents and particularly the studies carried out by the Council of Europe for the maintenance of the independent judiciary function, a *sine qua non* for modern democracies. Indeed, a recommendation released by the Council of Europe in 1994 underlines the need for boards that make decisions about judge appointments to be independent from governments and general administrative offices as a principle, or otherwise for special organs that advise government decisions in this vein. The "European Charter on the Statute for Judges" drafted again by the Council of Europe in 1998, on the other hand, favours the participation of judiciary councils, defined as "an authority independent of the executive and legislative powers within which at least one half of those who sit are judges" in all decisions concerning the profession, including the selection, appointment and the promotion of judges (Art.1). The "Universal Charter of Judges" declared by the International Association of Judges in 1999 adopts a similar attitude, pointing out that "independent body, that include substantial judicial representation" should play an effective role in the selection (Art.9) and the judicial administration and disciplinary action (Art.12) of judges. A similar expression is found in the "Palermo Declaration" released by the European Association of Democratic and Free Judges.

One should add, however, that the existence of high judiciary boards and particularly their involvement in the decision-making processes concerning the appointment of judges is not a universal practice adopted in all democratic countries. Above all, we should mention the existence of several democratic countries that do not have a high judiciary board in their constitutional systems in the sense that it is used in this study. Examples to such countries include Austria, Czech Republic, Finland, Germany, Latvia, Lichtenstein, Luxembourg, Monaco, Switzerland (at the federal level) and Japan. What is more interesting is the absence of a strong demand or debate concerning the formation of such boards in certain countries within this group that lead in terms of their social/political development level, such as Germany, Finland, Switzerland and Japan. On the other hand, in Austria and Czech Republic, which lag behind the others mentioned, there are persistent calls to this end often brought onto the agenda, and the need for such boards is voiced by judiciary circles and certain non-governmental organizations on every opportunity.
Considering countries that have a higher judiciary board within their constitutional systems contrary to those above, a categorization in terms of the authorities of these boards to appoint judges is in order. The first group that should be pointed out in this framework contains countries where the rule of law principle and the modern democracy standards have been consolidated at the utmost level. In these countries, as a consequence of the fact that issues related to judiciary independence are no longer controversial via natural processes, we see that high judiciary boards do not use significant powers in this filed and furthermore, that there is no strong sentiment that this is necessary. As examples to these countries, we may cite the United States and Canada in the Americas and Denmark, Iceland and Sweden in Europe. In this tendency, which may be termed the "Northern European Model" in terms of the formation and the functioning of the high judiciary boards, the boards are observed to take responsibility overwhelmingly in areas like judicial administration, the improvement of efficiency and effectiveness in the judiciary, a balanced distribution of the workload

and strategic planning and budgetary management. This can be interpreted as a striking manifestation of the lack of conflict in societies where the objective and transparent criteria in the selection and the appointment of judges are guaranteed within "…the context of established and generally accepted traditions and practices" as expressed by the "Universal Charter of Judges" touched upon above, and the institutional peace of mind that comes along with it.

The other group of countries which have a higher judiciary board in their constitutional systems are those where the boards are considered primarily within the framework of its functions of protecting and strengthening judiciary independence, which use their authorities in the appointment and other career affairs of judges. High judiciary boards are acknowledged as the exclusive authority in the appointment of judges in some of these countries, while their role in these processes are regulated as an advisory authority. These advisory decisions have a binding character in some of the countries in this latter group.

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Guarnieri, Carlo, "Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self Government", *Legal Studies*, Vol. 24, Nr. 1-4, 2004.

Detailed Information 9: "The Government of Judges "and "Judicial Activism"

The notion of "A Government of Judges" was used for the first time in 1921 by French lawyer Edouard Lambert in his book titled *A Government of Judges and the Struggle against Social Legislation in the United States*. The government of judges, often referred to as *juristocracy* or *krytocracy*, addresses situations where judges exceed the authorities bestowed upon themselves by the constitution and other laws and constrain the effectiveness of legislative and executive powers by a considerable extent. The notion in this sense is an idiomatic one and does not imply a regime where judges govern in the real sense (DAVIES, 1987).

The most significant reason for the re-emergence of the notion today is the groundbreaking jurisdiction of the "Federal Supreme Court" in the United States in certain areas and the reactions against these. On another note, the notion is also used with increasing frequency in the second half of the 20th century in the European legal sphere (SWEET, 2002). The problem with the increased frequency of the utilization of the idea is that it hence loses part of its explanatory power. Indeed, the notion is used as a popular expression of criticism by circles unhappy with the decisions of judiciary organs and particularly of constitutional courts, without taking into consideration whether these decisions in fact indicate a situation where the judiciary exceeds its own authority or usurps the function of other organs.

The notion of "Judicial Activism", on the other hand, was used for the first time in an article by Arthur Schlesinger published in *Fortune* magazine in January 1947 assessing the status of the American Federal Supreme Court. This gives us an indication about the birthplace of the problems

that led to the invention of the notion. Indeed, US President of the time, Franklin D. Roosevelt, was engaged in a series of serious economic reforms to tackle the destructive impacts of the Great Depression, the conflicts with the Supreme Court, which objected to these reforms led to the birth of the idea of judicial activism.

It is hard to say that there is a consensus on the definition of the idea of judicial activism, which comes onto the agenda every now and then in all democratic countries today (KMIEC, 2004: 1442). However, one could say it denotes a process whereby judges take into consideration their own worldviews and political preferences along with (or sometimes instead of) legal rules.

The notion is in wide and critical currency in Turkey in the recent years, particularly following some controversial decisions made by the Constitutional Court (ÖZBUDUN, 2007: 259-268).

For More Information See

Roosevelt, Kermit III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*, Yale University Press, New Heaven and London, 2006.

Detailed Information 10: The Tensions between Constitutional Courts and Political Power in Hungary and Russia

The "third wave" of democratization is a concept used to define the process which started with the Carnation Revolution in Portugal in 1974 and resulted in the demise of the Soviet Union at the onset of 1990s (HUNTINGTON, 1991: 3-5). This process is defined in essence as the transition of countries included in the wave of democratization to democratic regimes based on a free market economy and political pluralism. Regarding countries that have joined the third wave of democratization from the 1990s onwards that we focus on here, we can see that they are spread on a wide territory stretching from Central Europe to Central Asia and have had to tackle a series of common problems. In a majority of these countries, which experienced the pains of the transition to democracy, constitutional courts assumed the role of the main actor in these grand transformations in the field of economy and politics and have at times undersigned groundbreaking decisions that sparked a huge reaction. Without doubt, this role and the decisions of this kind have been the source of the serious contention between constitutional courts and political power. Russian Federation and Hungary strike the eye as two leading examples where such tensions were experienced.

The negotiations between the ruling Socialist Party and representatives of the opposition throughout the democratization process in Hungary resulted in the establishment of a Constitutional Court equipped with wide-ranging powers. The Court had a unique position in terms of the initiation of its review mechanisms along with the width of its review authority. Indeed, anyone in Hungary, regardless of whether they were a citizen of the country, was granted the right to apply to the Constitutional Court with the claim that any given legislation was unconstitutional (SAJO, 1995: 255).

The reason why the Court was equipped with such wide-ranging powers was the fact that the representatives of the "ancien regime" and the opposition leaders failed to foresee the results of the upcoming elections. Hence, both sides were concerned about an election result that would give the

other an overwhelming majority and considered the protection by the Constitutional Court as a major guarantee for themselves (SCHEPPELE, 2001). However, once it started to fulfil its function, the performance displayed by the Court had a truly shocking effect on the political elite. Indeed, the Court annulled one out of every three laws ratified by the parliament on average and undersigned decisions on several critical issues from death penalty to land reform that sparked a reaction among politicians and the people alike; so much so that some decisions made by the Court stirred a tension that even led to protest meetings in Budapest by the "Hungarian Democratic Forum", the bigger partner of the government coalition (BOULANGER, 2006: 271).

A similar milieu of conflict was observed in Russia. Indeed, the Constitutional Court of the Russian Federation, under the leadership of Court Chair Valery Zor'kin, found itself in an inconceivably difficult struggle with the political power, which tried to reconstitute Russia's authoritarian tradition within the body of the executive organ. In a political climate where the legislative organ was intimidated and all the authorities in the system were accumulated in the hands of the executive organ, the Court refused "to act like a fire engine called to duty after nothing is left but smoking ashes" in the words of Chair Zor'kin, and transformed into an organ that started to convey strong political messages in the name of defending the constitutional order (BAUDOIN, 2006: 680). The friction between President Boris Yeltsin and the Constitutional Court became so obvious at one point that 13 judges of the Court were even summoned to a meeting "to test their allegiance" by President Yeltsin. While the majority of the judges chose to ignore the invitation, the fact that the six judges who attended persistently remained silent about the topic of conversation behind the closed doors was taken as a strong indication of the unlawfulness of Yeltsin's "suggestions" (TROCHEV, 2008: 102).

The legal existence of the Constitutional Court, which made numerous "tough" decisions throughout this period, was ultimately suspended by President Boris Yeltsin with Presidential Decree no 1612 in 1993. When the Constitutional Court resumed activity under the chairmanship of Vladimir Tumanov in 1994, a new era of a much more limited judicial activism had begun.

For More Information See

Schiemann, John W., "Explaining Hungary's Powerful Constitutional Court: A Bargaining Approach", *Archives europeennes de sociologie*, Vol. 42, 2001, pp. 357-390.

Thorson, Carla. "Constitutional Courts as Political Actors: Russia in Comparative Perspective", *Paper presented at the annual meeting of the American Political Science Association*, Boston Marriott Copley Place, Sheraton Boston & Hynes Convention Center, Boston, Massachusetts, 2002 http://www.allacademic.com/meta/p65973_index.html

Zorkin, Valery, "Constitutional Justice of the New Democracies in the Conditions of Modern Challenges and Threats", *Speech Given at the Twenty Years of the Constitutional Court Symposium*, Budapest, Hungary, 2009, <http://www.mkab.hu/index.php?id=valery_zorkin__ president_of_the_ constitutional_court_of_russia>

Detailed Information 11: Separation of Powers in the Words of Montesquieu

French philosopher Montesquieu, one of the founding fathers of the principle of separation of powers, makes his point in his classic "Spirit of Laws" published in 1748 with the following words:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

Detailed Information 12: The Bicameral System

The bicameral system denotes the utilization of the legislative authority by a parliament composed of two pillars. After the initial instances of the system in Ancient Greece and Rome, there are also certain applications dating back to the 13th century when parliamentarism was born in Europe. The common feature of all these examples is the fact that they are the products of the effort to create a privileged channel of representation for certain privileged social groups (the Church, cities, the nobility etc.) (CONGLETON, 2006: 163-164). Following the 19th century, the bicameral system starts to lose its significance and a tendency towards unicameral systems prevails around the globe. However, the bicameral system has proved indispensable particularly in federal systems. Within this framework, bicameral system is in use in all federal systems with the exception of Micronesia and United Arab Emirates (TSEBELIS and MONEY, 1997: 6).

The advocates of the bicameral system underline the following points:

The second parliaments in bicameral systems serve to balance the majorities and their excessive tendencies the in the first parliaments.
The bicameral system allows a more effective monitoring of the executive.
The bicameral system allows for more flawless legislations.
The bicameral system constitutes a precaution against the ratification of unconstitutional legislations.

The opponents of the bicameral system, on the other hand, raise the following points:

In unicameral systems, parliaments are more effective institutions that can make decisions more rapidly.
The second parliaments in bicameral systems are usually weaker in their democratic qualities.
The second parliaments in bicameral systems are the venues of more conservative tendencies (HEYWOOD, 2000: 189-190).

Turkey's "Senate" Experience

In Turkey, "Senate" is used as a shortcut to denote the "Republican Senate" that constituted the second pillar of the parliament in the bicameral system implemented throughout the era of the 1961 Constitution.

As widely acknowledged, the countries where bicameral system is the norm are either those that have the system traditionally in their constitutional architecture (e.g. the United Kingdom) or have included it in their constitutions as a corollary of the federal system (e.g. the United States). In the former possibility, second parliaments serve more symbolic functions, whereas in the latter they have a much more vital role like the representation of the federal state within the federal structure.

In addition to these two groups of countries, there are instances where the bicameral system has been adopted in countries that are not federal in structure and that have no pressing need to maintain a long-standing tradition, including Italy, France, Japan, Ireland, Poland and Turkey. The primary reason why the bicameral system was adopted in these countries is different from those above: it seeks rather to add a new element to the system of checks and balances (ONAR, 2003: 27). Indeed, the primary rationalization of the foundation of the Republican Senate as stipulated by the 1961 Constitution was expressed as the introduction of constraints on possible extremisms of the majorities in the first pillar of the parliament and more specifically as the preservation of the fundamental principles of the constitutional order.

Nevertheless, it is not quite possible to say that the Republican Senate has succeeded in fulfilling these functions. In fact, the concrete contribution of the Republican Senate to the legislative processes between years 1961-1980 was simply delaying the ratification of the legislations by two months on average. Meanwhile, the majority of the legislations that were later annulled by the Constitutional Court on the grounds of unconstitutionality had been ratified by the Senate almost with no objection (EROĞUL, 1977: 84). Likewise, the authority granted to the Republican Senate to file lawsuits in the Constitution Court was not used effectively throughout this period. All these observations suggest that important lessons await to be drawn from the Senate experience in Turkey.

Detailed Information 13: Elections as a Review Mechanism and Global Examples of Ruling Parties Overthrown in a Dramatic Manner through Elections

Elections, as long as they are free and fair, are an effective political instrument used by the electorate to control, constrain and when necessary change the powers of the elected, and hence an indispensable component of representative democracies. Elections are held in numerous authoritarian regimes, but factors like the constraints imposed on the freedom to organize and run in elections (for instance, the presence of a single party or candidates in some cases) and the pressures on the electorate (for instance, voting in return for money, material handouts to poorer voters, fraud and violence) transform the elections in these countries into an instrument that serve to provide legitimacy for the group or the groups already in power in such countries. In free and fair elections, every citizen has the right to run in elections, along with the right to cast a secret vote. This helps alleviate the pressure of the ruling party on the electorate, and allows the electorate to use its right to assess the candidates/parties that vie to come to power, monitor the party in power and change in when necessary. Over the past twenty years, some countries have experienced incidences that certain

authors like to call "electoral revolutions", whereby ruling parties have been overthrown dramatically via elections.

In the light of developments over the course of 2010, we should underline the fact that the electoral revolutions particularly in Kyrgyzstan ("The Tulip Revolution") and in Ukraine ("The Orange Revolution") have not led to the foundation of liberal-democratic regimes in these countries. Along with allegations of fraud, lawlessness, the inadequacy of the liberal turn, and the preservation of the authoritarian features of the regime in both countries within the context of the last elections, we can easily observe the existence of a "counter-electoral revolution" in line with the same terminology. Hence, an important lesson to be drawn from these examples is that elections pose great significance as mechanisms to monitor and change power, but cannot guarantee by themselves that a new power structure will be set up and used within liberal boundaries without leading to corruption and legitimacy crises. In cases where elections prove inadequate in times of time period and scope, the other institutions and norms of the constitutional system for keeping power in check should be operationalized.

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Valerie J. Bunce and Sharon L. Wolchik, "Favorable Conditions and Electoral Revolutions", *Journal of Democracy*, Vol. 17, No. 4, October 2006, pp. 5-18.

Staffan I. Lindberg, "Democratization by Elections - A New Mode of Transition?", *Paper presented at Duke University*, October 27, 2008

Detailed Information 14: Similarities and Differences between Non-Governmental Organizations and Political Parties

In modern democracies, non-governmental organizations and political parties resemble each other in the sense that they are institutions that ensure communication and interaction between the rulers (government/state) and the ruled (citizen/individual). In a stable constitutional order, both types of institutions are acknowledged as the indispensable, legal and legitimate components of democratic politics. We can say that non-governmental organizations and political parties have the following common functions: The representation of certain interest groups constituting part of the society; the identification of certain political, economic, social and cultural goals expected to contribute to the development of the society; the effort to materialize these goals by trying to convince the public opinion and at times winning over the legitimate support of the masses and mobilizing them.

Despite these similarities, we should also point out that there are considerable differences between these two types of social institutions. For instance, political parties seek to come to power and in the case that they win elections, they form governments. In cases where they do not play a part in the government, they aim the acquisition of official titles for their members, such as deputy or mayor. Non-governmental organizations, on the other hand, seek to influence, guide or monitor the government or the administration in the direction dictated by their worldview, rather than being a part of the government or the administration writ large. Moreover, political parties contribute to the training and the formation of a professional team of administrators or politicians in order to be

effective both at the local and the national levels. Non-governmental organizations, rather than training politicians/administrators, are composed of individuals who are already defined by their professional status and (as in the case of trade unions or chambers) act within the context of a common profession, interests or vision. Finally, compared to non-governmental organizations, which typically take interest in a more specialized and limited areas like the environment, science or health, the goals of the political parties, which are more systematized, include promises of comprehensive social change. In other words, the organizational structure of the political parties are more mass-scale compared to non-governmental organizations, due to the fact that their goals are on a wider scale to begin with **(Table 2)**.

	Political Parties	**Non-Governmental Organizations**
Members	Venues where those that aim to be professional politicians and administrators are organized and trained	Venues where people of common professional interest or a common view concerning certain political problems gather
Relations with the government	Aim to become part of the government or of state organs in general via elections	Aim to influence, guide or monitor the government rather than assuming direct political roles
Goals and fields of activity	Aim to win the support of masses by developing wide-scale political projects that concern the entire society	Voice the suggestions and concerns of a specialized group or volunteering citizens in a limited area and scope of expertise

Table 2: Political parties and Non-Governmental Organizations

Detailed Information 15: Opposition: Its Significance in Terms of the Democratic Regime and Its Function of Monitoring Political Power

In politics, the opposition is composed of one or more parties or organized groups who stand against a government, or a party or group who has hold of the political power. The degree of tolerance for political opposition in a country is an indicator of the existence or absence, strength or weakness of a democratic regime in that country. In other words, the opposition is a *sine qua non* of a democracy. We witness the oppression of the opposition by power in authoritarian regimes, while in more liberal and democratic regimes the opposition monitors the power at various levels and can adopt an opposing stance.

As to the opposition at the parliamentary level, how representation is distributed in the parliament, how it is shaped with how many parties and the degree of the separation of powers, all depending on the political system that a particular country possesses, determines the nature of parliamentary opposition. For instance, the majoritarian electoral system in England, also known as the "Westminster Model", together with the order in the country which includes two major parties, leads to a picture whereby the receiver of the greatest number of votes wins the elections, and one party in the parliament represents the government/power, and the other party the opposition. This implies the accumulation of legislative and executive authorities in a single focus of political power, and a role definition for the parliamentary opposition as the "next government" (shadow government) in

terms of a critique of power in the light of the upcoming elections. Moreover, the opposition of the shadow government can be degraded in quality with the ambition to seize power. The advocates of the Westminster model argue that the model provides for a stable government system and an institutionalized opposition.

On the other hand, when the electoral system of a country is proportional representation, which allows a more effective political role for the parties and the groups other than the power and the opposition, the parliament transforms into a political arena where parties that have received more votes than a certain threshold are represented. The parliamentary opposition here is composed of more than one party. The weakness of the opposition in this system typically stems from the failure by the opposition parties to form a united stance in their objections to especially a single-party government. However, the advantage for such a system for oppositional politics and the democratic regime is arguably the representation of a wide range of differences.

As a result, it is obvious that different election and party systems will influence the formation of the opposition in different ways. However, a generally acknowledged point is that the opposition in modern democratic regimes is indispensable for the delimitation of power particularly at the parliamentary level.

Detailed Information 16: The Monitoring of Legislative and Executive Organs by Non-Governmental Organizations

Non-governmental organizations can review the legislative and the executive organs through various influencing and monitoring methods. Below are some interesting examples concerning legislative and executive organs that have potential for applicability:

"Deputy Monitoring Committees"

One of the most defining features of democratically governed societies is the feasibility for the governed to call the governors into account. Democratic governance resembles the notion of a contract whereby the governors and the governed assume mutual liabilities. The accountability obligation of the power holders for their actions is assessed within the context of how much and how they can fulfil their commitments under this contract. A type of democratic accountability is "social accountability". One of the most important actors of "*civic engagement*", i.e. the social accountability via the direct participation of citizens is the non-governmental organizations. Within this context, the deputy monitoring committees, whose examples can be observed in Turkey and elsewhere, aim to materialize the accountability principle by monitoring political power via the civil society.

The idea, which was proposed in Turkey in 1995 for the first time, resulted in the formation of "Deputy Monitoring Committees" in numerous provinces. These committees, which fulfil monitoring and reporting functions, aim to reinforce the sense of responsibility of the governors vis-à-vis the governed through the channel of non-governmental organizations, and to contribute to the more active and effective parliament. A similar undertaking took place in Uganda within the scope of the *Scorecard Project*. Within the framework of this project, several issues like the participation of deputies in the parliamentary works, their performances and their impact on the legislation process

have been graded and reported. Another similar example is in South Korea. Here, CSMNAIGO, founded in 1999, is a major civil society group established with the participation of some forty civil society organizations, which monitors the works and performances of deputies via "civic engagement" and undertakes wide-ranging activities in order to materialize the principle of accountability.

The Monitoring of Local Administrations by the Civil Society: Examples from the World

Local administrations, with a universal definition, are decision organs (executive organs in some cases) founded with the aim to provide the members of a local community living in a certain geographical area (village, city, town, province, etc.) with the services relevant to them for the sake of living together, and public legal entities which (in certain cases) come to office by election by the local community, have certain responsibilities and authorities defined by laws, special revenues, a budget and a staff, and enjoy an administrative autonomy in their relationship with the central administration (COŞKUN, 1999). The increasing needs of further developing societies in our era make it difficult to meet all the demands of the society by the central administration. Local administrations step in at this point and due to the fact that they work for human groups working in narrower boundaries, they always have the chance to build closer links with the people. On the other hand, the relationship between local administrations and the citizens should not be one-sided; an effective operational order for local administrations is only possible with the participation of citizens in local administration activities. This form of participation cannot be confined to the phase of the election of administrators only, but also in the monitoring of the elected during their term in office. Several legal and constitutional regulations can be made in order to ensure that.

Examples from the world in this sense include France where the local populace has the opportunity to influence the decisions of the local administrations. According to Article 72 of the French Constitution, the electorate has the right to submit petitions on any issue under the jurisdiction of municipalities and hence ensure that the issue will be on the agenda of the municipal assembly (KARAARSLAN, 2008: 265).

With *"The Right of Information Act" in the United States, a.k.a.* the *"Sunshine Laws"*, the people have the right to attain information on works undergoing in or undertaken by local administrations. Here, the people can receive information about a decision or an action and can receive copies of documents on any public issue as long as it is not about personal or national security (KARAARSLAN, 2008: 266). One of the important ways of ensuring public monitoring is the right to file lawsuits against the actions of local administrations, directly or solely on the grounds of living in that area, and is often encountered in the American and European legal systems.

Thanks to the "Local Administrations Act" of 1933 in the United Kingdom, voters can control or examine all the minutes of the assembly and the registries of the actions taken by any given local administration unit (ÇOKER, 1970: 41-42). The citizens also have the right to see and obtain all the official information and documentation that public authorities have.

In Germany, local administrations are subject to the direct monitoring of the civil society. Here the people can influence the local administrations particularly via instruments of semi-direct democracy

like the public initiative. In order to make sure that this process is based on a solid ground, the information on the local administration is conveyed to the public on a regular basis (KARAARSLAN, 2008: 266).

The referendum mechanism is considered to be a significant instrument for the participation of the people in the local administrations and the monitoring of these administrations by the civil society. For instance in Spain, referenda can be held on autonomous groups and local services. Similar regulations are seen in Italy and the Netherlands. Such local referenda are employed in France since 1992 (KARAARSLAN, 2008: 270).

Detailed Information 17: "Recall"

The recall mechanism is an instrument of semi-direct democracy whereby voters can remove from office their elected representatives when they are not satisfied with their actions and decisions before their term in office normally ends. In this method, the process is initiated with the petition of a certain number of citizens and is concluded by a mini-election where the ultimate decision on the issue will be made. The mini-election hence determines the political fate of the public official subject to the recall initiative. The mechanism can be operationalized by putting in process a resignation letter signed by the representative before he was elected to office in the first place.

The recall mechanism was first advocated by Karl Marx in his essays on the "Paris Commune" but was first implemented in a widespread manner in the United States from 1903 onwards. In terms of its American application, the mechanism can be considered as the functional equivalent of the vote of non-confidence of parliamentary systems in the presidential system, which rests on the "hard separation of powers" (GILLIAN, 1991: 522).

The mechanism is in line with the "mandatory representation" approach which advocates that representatives should be bound tightly by the opinions and the directives of the electorate, but is also adopted by "radical democrats" who believe that voters should have a wide-ranging monitoring authority over politicians (HEYWOOD, 2002: 227). The advocates of the mechanism argue that the possibility to be recalled encourages elected representatives to be more careful and caring in their actions and creates a political participation facility for voters that is speaks to liberties and is not limited time-wise. The opponents to the mechanism, on the other hand, state that the practice will discourage the representatives from taking actions that are necessary but likely to cause hurdles in the short run; and when used irresponsibly, will make it much more difficult to maintain public life in a sound manner.

The recall mechanism can be initiated against organs of the local administrations that come to power by elections, elected members of the parliament at regional, national and even supra-national levels, and elected heads of state. However, despite its wide applicability potential in theoretical terms, the mechanism has been adopted by very few countries today. At the time of writing, the recall mechanism is in practice in 18 states in the United States, 6 of the 26 cantons of Switzerland, and the British Columbia region in Canada. It is implemented at the national level only in the Philippines and in Venezuela.

In the Philippines where all the elected organs of local administrations can be recalled, recall elections have been temporarily suspended on 13 November 2008 on the grounds of financial difficulties, but has been reinstated on 29 January 2009 (COLEMAN, 2010: 4). The interesting feature about the practice in Venezuela is the fact that it is the only example where an elected head of the state can also be recalled. The first application of this regulation, which made its way to the Venezuelan Constitution in 1999, was initiated in 2004, and Hugo Chavez, who remains to date the head of the state of the country, attained a 60% vote rate in the elections on 15 August 2004 throughout the recall process initiated against himself, thus winning the right to remain in office.

Detailed Information 18: "The Media" as a Mechanism Monitoring Political Power in Modern Democracies

Stephen D. Tansey says in his *Politics: The Basics* that the responses to a few critical questions will determine whether the media can fulfil its function of monitoring political power. The questions include:

1- *Which information can the media access on politics, can it make this information public?*

The nature of the information that citizens and media representatives can access and attain on the decisions made by the government directly influences the monitoring function of the media over power. Modern democracies display variability in this sense, particularly in terms of their legislations on the right to information (TANSEY, 1995: 179-180). Sweden poses an interesting example as the country which has the oldest and the widest right to information act. According to the "Public Access Principle" here, anyone, including non-Swedish citizens, has the right to see and read the decisions taken by the government and the local authorities. In addition, public employees also have the right to share what they know by way of their post and give information to the media. Furthermore, the gatherings of the legislative and judiciary organs should also be open to the public. The law also stipulates what kind of information can be considered "secret" and cannot be shared. For instance, some information can lose their public nature and be taken in the secret category for the protection of the private lives of individuals and for the effective prevention and prosecution of certain types of crimes.

2- *What are the channels through which information is distributed and conveyed, what interests do they serve?*

In order for the media to pursue an effective monitoring function over political power, the existence of private communication facilities outside state control is mandatory. In addition, the variability of the media institutions contributes to democratic monitoring. Therefore, if the media is composed of communication facilities owned only by a few capitalist magnates and the state, it cannot be expected to properly fulfil its function of monitoring power (TANSEY, 1995: 180-1). Hence, in order to preserve pluralism in the media, "social responsibility of the press" approach has been devised in modern democracies As A. Raşit Kaya notes in his *İktidar Yumağı: Medya-Sermaye-Devlet* (The Web of Power: the Media, the Capital and the State), the social responsibility of the press rests on the principle that "...the owners of communication facilities should designate their messages (the content of their broadcast) not by virtue of their particularistic interests, but rather for the sake of the public well-being." (KAYA, 2009: 109-10).

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