

LOCATING SUSURLUK AFFAIR INTO THE CONTEXT OF LEGAL-POLITICAL
THEORY: A CASE OF EXTRA-LEGAL ACTIVITIES OF THE MODERN STATES

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ABSTRACT

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The study locates Susurluk Affair into the legal-political theory, around an axis passing through two standpoints that defines the state either as a legal or as a political institution. Two words, “Susurluk Affair” refer to an accumulation of incidents and relationships that point to extra-legal activities of the state that are revealed by a traffic accident in Turkey. Susurluk Affair and similar cases of extra-legal activities of the state are frequent in modern political life, although the modern state is founded on the presumption of legal use of public authority.

Susurluk Affair is discussed with reference to Max Weber’s and Jürgen Habermas’s theories of the rule of law, and Hans Kelsen’s legal positivism, both of which provide perspectives that define the state as a legal institution, and from the viewpoints of doctrine of *raison d’etat* and Carl Schmitt’s theories of the political and sovereignty that conceptualize the state as a political institution. Susurluk Affair can be interpreted in accordance with Weber’s, Habermas’s and Kelsen’s theoretical standpoints either as a deficiency in legitimacy or violations by certain persons, however it can be interpreted as activities for maintaining the state in the framework of the doctrine of *raison d’etat*. On the other hand, the Schmittian approach acknowledges extra-legal activities of the state, but Susurluk Affair cannot be interpreted as a case of deciding the exception in the Schmittian sense.

Keywords: Susurluk Affair, the rule of law, *raison d’etat*, the political, exception.

ÖZ

SUSURLUK OLAYINI HUKUK-SİYASET TEORİSİ BAĞLAMINDA KONUMLANDIRMAK: MODERN DEVLETLERİN YASAL ALAN DIŞINDAKİ FAALİYETLERİNE BİR ÖRNEK

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Çalışma, Susurluk Olayını hukuk-siyaset teorisinde, devleti hukuksal bir kurum olarak ve siyasal bir kurum olarak kavramsallaştıran iki teorik bakış açısında nereye oturduğuna bakarak konumlandırıyor. “Susurluk Olayı” Türkiye’de bir trafik kazasıyla açığa çıkan, yasal alan dışındaki devlet faaliyetlerini ifade eden bir olaylar ve ilişkiler toplamını tanımlamaktadır. Modern devlet kamusal gücün hukuksal kullanımı varsayımı üzerine kurulmuşsa da, Susurluk Olayı benzeri yasal alan dışındaki devlet faaliyetleri örneklerine modern politik hayatta sık rastlanmaktadır.

Susurluk Olayı, devleti hukuksal bir kurum olarak kavramsallaştıran Max Weber’in ve Jürgen Habermas’ın hukuk devleti teorileri, Hans Kelsen’in pozitif hukuk teorisi ile devleti siyasal bir kurum olarak kavramsallaştıran *raison d’etat* doktrini ve Carl Schmitt’in siyasal ve egemenlik teorileri açısından tartışılmıştır. Weber’in Habermas’ın ve Kelsen’in teorik bakış açıları Susurluk Olayı’nı meşruluk kaybı olarak ya da belirli kişilerin suçları olarak yorumlanabilirken, olay *raison d’etat* doktrini açısından devletin korunması için gerekli faaliyetler olarak yorumlanır. Öte yandan, Schmitt’in bakış açısı devletlerin yasal alan dışı faaliyetlerini kabul etse de, Susurluk Olayı Schmittci anlamda bir istisnaya karar verme örneği olarak yorumlanamaz.

Anahtar sözcükler: Susurluk Olayı, hukuk devleti, *raison d’etat*, siyasal, istisna.

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CHAPTER 1

INTRODUCTION

SUSURLUK AFFAIR AS A CASE OF EXTRA-LEGAL ACTIVITIES OF THE MODERN STATES:

Two words, “Susurluk Affair” refer to an aggregation of incidents and relationships that point to extra-legal activities of the state that are revealed by a traffic accident near Susurluk, a small town in northwest Turkey, on November 3, 1996.¹ The concept of “extra-legal² activities of the state” refers to activities that are apparently beyond legally defined jurisdictional areas of state affairs, but are conducted or allowed by the executive body. A case of extra-legal activities of the state can only be discerned in a supposedly valid constitutional order, in which executive and legislative functions of the state are separated and are subject to judicial review. Otherwise, it is impossible to articulate whether the authority is used beyond legal limits. Therefore, one can mention such a case in regard to the constitutional order that sets forth limits of executive actions, and proposes a competent judiciary body to review these actions. Such kind of incidents lies on a threshold where it is difficult to distinguish the implementation of law from the transgression of law, and therefore which can only be included into the constitutional legal order either as implementation or transgression of law. In principle, distinguishing a transgression of law from an implementation of law is only possible when such a case is brought before the competent authority. Such

¹ The car that crushed into a truck near Susurluk, a small town in northwest Turkey, on November 3, 1996, was carrying a member of parliament, the former Istanbul deputy security chief and a criminal, who was wanted for many crimes in Turkey and who was in prison in Switzerland and escaped from prison in 1990, and wanted by the Interpol with a red notice. Moreover, there were many guns with silencers in the baggage of the car.

² Extra-legal is defined as “1. Beyond legal purview; outside the scope of law; 2. Illegal” in Funk and Wagnalls New “Standart” Dictionary of the English Language (1953).

kind of incidents is not explicitly included into the legal order, and they are rather the outcomes of political decisions. Extra-legal activities of the state are conducted or allowed covertly, and if they are disclosed, they are presented as activities that are carried out by certain officials, individually. That's why, those statesmen who are accused of such offenses are protected by legal armors of classified information, immunity, pardon, parliamentary decisions, and so on. Therefore, such a case points out that a political decision to conduct such extra-legal activities has already been made. In cases of extra-legal activities of the state, there is an ambiguity if the authority that is conferred to the executive body by the constitutional order is used beyond the limits that are set forth in this order. This study intends to point out a deviation from legal functioning of the modern state that is supposed to be grounded on a legal structure. Susurluk Affair can be defined as a case of extra-legal activities of the state, which is disclosed by the help of information revealed in Susurluk Accident.

There are various incidents that can be approached under the coverage of extra-legal activities of the state cited in investigation reports and legal documents about Susurluk Affair. Besides certain private persons, certain public officials, and a former Minister and a former deputy were brought to court, on charge of offenses, which are defined with the help of information revealed by Susurluk Accident. Before the Susurluk accident, extra-legal practices of the state were on the agenda of certain critical persons and groups for a long time. However, most of the case, not only the claims were veiled, but also the claimers were prosecuted. After its disclosure, Susurluk Affair has been a theme used for criticism of and defenses for extra-legal activities of the state, since the accident cleared the way for accumulation of information and discussions on such an affair. However, these discussions revolved around the details of the incidents, and the affair was brought to the media as a sum of details about relations between certain persons. Though information about and around the Susurluk Affair was abundant, analysis as to its totality were scarce. Those who made such

a general analysis, rather than approaching to the case as a sum of details, either defended or criticized it. In brief, there were two trajectories in approaching to the Susurluk Affair, in the public opinion.

Certain politicians and columnists defended those who were involved in the Susurluk Affair. These persons argued that Susurluk Affair was an outcome of the efforts for sustainment of the state. Others, who criticized Susurluk Affair, argued that it implied a deficiency in the rule of law. While analyzing the reasons of supposed deficiency in the rule of law, certain persons put emphasis on specific conditions of the Republic of Turkey. They underlined the correspondence between such extra-legal activities of the state in Turkey and the Turkish state tradition. In this approach, Susurluk Affair has been discussed in the framework of certain characteristics attributed to the Turkish state. Most of these arguments revolve around the oppressive character of the state in Turkey. Many examples of such arguments uttered by certain writers who are advocates of a liberal approach known as the “Second Republicanism”, can be found in daily newspapers. The idea of the “Second Republic” is founded on a criticism of principles of the Republic, on the ground that they oppress the civil society and obstruct social development. Since this group has an almost abiding opinion on the character of the Turkish state, not surprisingly, the arguments made by them regarding Susurluk Affair are founded on a criticism of the oppressive character of the state in Turkey. The literature produced by this milieu on Susurluk Affair has generally been founded on a premise that the Republic of Turkey has inherited a despotic political culture from the Ottoman Empire. Such writers argued that Turkish state is despotic, and civil society in Turkey is not developed enough to limit such a despotic power. This despotic tradition supposedly flourished in the first years of the Republic associated with the principle of statism, which was accepted as one of the founding principles of the Republic. The theme of oppressive, despotic state is also brought into the context of Susurluk Affair by another group of intellectuals, who write in a semi-academic,

left-wing journal, *Birikim*.ⁱ

In brief, in all these approaches, Susurluk Affair has been evaluated as a question of deficiency in democracy and weakness of the civil society, and in relation to the Turkish state tradition. However, it has not never been tried to be located into the context of the legal-political theory. Only Sancar (2000) approaches Susurluk Affair a perspective of legal-political theory. He says that dominant mentality about the state does not rest on legality, but rests on “*devletin bekaası*” (sustainment of the state) in Turkey. He points out that there is a parallelism between the National Security Council’s (NSC) recognition of sovereignty and Carl Schmitt’s conception of sovereignty (Sancar, 2000: 95). Sancar (2000) emphasizes that such a tendency is related to the Turkish state tradition, too. These views may point out an utmost important factor in evaluating politics in Turkey. Turkish state tradition may have an effect in political culture in Turkey, however, focusing on the role of Turkish state tradition may lead to disregard the structural factors in evaluating Susurluk Affair.

Indeed, Susurluk Affair is not the only case that undermines supposedly legal functioning of the modern state. Though the modern state is founded on the presumption of legal use of public authority, Susurluk Affair and similar cases of extra-legal activities of the state are frequently witnessed in modern political life. There are many examples of such kind of affairs in the political literature such as Gladio, GAL (Amnesty International Report, 1997: Aretxaga, 2000), Gibraltar Killings committed by SAS soldiers of the UK (Rolston, 2000), case of death squads in Ireland (Rolston, 2000; Sluka, 2000), Iran-Contra Affairs (Walsh, 1993; Executive Summary of the Report on Drugs, Law Enforcement and Foreign Policy), case of extra-legal police forces in India (Mahmood, 2000; Pettigrew, 2000), in Brazil (Pinheiro, 1991; Chevigny, 1991), in Indonesia (Aditjondro, 2000); and other cases in which it is difficult to distinguish legal exertion of state power from illegal practices as in cases of Argentina (Robben, 2000; Chevigny, 1991), and

Guatemala (Afflitto, 2000; Ibarra, 1991; Warren, 2000), etc. A brief analysis of these cases would be helpful in defining Susurluk Affair as a case of extra-legal state activity. These cases show that the distinction between legal and illegal use of the state power may be blurred. While it is impossible to determine the distinction between legal and illegal use of state power for certain cases, this distinction is relatively clear for the others. Case of Argentina is an example of the former. Social opposition was repressed through use of violence beyond legally defined limits when certain critical persons who were detained by public authorities disappeared in the period that the junta was in power from 1976 to 1982³ (Robben, 2000: 97). Those, who were involved in disappearances, could in no way be brought to the court in that period, some of them were brought to the court in 1986 and were pardoned in 1990 (Robben, 2000: 110). There are other cases in which the distinction between legal and illegal actions of public officials are relatively clear, and subject to legal prosecutions. For instance, in case of GAL, the social democrat government of Spain hired guns for killing 28 ETA members. Ten of the defendants, including the then Minister of Internal Affairs and the then Secretary of State Security were prosecuted and sentenced in prison ranging from 2 years to 10 years for these crimes. Their penalties, on the other hand, were suspended by the Council of Ministers and the Constitutional Court, on the recommendation of the Supreme Court (Amnesty International Report, 1997). One has to remember that activities of an extra-legal group operating on behalf of the state in Spain were acknowledged by certain persons who were critical of the state, but were denied until reveal of GAL. Therefore, even if the distinction between transgression and execution of law is defined relatively clear in legal texts, and in terms of constitutional order of the concerned country, these transgressions may not be disclosed, and be brought to the court. For instance another case, in which boundary between transgression and execution of law is

³ Between 10,000 and 30,000 people disappeared from 1976 to 1982 in Argentina (Robben, 2000: 93).

relatively clear, but was not disclosed totally is the case of extra-legal forces of the state in India incorporated into counterinsurgency policy of the Indian state against Sikhs in Punjab and Muslims in Kashmir (Mahmood, 2000). As stated by Pettigrew: “illegal detention, disappearance, false encounter (a fictitious armed engagement as a cover up for police killing of a detainee) became daily events”, and continues in the Sikh rural areas of Punjab (2000: 205). Special police forces were formed as “extralegal groups operating on behalf of the state” (Pettigrew, 2000: 207). These special police forces “are permitted to function outside their normal areas of jurisdiction” and can join both military and paramilitary units for special operations (Pettigrew, 2000: 209). Similarly, Northern Ireland turned out to a territory where distinguishing transgression from execution of law is difficult in the period 1969-1994. Sluka says that British security forces have used complicated methods for supporting and promoting Loyalist Protestant death squads against Nationalist Catholics in North Ireland (2000). Sluka points out that “the British government has established a sophisticated system of direct control, through its military and intelligence services (MI5 and MI6)” for effectively “maintaining a respectable distance between the government at the top and the people who are killing at the bottom” (2000: 141). Sluka (2000: 142) says that there are many evidences of collusion between British military forces and the death squads in Northern Ireland, and “a large number of human rights organizations have consistently documented British state involvement in and management of loyalist death squads”. Collusion between Loyalist death squads and British security forces was revealed in supplying weapons and intelligence about Catholics to the death squads from 1969 until the cease-fire in 1994 (Sluka, 2000: 142, 144). Furthermore, while Nationalist Catholics’ offenses have been prosecuted appropriately, Loyalist Unionists’ offenses are seldom prosecuted (Sluka, 2000). Besides collusion between Loyalist death squads and British security forces, there are cases that British security forces are directly responsible for, such as the case of Gibraltar Killings. “Gibraltar Killings” refer to an incident

that British SAS soldiers killed three unarmed IRA members in Gibraltar (Rolston, 2000: 161). The European Court of Human Rights “found the British government guilty of contravening Article 2” of the European Convention of Human Rights in regard to this case (Rolston, 2000: 161).⁴ One has to take into consideration that the legal framework has been changed in emergency conditions as well. For instance, Fin (1991: 206-216; 86-97) analyzes constitutional reconstruction in North Ireland and West Germany in the periods of fight against the IRA; and the Red Army Fraction, respectively. Fin says (1991: 219) that amendments in the constitutions and legal framework empowered security forces, and disrupted the constitutional integrity.

While certain cases such as GAL, Gibraltar Killings, Gladio, and cases of death squads and disappearances can be defined in relation to the use of violence beyond legal limits, there are other cases of extra-legal state activities, such as Iran-Contra Affairs. Iran-Contra Affairs were disclosed after Nicaraguan soldiers shot down a plane in Nicaragua in 1986.ⁱⁱ Iran-Contra can be narrated as two integrated affairs. The first is arms sales to Iran by the CIA, when the US imposed an embargo on arm sales to Iran and demanded other countries to comply with the restriction. The other is transferring the proceeds of arm sales to “contras” in Nicaragua, when the US Congress made an amendment prohibiting all financial support to contras to the Fiscal Year 1985 Defense Appropriations bill. US foreign policy for Central America as well as Cold War policy of fighting against communism forms the historical background of the “contra” side of the Iran-Contra Affairs. US had been involved in internal affairs of the countries in the Central America for a long time (Blum, 1995). This policy of interference was promoted in the period of Cold War (Rubin, 1985: 299). The Sandinista regime, declaring a socialist perspective of development, seized power in Nicaragua in 1979. President Reagan promoted American activities against the Sandinistas and “embraced their opponents, known as the Nicaraguan Democratic Resistance or

⁴ The decision made in 1995, by a 10 to 9 majority. (Rolston, 2000: 161).

'contras'" (Walsh, 1993).⁵ The president aimed to support contras, while the Congress that is controlled by Democrats, wanted to cut off these supports. For Democrats and Republicans, US support to contras was a realm of struggle.⁶ The Congress amended the Fiscal Year 1983 Defense Appropriations bill. This amendment "prohibited the Central Intelligence Agency (CIA), the principal conduit of covert American support to the contras, from spending any money 'for the purpose of overthrowing the government of Nicaragua'" (Walsh, 1993). This amendment is known as the "Borland Amendment". Another side of Iran-Contra Affairs is the drug traffic allowed by the CIA. This side was investigated by the US Senate's Foreign Relations Subcommittee on Terrorism, Narcotics and International Operations. However, these investigations were halted by the Department of Justice. Iran-Contra Affairs is a perfect case of transgression of laws, as incorporated into US's Cold War policies of preventing socialist expansion.⁷ While US was officially supporting military forces, such as contras in Nicaragua, all over the World, after the Congress' ban on support to Nicaragua, such a support was converted into a case of the transgression of law. However, an extra-legal organization beyond legal restrictions, even though monitoring procedures are clearly defined by laws in US, has implemented the policy of "preventing communism in Central America" in Iran-Contra Affairs. These affairs were revealed accidentally. It is known that US has supported and promoted counterinsurgency policies of certain countries in the Cold War period. Indeed, "counterinsurgency" as a military doctrine was developed by US (McClintock,

⁵ For instance, the fact that the CIA had secretly mined Nicaraguan harbors was revealed in 1984.

⁶ In early December 1983, a compromise was reached: Contra funding for FY 1984 was capped at \$24 million -- an amount significantly lower than what the Administration had wanted -- with the possibility that the Administration could approach the Congress for supplemental funds later. (Walsh, 1993)

⁷ Another case that deserves analysis is case of extra-legal activities of McCarthyism in Cold War US. Howse (1998) points out Leo Strauss's criticism on Schmittian decisionism. According to that analysis, Strauss criticizes McCarthyism through criticism of Schmittian conception of friend-enemy distinction and of conception of internal enemy (Howse, 1998: 74).

1991: 121). McClintock (1991: 121) says, “the doctrine’s unique contribution was the legitimization of state terrorism as a means to confront dissent, subversion, insurgency”. For instance in Guatemala case, Guatemala’s final truth commission report released in 1999 tells a lot about the US training given to Guatemalan counterinsurgency officers, and direct and indirect CIA support of state terrorism (Warren, 2000: 240).⁸ US School of Americas was a “training center for Latin American military officers who have been implicated in many human rights abuses” (Warren, 2000: 232). US also trained police forces in Latin America for stronger control of population in these countries (Huggins, 1991). US promoted “strong governments” in Latin America and helped to create legal instruments for harsh treatment of social opposition, too (Echandia, 1991: 145-146).⁹ Iran-Contra Affairs show that even if the legal framework regulating control of executive power by the parliament is clearly defined, as in the case of the Iran-Contra Affair, these procedures may be bypassed and suspended, too (Walsh, 1993; Executive Summary of the Report on Drugs, Law Enforcement and Foreign Policy). Thus, these cases show that there is a structural problem in regard to definition of transgression and execution of law for state affairs. Warren (2000: 226), in regard to cases of death squads, asks if these cases can be defined as an outcome of fascist, totalitarian regimes, or “as temporary state extremism in response to armed opposition to state authority, or as routine forms of social control gone awry”. Spectrum of these cases makes it difficult to prefer one of these explanations. However, one can easily say that Susurluk Affair can be located as a case definitely different from the case of Argentina, since distinction

⁸ Warren says that “President Clinton apologized for the US involvement in widespread repression” (2000: 240). One has to take into consideration that “in 1980-1983, an estimated 26,000-35,000 people were killed, 440 villages destroyed” in Guatemala (Warren, 2000: 235).

⁹ After the end of the Cold War, there are other cases, in which international law is suspended manifestly, such as suspension of law in the Camp X-Ray at Guantanamo Bay and many similar examples of violations have been cited in press, and introduced into the literature of political science, after the September 11 (see Bauman, 2002: 85, Dillon 2002: 77).

of transgression and execution of law is relatively clear in the case of Susurluk Affair. Then, how could Susurluk Affair be understood as a case of extra-legal activities of the state?

The above question can only be answered if one can locate Susurluk Affair as a case of extra-legal state activity in the theory of the state. Answering this question is utmost important for understanding Susurluk Affair. It would help understand similar cases, too. However, obviously, a perspective that focuses on characteristics of the Turkish state for understanding Susurluk may overlook the role of structural features of the state. That's why understanding Susurluk Affair as an accumulation of extra-legal activities of the state in Turkey, and clarifying the role of the state as a structural factor in these practices would pave the way for an overall understanding of the foundations that Susurluk Affair and similar cases rest upon. That's why, Susurluk Affair should somehow be located within the theory of the state, through the axis of two standpoints that defines the state either as a legal institution or as a political institution. Such an endeavor would yield an evaluation of the theoretical standpoints in understanding Susurluk Affair. Then, it will bring to light whether Susurluk and similar cases would be recognized from the viewpoint that understands the state as a legal institution, and whether the problems of this viewpoint could be overcome from the viewpoint that understands the state as a political institution. This study will contribute, in particular, to the literature on Susurluk Affair, and in general, to the conception of extra-legal activities of the modern state. There are two stages in such a study. One of these stages is defining Susurluk as a case of extra-legal activities of the state, and the other is locating it, through interpretation, in the legal-political theory. The following sections explain the basic preferences in explaining Susurluk Affair, and the reasons behind them.

1. 1. Method for Defining and Narrating Susurluk Affair

The question how could Susurluk Affair be assessed is an important problem that the study has to answer. The extra-legal activities of the state were investigated by competent judicial authorities, by a Commission formed by the Turkish Grand National Assembly (TGNA), and by the Chairpersonship of the Investigation Board of the Prime Ministry. Most of these activities were not brought to court, and therefore were not defined as violation of law in legal terms, however were narrated in the report of the Chairpersonship of the Investigation Board of the Prime Ministry.

This study assumes that the concerned report is an important document which reflects certain aspects of Susurluk Affair, though it is not a legal document which presents factual account of Susurluk Affair. However, although the report is accepted as the main document for this study besides the decisions of the courts, since certain parts of the report were censored, the whole content of Susurluk Affair could not be included in this study. Therefore, one who intends to study Susurluk Affair has to consider the fact that Susurluk Affair is a sum of extra-legal activities that can never be totally brought to the sphere of inquiry. That's why, to stay content with the already unveiled information concerning Susurluk Affair has been preferred. There is another reason for preferring to bring relatively less information about Susurluk Affair to the study. I do not intend "to discover the exact case", but desire to locate extra-legal activities of the state, as far as they are revealed, in legal-political theory. Bringing certain incidents that reflect Susurluk Affair as a case of extra-legal activities of the state would serve for such an analysis better. Therefore the study focuses on certain practices that were referred in the investigation reports. However, if Susurluk Affair is narrated as a sum of certain incidents without any reference to the background of these incidents, it would be rather difficult to understand, since these practices emerged in the context of certain conflicts which lie in the social life. Therefore, the

background of Susurluk Affair is also included in the study. Theoretical framework that Susurluk Affair is located in is presented below.

1.2. Theoretical Framework for Interpreting Susurluk Affair

For the above stated purpose, Susurluk Affair will be evaluated from two standpoints in the theory of the state, one of which conceptualizes the state as a legal institution, while the other assumes it as a political institution. In the legal-political theory, both the theory of the rule of law, and the legal positivism are perspectives that define the state as a legal institution. While the theory of the rule of law conceptualizes the state as a legitimate legal institution on the whole; the theory of legal positivism conceptualizes it as a legal institution explicitly excluding the question of legitimacy. The theory of the rule of law is brought to the study from Max Weber's conception of formal rational legal order, and Jürgen Habermas's democratic conception of the rule of law. Weber is one of those who wrote first about arise of formal rational law. He has defined the modern state as an organization that holds the monopoly of legitimate use of physical force, which is grounded on legality. He constructed a theory on bureaucracy and conceptualized the administration as a form of bureaucracy, which is the instrument of legitimate use of physical force for the modern state. Additionally, though Weber defines formal legal rationality as the essential functioning principle of the modern bureaucracy, he thinks about "official secrets", and the role of *raison d'état* in functioning of bureaucracy. Thus, Weber's theory on formal rationality of law, and on bureaucracy has a potentiality for locating Susurluk Affair in the legal-political theory. While Weber was one of the first figures thinking about formal rationality of law, Habermas is a contemporary theorist who thinks about the rule of law and incorporates the idea of the rule of law into the idea of democratic legitimacy, which is founded on the premise of the communicative power. The idea of the rule of law and democratic legitimacy are complementary in Habermas's conception of the rule of law. Habermas says that political power is established on two basic social functions of law: conflict

resolution and of collective will-formation. According to Habermas, law cannot be reduced to a mere political instrument, it always bears a moment of indisponibility, otherwise it cannot be legitimated. Legitimacy, on the other hand, can be maintained through democratic mechanisms, for Habermas. Habermas's model of legitimacy rests on Arendt's concept of the communicative power. In this general framework, law is supposed to translate communicative power to administrative power. Constitutional state, thus, has to provide an appropriate "translation", otherwise there is a problem of legitimacy of the political power. Both Weber and Habermas, from different viewpoints, conceptualize the idea of the rule of law, which brings question of legitimacy of the legal order. Legal positivism, which is another standpoint that defines the state as a legal institution in legal-political theory denies to conceptualize legal order as a question of legitimacy. This standpoint is derived from Hans Kelsen's legal theory. Kelsen's theory has to be incorporated into this study not only because he is one of the prominent theorists of legal positivism but also because the former president and most of the members of the former government, surprisingly, referred to basic premises of Kelsen's theoretical framework in evaluating Susurluk Affair, though probably they had not read Kelsen. Therefore, Kelsen's "pure theory of law" is valuable for this study. Kelsen's theory conceptualizes the state and law as identical and does not bring a question of legitimacy. Though Kelsen valorizes democracy, he conceptualizes an impartial legal sphere. He intends to incorporate the state into a supposedly impartial sphere of law. The state is a corporation established by the constitution for Kelsen. Though one has to admit that it is difficult to define the state beyond norms and persons implementing these norms, as Kelsen mentions, this perspective makes it difficult to understand certain aspects of the state and its extra-legal activities.

While the standpoint that defines the state as a legal institution rests either on the concept of legitimacy or legality, the other standpoint, which defines the state as a political institution rests on necessities of the political sphere, which are

analyzed through two perspectives in this study. The first is the tradition of *raison d'état*, which is defined as "Machiavellism" by Meinecke (1998). Machiavelli's *Discourses* and Meinecke's *Machiavellism* are accepted as basic references for outlining the doctrine of *raison d'état*. Machiavelli (1975) points out that the state should be reflexive to extraordinary conditions so that it can sustain its existence. He emphasizes that enemies of a state promote development of the state, and power politics is important not only for dynasties, but also for republics. This basic idea has been acknowledged in different conditions and different state organizations. Meinecke narrates the history of doctrine of *raison d'état*. He argues that *raison d'état*, which flourished through continuing wars, converted into a balance of great powers, so that new wars can only begin in conditions of instability. While the doctrine of *raison d'état* may provide a general framework for approaching Susurluk as a case of extra-legal activities of the state, it does not offer a legal analysis.

Carl Schmitt's concept of sovereignty, on the other hand, is constructed on the legal theory, and rests on the concept of "political". Schmitt defines the state as a political institution, so that political character of the state leads to ambiguity of legal and extra-legal spheres when the state affairs are concerned. Therefore, Schmitt's theories of sovereignty and political are prolific for studying extra-legal activities of the state and Susurluk Affair as a case of such activities. Constitution cannot be defined abidingly for Schmitt, it always bears a dynamic constituting power. Schmitt says, similarly, law cannot be translated into legal texts, it has to be interpreted through referring the life, otherwise, it cannot be implemented. When law cannot be applied to practices of life homogeneously, it is suspended by the sovereign. The concept of the political, on the other hand, is a question of maintaining a people's own form of life. Therefore, it is an existential question, and human life is translated into the political sphere through a political decision on who the enemy is. Schmitt claims that liberalism offers a perspective that nullifies possible political groupings, however, problems of social integration

cannot be solved through discarding the question of the political.

This study intends to have different readings of Susurluk Affair through different conceptions of the state in legal-political theory. The motive that generates the study is to emphasize that it is necessary to confront with Susurluk and similar cases. It seems difficult to interpret Susurluk Affair, as a case of extra-legal activities of the state from the viewpoint that understands the state as a legal institution. The other viewpoint, particularly Schmitt's conception of the political may provide a framework for understanding Susurluk Affair.

Endnotes

ⁱ Most of those writers focused on the Affair in the framework of discussions on attributes of the state of the Republic of Turkey. For instance, Özkonur (1997) claims that the Turkish state, because of the specific characteristics of its foundation stage, is more despotic and indifferent to law in Turkey than it is in a “normal capitalist state”, and it controls and manipulates the society. Likewise, Laçiner (1997) says that “the sovereignty of nation” is an “imported” notion, and it could not be implemented, it rather remained almost as a fiction for the Turkish society. Another factor is defined as the “threat factor”, by Laçiner (1997). He acknowledges it as the constitutive element of any nation, but insists that Turkish society is more sensitive than the others in believing and perceiving this “threat factor”. Kivanç (1997: 28) defines Turkish society as a society in which the priority of state is institutionalized, and consequently, “the state officials do not feel bound by laws, that they can act in an arbitrary manner, and that they are protected by legal armors that make their prosecution almost impossible”. These views on Susurluk Affair are formulated in the framework of certain presumptions regarding the Turkish state, focus on the peculiar characteristics of the Turkish state tradition in the context of Susurluk Affair. Sancar (2000) has a different focus, since he approaches to Susurluk Affair in the frame of legal-political theory, however, he also emphasizes that Susurluk Affair is an outcome of Turkish state tradition. He (2000) admits that the rule of law attribute is optional for a bourgeois state, including the states in Western countries. However, Sancar also insists that the Turkish case is different, since the Ottoman State tradition was transferred to the Republic. He claims that the reason of state doctrine is embedded in the structure of the state and in the perception of legitimacy in Turkey (Sancar, 2000: 66, 67). Sancar (2000) insists that the perception of legitimacy founded on the doctrine of reason of state is a component and reminder of statism, which was the foundational principle of the Republic of Turkey (Sancar, 2000: 65). This “statism”, he says, means a total political world that does not admit autonomous legitimacy of any social phenomenon (Sancar, 2000: 65). Sancar (2000: 94-95) emphasizes that Turkish state tradition leads to an understanding of legitimacy which is grounded on the idea of reason of state. He claims that Susurluk Affair shows that the idea of rule of law has not a significant influence on the Turkish political tradition, and

cannot withstand against the hegemony of reason of state perspective (Sancar, 2000: 65).

ⁱⁱ Eugene Hasenfus, an American, survived. The plane was carrying arms for “contras”, anti-revolutionary forces in Nicaragua. Nicaraguan Government had been charging the US of coordinating a secret war against the Nicaraguan regime for a long time. However this charge was refused by the US. After fall of the plane with arms, President Reagan once more refused this charge and said that Hasenfus was not a public officer, but a volunteer. The State Department Spokesmen Redman said, “the US government had no connections with the flight, the plane, the crew and the cargo” (Time, Oct. 20, 1986). Another authority, spokesman for the CIA reminded that involvement of the CIA in providing aid to contras was financially barred by the US Congress (Time, Oct. 20, 1986). The financial bar that the spokesman mentioned was introduced by an amendment to the Fiscal Year 1985 Defense Appropriations bill. The amendment was accepted by the US Congress. The fall of the plane in Nicaragua seemed not as a defect in the US foreign policy at first. However an article stating that the US had sold arms to Iran brought another question. On Nov. 3, 1986 a Lebanese weekly magazine, *Al Shiraa* reported that the United States secretly sold arms to Iran while it was organizing a worldwide embargo against arms sales to Iran (Walsh, 1993; Time, Nov. 17, 1986: 18). On Nov. 6, 1986 President Reagan denied that arms were sold to Iran, but he conceded it after a week. On Nov. 25, 1986 White House disclosed that the profit of arm sales to Iran was diverted to contras in Nicaragua (Walsh, 1993). The President and the National Security Council were at the focus of public debates. National Security Adviser Robert C. McFarlane; McFarlane's deputy and successor, Vice Admiral John M. Poindexter; and the deputy director of political-military affairs, Lieutenant Colonel Oliver L. North were declared as persons who were responsible for US arm sales to Iran, when the US was organizing a worldwide embargo against arms sales to Iran; and transferring of the money to contras in Nicaragua though it was prohibited by the US Congress (Walsh, 1993).

CHAPTER 2:

SUSURLUK AFFAIR

Extra-legal activities of the state, as far as they are disclosed in the context of the Susurluk Affair, are documented below. Besides these practices, background of the concerned practices is constructed, too. The first section of the chapter narrates the historical background, the second section narrates these practices and the third section narrates legal proceedings. The last section aims to clarify how “Susurluk Affair” can be described in the context of this study.

2.1. Narration of the Disclosure of Susurluk Affair and the Historical Background

Sedat Edip Bucak, a deputy of the True Path Party, Hüseyin Kocadağ, the former security director of İstanbul, and Abdullah Çatlı, a criminal, were in a car that crushed into a truck near the town of Susurluk on November 4, 1996. There were many guns with silencers in the boot of the car. Çatlı and Kocadağ died, Bucak survived. Çatlı was a member of an ultranationalist group, *Grey Wolves*, before the coup d’etat in 1980. He was one of the convicts of the murder of seven students, who were sympathizer of the TİP (Turkish Worker Party), and wanted for this incident and for murder of a renowned journalist in Turkey before the coup of 1980. He was arrested for drug smuggling in Switzerland and escaped from prison in 1990. He has been by the Interpol with a red notice. Sedat Edip Bucak, a deputy of the True Path Party, was the leader of a clan (*aşiret*) in Southeastern Turkey, and squaded village guards against the PKK (Kurdistan Workers’ Party). The connections between politicians, officials and criminals have been discussed in the media after Susurluk accident. The then Minister of Internal Affairs, Mehmet Ağar resigned¹⁰, since he was accused of involvement in the

¹⁰ Mehmet Ağar resigned on November 8, 1996. Meral Akşener has been appointed as the Minister of Internal Affairs following his resignation.

Affair. Abdullah Çatlı, who died in Susurluk accident, was carrying a green passport issued by the Ministry of Internal Affairs, and a gun license¹¹ with Mehmet Ağar's authentic signature on it. His signatures on these fake cards were found out to be authentic consequent to the criminal inspection carried out by the gendarme following the accident.

A coalition between an Islamist party, the Welfare Party (*Refah Partisi*), and another right-wing party, the True Path Party (*Doğru Yol Partisi*) was in power when Susurluk Affair was revealed. A commission was formed by the TGNA for the purpose of investigating Susurluk Affair, while this government was in power.¹² The commission invited many persons for testimony, and drew up an investigation report. Details about the connections between politicians, officials and criminals, which were revealed by Susurluk accident, had an audience in the public. A campaign demanding that Susurluk Affair should be brought to light was launched by a citizens' initiative. The government was brought to an end by a "non-military" intervention.¹³ Another coalition government of the Motherland Party (*Anavatan Partisi*) and a leftwing nationalist party, the Democratic Left Party (*Demokratik Sol Parti*) came to power. The prime minister of this coalition charged the Chairpersonship of the Investigation Board of the Prime Ministry, with the duty of unveiling Susurluk Affair. The Board prepared a report, which is known to public by the name of the Chairperson of the Board, Kutlu Savaş, publicized in January, 1998. This report narrates the content of the Affair. The TGNA's Susurluk Investigation Commission Report and the report prepared by the Chairpersonship of the Investigation Board of the Prime Ministry stated that certain illegal methods

¹¹ The green passport and the license were all fake documents issued in the name of another, with Çatlı's photographs.

¹² The proposal to form an investigation commission was accepted on November 12, 1996.

¹³ Coalition was formed by an unwritten contract between the Islamist Welfare Party and the liberal True Path Party. According to the deal, leader of those parties would be the prime minister in turn. When the then prime minister Erbakan resigned in order to pass the term to Çiller, the then president Demirel did not assign the duty of forming a government to Çiller, and asked Yılmaz, who was the leader of Motherland Party, to form the new government.

were used and criminals were employed by forces of the state in the fight against the PKK. For having a view about those people employed in Susurluk Affair, it would be better to look at historical background of those cadres.

2.1.1. Historical Background

A brief account of the historical background of extra-legal forces of the state in Turkey and the PKK is presented in this subsection. Extra-legal forces, who were employed in Susurluk Affair, were members of a political movement which appeared as the anti-Communist movement.

2.1.1.1. Before the 1980 Coup: Anti-communist Cadres

One of those who died in Susurluk accident was Abdullah Çatlı, a youth leader of an ultranationalist group in 1970s, who had taken part in “the fight against communism” till the 1980 coup. Çatlı and his accomplices i.e., other ultranationalists, called Idealists (*Ülkücüler*) or Grey Wolves (*Bozkurtlar*) in Turkey, have been employed in the implementation of this strategy. The Republic of Turkey joined the NATO in 1952.¹⁴ The fight against communism has been institutionalized in the Cold War period. In 1947 the Turkish Youth Organization was formed. The Turkish Association for Struggling Against Communism was established in the same period (Ağaoğulları, 1990: 209). Kürkcü referring to Rowse says that the Republic of Turkey, like other members of the NATO, had to form an anti-communist organization in this period:

A secret clause in the initial NATO agreement in 1949 required that before a nation could join, it must have already established a national security authority to fight communism through clandestine citizen cadres. This Stay Behind clause grew out of a secret committee set up at US insistence in the Atlantic Pact, the forerunner of NATO. (Rowse, cited in Kürkcü, 1997)

¹⁴ The Republic of Turkey was founded in 1923 after the War of Independence. A single-party regime was in force between 1923 and 1950, with exceptions of short periods (Eroğul, 1990: 113). The first period of multi-party regime was between 1924 and 1925, the second period was in 1930, but it survived for a few months. At the end of the Second World War, political regime was revised and a multi-party system was initiated in 1946.

The “stay behind” organizations, it is said, were founded with the aim of defending these countries if Soviet Union would invade them. Gladio, the stay behind organization established in Italy, was revealed in 1990, in association with a judicial investigation into a 1972 car-bombing (Blum, 1995: 107). Another legal case was associated with Gladio in 2001.¹⁵ A former head of military counter-intelligence, accused rightist militants, of killing 16 people in the bombing of a Milan bank in 1969. He said that they were supported by the CIA (Willan, The Guardian, March 26, 2001). He said that “the impression was that the Americans would do anything to stop Italy from sliding to the left” (Willan, The Guardian, March 26, 2001). “The planning for this covert paramilitary network, code-named ‘Operation Gladio’ (Italian for “sword”), began in 1949” (Blum, 1995: 106). US, England and Belgium were countries which designed and initiated this network (Blum, 1995: 106). Units of stay behind were established in non-socialist European countries except Ireland and Finland (Blum, 1995: 107). In a similar vein, a retired general in Greece “declared that a Greek force was formed with CIA help in 1955 to intervene in case of Communist threat, whether external or internal” (Blum, 1995: 107). This organization was formed of “ex-military men, specially trained soldiers and also civilians” (cited in Blum, 1995: 107). Those people were integrated through ultra- rightist ideology (Blum, 1995: 107). Kürkçü, referring to Richards and Jones, says that these countries stated below, and Portugal, and Germany acknowledged that they participated in the covert network.

Italy (“Gladio”), Belgium (“SDRA-8”), France (“Rose des Vents”), Holland (“P:26” or “NATO Command”), Greece (“Sheepskin”), Denmark, Luxembourg, Switzerland (“Schwert”), Norway, Austria, Spain, Britain (“Secret British Network”). (Richards and Jones cited in Kürkçü)

The Republic of Turkey did not acknowledge that a paramilitary stay behind unit was formed in Turkey, though there were many evidences of and claims on this issue. Democrat Party was in power when Republic of Turkey was admitted

¹⁵ There are other cases such as “Bologna railway station bombing that is conducted by rightist militants and blamed on the left” (Blum, 107).

to the NATO. A coup d'état overthrew the right-wing Democrat Party government, and brought a constitutive National Assembly that passed a new constitution in 1961. In 1961 a coalition government was in power. The new constitution drew a new legal framework, promoting political freedoms and introducing a mechanism to maintain obedience to the Constitution (Eroğul, 1990: 146-148). This was a period of rapid social change, working class has appeared, and this period paved the way for a new structuring in Turkish left. Ultranationalist groups have also flourished in this period. Those ultranationalist cadres have been employed when oppressive methods of the state were considered insufficient to counter leftist opponents (Ağaoğulları, 1990: 212). In 1963, an ultranationalist group joined a political party and the name of the party was changed to the Nationalist Movement Party (MHP) in 1969¹⁶ (Ağaoğulları, 1990: 214-215). The MHP, and its youth organizations played an active role in the fight against the left.¹⁷ Those young people, trained in MHP's "commando camps," were called "commandos" at the beginning, later they were called as "Gray Wolves" (*Bozkurtlar*) and "Idealists" (*Ülkücüler*) (Ağaoğulları, 1990: 232).

In 1971 the then Chief of the General Staff submitted a note calling for resignation of the government, stating that otherwise the Turkish Armed Forces would seize the power. (Eroğul, 1990: 155) Martial law entered into force and a new government was formed. The martial law served as a ground for oppressing leftists. Charges of employment of a "counter-guerrilla" force against opponents by the state were brought to the agenda for the first time in this period. During the years following the coup in 1971, which oppressed left wing organizations, ultranationalist groups initiated attacks on leftists groups. Later on, renowned

¹⁶ An ultranationalist group of officers who had participated in the 1960 coup, and refused to transfer the power to the civil authorities decided to form a new political movement. Ten of the fourteen members of this group have joined a political party and changed it into an ultranationalist party.

¹⁷ In 1968 the first massive actions of ultranationalist youth took place. The National Turkish Student Union leading the rightist youth staged a rally in İstanbul in 1968. Those ultranationalists began to be organized in the Association of Hearths Societies of Ideal (*Ülkü Ocakları Dernekleri*) in mid 1968 (Eroğul, 1990: 152).

journalists, academicians, and leaders of trade unions and political parties were also targets. They killed an assistant prosecutor, and a security director, too (Ağaoğulları, 1990: 233). Many people claimed that there was a contra-guerrilla organization and ultranationalist militants worked for this organization. The then Prime Minister Ecevit mentioned that there was a counter-guerilla organization in Turkey. Officially, “Special War Office” attached to the Chief of the General Staff was constituted in order to initiate and organize an underground war in case that the country is invaded by a foreign force.¹⁸ Abdullah Çatlı, a key name of Susurluk Affair was a youth leader in the anti-communist movement before 1980 coup. His companions of anti-communist movement were taken part in Susurluk Affair, too. Those cadres were later employed in the fight against the PKK in 1990s, until the reveal of Susurluk Affair.

2.1.1.2. After the 1980 Coup: Ultra-nationalist Cadres

The PKK (Kurdistan Workers’ Party) was founded in November, 1978. The political groups have been mobilized as leftist and rightist groups through the country, also in eastern and southeastern Turkey, before the 1980 coup. The PKK was a small group before the 1980 coup. The coup repressed political groups. The PKK managed to move its cadres abroad just before the coup. It was established as a Marxist-Leninist organization, but then transformed into a nationalist movement struggling for establishing an autonomous state in the Southeastern and Eastern part of Turkey, the region inhabited mostly by the Kurdish population.¹⁹ The PKK

¹⁸ The name of this office has been later changed to “Commandership of Special Forces” (Yirmibeşoğlu cited in Kışlalı, 1996: 243).

¹⁹ The PKK defined in the draft Party Program in 1977 the final stage it pursues as follows: “The minimum objective will be to establish an independent non-aligned Kurdish state in the region. The maximum objective will be to establish a state based on Marxist-Leninist principles” (Draft Party Program, cited in İmset, 1992: 15).

According to 1988 Party Conference, a national independence was proposed (İkibine Doğru, cited in İmset, 75).

The leader of the PKK, Abdullah Öcalan was kidnapped and brought to Turkey in 1999. He was sentenced to death. The TGNA abandoned capital punishment in 2002, except in situations of war or imminent threat of war, and all sentences of death penalty were commuted to life imprisonment in 2002.

proposed guerilla warfare as a method of achieving its ends. There were approximately 400 PKK guerillas in 1983. The first attack by the PKK after the coup was in 1984. The Republic of Turkey was under martial law from the 1980 coup until 1987. In 1987, a state of emergency (*olağanüstü hal*) was declared in 13 provinces in Eastern and Southeastern Anatolia²⁰. Guerilla force and attacks of the PKK increased in time. In 1993, the Secretariat of General Staff decided that security at home had priority over international security problems (Kışlalı, 1996: 190).

‘Kurds’ were acknowledged as a constitutive party of the Turkish state in the years of foundation of the Republic of Turkey.²¹ This promise has not been respected after the War of Independence. The new republic initiated a modernization project, which was founded on the notions of development and Westernization. Then, for the purpose of cultivating a relatively homogenous population, it refused to acknowledge different groups, and substituted an overemphasized Turkish nationalism for all differences. Kurdish population, which had a *de facto* autonomy in the Ottoman Empire, had to be integrated to the nation as well (Yörük, 1994: 28-29). These attempts to ‘integrate’ the Kurdish population into the ‘nation’ resulted in rebellions in Eastern and Southeastern Turkey from 1924 to 1938. These rebellions were repressed by the government;

After he was brought to Turkey, Öcalan stated that Kurds and Turks could live together in a democratic republic. His perspective of “democratic republic” which proposes democratization of the Republic of Turkey and integration of the Kurdish nationalist movement into the political era of the republic was accepted by the PKK, too.

²⁰ The 1982 Constitution for the first time, introduced a concept of state of emergency, which is quite different from martial law.

²¹ M. Kemal said the following in 1922:

Rather than thinking in terms of a separate Kurdish entity, our Constitution asserts a form of autonomy. According to this, wherever the Kurdish population is overriding, they would have autonomous self government. Moreover, when we talk about the people of Turkey their (the Kurds) name has to be pronounced beside the Turks. If their identity is not pronounced beside the Turks. If their identity is not pronounced they make this problem. Today, the Grand National Assembly consists of both Turkish and Kurdish deputies. Grand National Assembly consists of both Turkish and Kurdish Deputies. (2000’e Doğru, cited in Yörük, 1994: 28-29)

certain parts of the population were moved to western parts of the country. The project of integrating different parts of the population and constituting a nation state seemed successful until the PKK's claims as regards the Kurdish population. After 1993, a "low intensity conflict" was introduced as a strategy of the fight against the PKK. According to this new strategy, as the PKK had used to, the Turkish Armed Forces (TSK) also formed small teams resting all the day and carrying out operations at night. The fundamental principle of the "low intensity conflict" was breaking the links between the activists and the rest of the population. Then, many villages that supposedly supported the PKK have been evacuated and burned down (Kışlalı, 1996: 201). The then Governor of the Emergency State Region said that 987 villages and 1676 hamlets were evacuated, and approximately 310.000 villagers were moved until 1995 (Erkal, in Kışlalı, 1996: 265). One should take into care that real figures might be much higher than these official figures. Additionally, an official restriction on food transportation was in force in order to cut off the food sources to the PKK. The quantity of foodstuff that could be brought by villagers to their villages was restricted. As stated above, the counterinsurgency strategy was pursued through two sub-strategies. The first was directly against the forces of the PKK while the second was against the forces supporting the PKK. Those who were supposed to be supporters of the PKK and therefore targeted by the forces stated above were either the Kurdish population, i.e. villagers and urban population, who gave logistic support to the PKK guerrillas, or Kurdish businessmen and intellectuals who gave financial and political support.

2.2. The Case

These strategies mentioned above were disclosed after Susurluk accident. What the two words, "Susurluk Affair", cover cannot be elaborated easily. However, two quotations from Savaş's (2000) investigation report may give an idea about these practices. The report prepared by Chairperson of the Investigation Board of the Prime Ministry, Kutlu Savaş under orders from Prime Minister Mesut Yılmaz and was presented to the media on January 1998. In the

context of three cases that were brought to the European Court of Human Rights, the Turkish government argued that Savaş's report has no legal or factual attribute, thus should not be taken into consideration, the Court claimed that the concerned report has not interpreted as an evidence which shows the security forces have involved in certain murders, but it is an important document which presents that certain murders were committed under the information of security forces (Özdek, 2004: 152).²² In *Özgür Gündem* case, which was brought to the European Court of Human Rights, the government argued that Savaş's report was not an evidence, and had no legal significance, but the Court claimed that the concerned report was prepared and brought into public notice under the order from the then prime minister, thus presents the problems and provides information about the fight against the terror, though it was not acknowledged as the evidence of involvement of a certain public into a specific case (Özdek, 2004: 253). This study assumes that Savaş's (2000) report is an important document for narrating Susurluk Affair, though it is not a legal document that rests on a judicial process.

Savaş (2000) refers to many murders by unknown assailants in the report. Savaş's (2000) investigation report narrates the methods used for cutting off support to the PKK. For instance, Savaş says that the person concerned, Behçet Cantürk, was a Kurdish businessman involved in drug traffic, financially supporting the PKK. He says that Cantürk was a shareholder of a daily newspaper, *Özgür Gündem* (Savaş, 2000). This newspaper was publishing news about the problems of the Kurdish population, the fight against the PKK waged by the state. The leader of the PKK, Abdullah Öcalan was a columnist of the daily, writing with a nick name. The headquarters of the newspaper was blown up, and Cantürk was murdered by unknown assailants. According to Savaş's report (2000), the Turkish Security Organization had planned and executed these actions. He narrates that incident as follows:

²² The European Court of Human Rights claimed that there were not an effectively functioning penal judiciary in the region (Özdek, 2004: 152).

Although his identity and activities were obvious, the State could not cope up with Cantürk. The legal procedures consumed proved impotence, and as a result, the daily “Özgür Gündem” was blown up by plastic explosives. When Cantürk was expected to obey the state, the mentioned person took action to erect a new building, and therefore his murder by the Turkish Security Organization was decided and the decision was executed. (Savaş, 2000)

Then Deputy Chairman of the Intelligence Office of the Security Directorate, Hanefi Avcı, said illegal teams were formed within the Security General Directorate, National Intelligence Organization, and the Gendarmerie, to fight against the financial supporters of the PKK (Meclis Susurluk Araştırma Komisyonu Raporu, 1997). Many of those financial supporters of the PKK were killed by unknown assailants. Another quotation from Savaş’s (2000) report claims there is an organization, which is known as JİTEM (Gendarme Intelligence and Counter Terror). The JİTEM is a mysterious organization; though it is said that there is no such official organization it exists and operates as an official body²³. The report of the Commission formed by the TGNA for the purpose of investigating the Affair, says that the Commission had been unable to reach correct information about the official duties of the JİTEM. It is said that while its existence is a matter of discussion, actions by the JİTEM are beyond doubt (Meclis Susurluk Araştırma Komisyonu Raporu, 1997). What kind of actions has been carried out by the JİTEM? According to Savaş’s report (2000) ex-members of the PKK, who were confessors, participated into gendarmerie in certain operations. This new organization which is composed of gendarmeries and the ex-members of the PKK was called JİTEM. Savaş (2000) cites a JİTEM member’s testimony in the report as follows:

Meanwhile, an illegal formation was established under the roof of JİTEM. We were authorized to execute almost everybody we suspected

²³ Establishment of JİTEM is not acknowledged by any competent body.

There exists a JİTEM," Gen. Koman acknowledged, "but not as an official intelligence organization set up by the state. [Rather it is run] by some irresponsible elements within the gendarme. ... I banned the usage of such a title as soon as I recognized counter-terrorism efforts conducted under such a name. [15] (Ergin, cited in Kürkçü, 1997).

of being in relation with the PKK in Diyarbakır and its surroundings. Instead of catching these people and fixing the crimes committed by them if there are any, and then delivering them to the judiciary, we adopted as a method murdering them in a way to conceal the assailants. We were required to do so, we were instructed in this manner.

What is narrated was arresting, judging and executing people, by methods that surpass the formal legal procedures. According to Savaş's report (2000) "another system of justice", which is somehow distinct from the officially defined mechanisms of justice, has been set by these executors. It is operated by way of murders, though officially no death penalty has been executed in Turkey since 1984. Who implemented the counterinsurgency strategy? Which patterns were used in implementing that strategy? On which ground this strategy was build? Counterinsurgency strategy against the PKK and against the supposed supporters of the PKK were carried out by the Turkish Armed Forces which was officially associated with the Ministry of National Defense, and by the Ministry of Internal Affairs. A Special Operations Office was formed by the Ministry of Internal Affairs. According to Savaş's report (2000) gendarmerie, which is associated with the Ministry of Internal Affairs, formed a Counter-Terror and Intelligence Unit (JİTEM).²⁴ Another very powerful organization in the fight against the PKK was the village guard system. A force of village guards, most of who were embraced by their feudal clan (*aşiret*) network, was formed in villages. Village guards were employed by the Ministry of Interior Affairs, according to the amended article 74 of the Law on Village, No. 442.²⁵ Most of those village guards were members of certain clans in the region (Akşener, January 7, 1997). Sedat Bucak, who survived

²⁴ Though competent authorities did not acknowledge JİTEM, many operations was attributed to JİTEM.

²⁵ The number of village guards was stated by then Minister of Interior Affairs, Akşener (March 4, 1997), as follows in 1997:

44.141 village guards were employed in provinces under the state of emergency, 5.517 were employed in neighboring provinces.

2.156 voluntary village guards were employed in provinces under the state of emergency, 505 were employed in neighboring provinces.

Those were armed by the Ministry of Internal Affairs. While temporary village guards were paid by the Ministry, voluntary village guards were not.

Susurluk accident was the leader of Bucak clan with 89 temporary village guards and 345 voluntary village guards (Akşener, 20 November, 1996). Those forces stated above, except the JİTEM, were the official forces of the Republic of Turkey. Çatlı and other figures, on the other hand, were members of another organization, which was not acknowledged officially, but was operating with official means such as fake identity cards with authentic signatures. Then, there were publicly acknowledged official forces and concealed forces. Three groups of people were employed in those forces. The first group was composed of members of Turkish army and police force. The second group was composed of villagers embraced by clans, but either paid or supported by the Ministry of Internal Affairs. The third group was composed of criminals. After disclosure of Susurluk Affair, a legal prosecution was launched. The following section narrates legal proceedings concerning Susurluk Affair.

2.3. Case of Law: Legal Proceedings Concerning Susurluk Affair

The Public Prosecutor of Susurluk decided that the case involved the crime of forming a gang, and hence fell under the jurisdiction of the state security court. Then, the case file was sent to the İstanbul State Security Court on November 11, 1996. It would be better to remind the status of the state security courts. The state security court is not a part of administrative jurisdiction, it belongs to the realm of common law according to jurisdiction system of the Turkish Republic. What is striking about the legal proceedings is that the Susurluk Case known to public as if it were not against the state, but against certain individuals. It is brought to the state security court. Those offenses concerning Susurluk Affair are supposed to be committed against the state. The legal proceedings are narrated below according to decisions given about the persons concerned.

The TGNA was asked for stripping Sedat Bucak's and Mehmet Ağar's immunities. The TGNA stripped them of their immunities on December 11, 1997 (Meclis Soruşturması Komisyonu Raporu, S. Sayısı: 509, 2000). The Chief Prosecution Office of the State Security Court launched a public action against

Ağar. The first hearing was on February 5, 1997. In the first session, which Ağar attended as the defendant, it is decided that the court was not competent for the case. The reason for this decision was Article 100 and 148 of the Constitution²⁶ and the Rules and Regulations of the TGNA. Since Ağar was the minister of internal affairs when these crimes were committed, only the Constitutional Court could hear a case brought against for this period (Meclis Soruşturması Komisyonu Raporu, S. Sayısı: 509, 2000). However, the Supreme Court annulled this decision. A decision to transfer the Case to the Council of State was made, since it is the competent authority to decide if Ağar can be brought before court, under the Law

²⁶ The Article 100 of the Constitution (Republic of Turkey Directorate General of Press & Information, 1999) is as follows:

Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with a secret ballot within one month at the latest.

In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the commission shall be granted a further and final period of two months.

The Assembly shall debate the report with priority and, if necessary, may decide to bring the person involved before Supreme Court. The decision to bring a person before the Supreme Court shall be taken only by an absolute majority of the total number of members.

Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations.

The article 148 of the Constitution (Republic of Turkey Directorate General of Press & Information, 1999) sets forth that

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

The Chief Public Prosecutor of the Republic or Deputy Chief Public Prosecutor of the Republic shall act as public prosecutor in the Supreme Court.

on Prosecution of Civil Servants²⁷ for the period he worked as a security director (Meclis Soruşturması Komisyonu Raporu, S. Sayısı: 509, 2000; Cumhuriyet, June 10, 1997). Then, the file was sent to the Council of State. While the file was waiting before the Council of State, Ağar was elected deputy in the general elections held on April 18, 1999. Thus, once more, he was armored by parliamentary immunity. A motion to launch an investigation by the TGNA against Ağar was raised. This motion was accepted and the investigation concluded on June 29, 2000. The Commission of Investigation decided that there is no need to bring Ağar before the Constitutional Court.²⁸ In brief, TGNA admitted that there is no need to bring Ağar, whose original signature were on the fake cards prepared for criminals, to the Constitutional Court.

Sedat Bucak's parliamentary immunity was stripped on December, 11, 1997. He was reelected deputy from Urfa province in the general elections held on April 18, 1999, but could not be elected in November 3, 2002 general elections. His case was carried on and concluded after the general elections. The guns with silencers in the boot of the car were not registered officially, and official responsibility regarding these guns was not clear. Sedat Bucak was charged for carrying these guns without license, and concealing a wanted person, Abdullah Çatlı. On December 22, 2000 a law for release on pardon entered into force. The execution of

²⁷ The Law about Prosecution of Civil Servants was a temporary law passed by the government of the Union and Progress Party in 1913. According to this Law, the chief public prosecutor shall apply to the authority stated in the Law for getting a permission of prosecution. The Council of State is designated as the competent authority that decides on appeals concerning a permission of prosecution.

This law was annulled and replaced by the Law No. 4483 on Prosecution of Civil Officials and Other Public Agents entered into force on December 4, 1999. The Law No. 4483 covers the provisions of the Law dated 1913, which is annulled by this law, and re-designates the competent authorities that shall permit prosecution of civil officials and other public officials for the crimes they committed on account of their duties. It also sets forth time limits on coming to a decision by the competent authorities. (The Official Gazette, 1999: 1-5)

²⁸ Today Ağar is still a member of the TGNA and the leader of the True Path Party. He was elected in 2002 General elections as an independent deputy, and later joined to the True Path Party. He is the leader of the True Path Party, since December, 14, 2002.

decision concerning the offenses stated above was delayed by the Law No. 4616.²⁹ The prosecutor said that Bucak could not commit the crime of forming a gang, since he was spending his time either in farm works in Siverek, or in the TGNA. He added that there was no evidence that Bucak had committed the crime. Then, the court acquitted Bucak (Radikal, 27.06.2003).

The Public Prosecutor of the İstanbul State Security Court, launched a trial on March 5, 1997 against 14 persons³⁰, including a retired military officer and trainer of the Special Team of the Security General Directorate, Korkut Eken, and the deputy Chief of the Special Operations Office of the General Directorate of Security, İbrahim Şahin on charges of forming an armed gang for the purpose of committing crime. The court decided on February 12, 2001 that 12 of those persons were guilty of “concealing a wanted criminal”, and all of them were of “forming an armed organization”. Additionally, it was decided that İbrahim Şahin and Korkut Eken committed the crime of “leading the mentioned organization”³¹

²⁹ The Law No. 4616 on Provisional Releasing Offenders and Delaying of Law Cases and Penalties Concerning Crimes Committed until 23 April 1999 entered into force on December 22, 2000.

³⁰ Of the other defendants:

7 were policemen, and former members of the Special Operations Office of the General Directorate of Security, 6 were Bucak’s bodyguards, 3 were detained for murder of a casino boss.

1 was Bucak’s driver.

2 were business partners of the killed casino boss, Ömer Lütfü Topal.

2 were former members of Grey Wolves, one was convicted of the murder of 7 leftist students in 1978, and escaped from prison. Those persons had also fake licenses with authentic signatures. They were Çatlı’s friends and accomplices.

³¹ There are other cases which are related to Susurluk Case. These are:

Case concerning murder of a casino boss, who said to his lawyer that he made erased his name on the list of PKK’s supporters. This list was mentioned by the then deputy prime minister in 1993.

Prosecutions concerning murder of Behçet Cantürk,

Prosecutions concerning kidnapping of Yaprak in Gaziantep,

Prosecutions concerning murder of Cem Ersever and his friends,

Prosecutions concerning murder of Tarık Ümit,

Other prosecutions concerning fake identity cards, licenses, and unregistered arms.

(Yargıtay, 24.10.2001). The Court sentenced Eken and Şahin to 6 years in prison and other defendants to 4 years in prison, each (Yargıtay, 11.12.2001). Following the verdict, convicts appealed to the Supreme Court of Appeal on the claim that prosecution procedure was incomplete. They asked the Supreme Court of Appeal for a closed hearing, so that certain offenders, who have been disregarded concerning the esteemed interests of the state, can be brought to the court. Eken also asked for a closed hearing for submitting information concerning the missing arms. The 8th Penal Office of the Supreme Court of Appeal decided to annul the decision on the ground that the demand for a closed hearing was rational and the prosecution procedure was incomplete. However Public Prosecution Office of the Supreme Court of Appeal objected to this decision. The General Board of the Supreme Court of Appeal ratified the objection (Yargıtay, 24.10.2001). Those convicts appealed to the Supreme Court of Appeal for the final decision. The 8th Penal Office of the Supreme Court of Appeal decided that action concerning the crime of “concealing a wanted person” was suspended in accordance with the Law No. 4616. Penalties concerning the crime of “forming an armed organization” were ratified (Yargıtay, 15.01.2002). After ratification of the penalties, Korkut Eken objected to the decision. He appealed to the Supreme Court of Appeal for correction of the decision. However, the Supreme Court of Appeal rejected the appeal (Cumhuriyet, 16.03.2002).

After Korkut Eken objected to the decision of the Supreme Court of Appeal, a former chief of the general staff, Doğan Güreş, and two former generals, Necati Özgen and Hasan Kundakçı, and Cumhur Evcil talked about Eken to the press. They said that Korkut Eken was “*kahraman bir subay*” (a heroic officer) who had executed the orders. They stated that they had known whatever Eken had done (Cumhuriyet, 14.03.2002). A public prosecutor launched an investigation

Though there were such other cases related to the Case, they were either concluded at the prosecution stage or referred to penal courts. The case that is designated as Susurluk Case is different from those other cases, because it is prosecuted by the State Security Courts, and it brings deputies and high level bureaucrats to court.

concerning these statements, but did not demand a trial. Then, those people were not prosecuted. However, the role of the “highest ranks” in the Susurluk Case was no more a secret. When Susurluk Affair was revealed in 1996, the Chief of the General Staff asserted that the Turkish Armed Forces (TSK) was not involved in the Affair. He said that those officers who had been involved in the Affair were dismissed from the army. Then, the incident was referred to as an organization of certain individuals. He said “required legal procedures as regards the incidents, which individual involvement of the TSK members were found out in, are carried out immediately” (Karadayı, Milliyet, 26.12.1997). He mentioned a gang affair and said a military officer and a warrant officer found out to have been involved in a gang affair were immediately dismissed from the TSK, and their trial is still under way (Karadayı, Milliyet, 26.12.1997). He asserted that the TSK “sorrows for and refuses the efforts still paid for drawing the TSK into the affair” (Karadayı, Milliyet, 26.12.1997). However, on December 5, 1996 editor of the daily *Radikal*, İsmet Berkan, wrote that he had seen a General Secretary of National Security Council document about a new organization having the mission of fighting the PKK. He said that the document contained an organization chart, together with the names of the persons, including the name Çatlı. According to Berkan, some of Çatlı's friends were proposed to take part in this new organization (Radikal, 05.12.1996; Radikal, 06.12.1996). He says that the decision for a change in the strategy of fight against the PKK was taken by the National Security Council in 1993 (Berkan, Radikal, 05.12.1996).³² Then, it means ‘Susurluk Affair’ covers more than mere violation of laws by certain individuals. Decision for unlawful use of power, it seems, to be taken by the highest authority of the Republic of Turkey. Additionally, according to the findings of the investigation reports, it is impossible to imagine an organization operating within the state, employing criminals

³² Berkan (Radikal, 05. 12. 1996) claims that the change in strategy was put on the agenda of the National Security Council toward the end of 1992. According to Berkan, this new technique of struggle was approved in the fall of 1993, thus the special organization revealed by Susurluk Affair was founded with a decision taken by the NSC (Berkan, Radikal, 05. 12. 1996). However, the then president, Demirel said that NSC has not debated forming of a special organization (Demirel referred in Berkan, Radikal, 10. 12. 1996).

beyond notice of the highest posts of the state. This policy, it seems, be accepted by the National Security Council, was implemented by means of a counter-guerilla strategy introduced into the fight against the PKK. This strategy has had two objectives. The first one is conducting "a war" or "low intensity war" against the PKK, and the second one is cutting financial supports of the PKK.³³ This strategy was unveiled after Susurluk accident and then investigated and brought to court as narrated above.

2.4. A Partial Conclusion on Susurluk Affair

Extra-legal activities of the state in regard to the fight against the PKK were revealed, by Susurluk Accident. Ultranationalist cadres that first appeared in the strategy of fight against communism conducted by the NATO in the Cold War period were employed in these extra-legal practices. The decision concerning these practices might have been taken by the executive body, since although there is no evidence exposed, such as the document regarding a secret decision made by the executive body, imagining such an enormous extra-legal organization operating beyond the authority of executive body seems impossible. However, the then members of the executive body were not prosecuted for these extra-legal activities. TGNA decided not to brought Aġar's case to the Constitutional Court. The Supreme Court of Appeal has not made a decision about the case of Bucak, who is one of those politicians prosecuted on charges of forming an armed gang, yet. Then, Susurluk Affair seems to be conducted by two persons; a retired military

³³ Kürkçü (1997) narrates Berkan's arguments about the change in the strategy of the Turkish army as follows:

According to Berkan, in 1992, faced with the guerrillas' growing strength, the Turkish army units which had previously pursued a reactive strategy, shifted tactics "to bring the war to the PKK." They would not wait, they proclaimed, arms folded, while the PKK raided gendarme posts and army garrisons. Instead, the army would seek out and attack guerrilla strongholds in urban areas, cut the rebels' local support in the southeast countryside, and forcibly depopulate remote villages and hamlets suspected of providing support to the rebels. Adopting a euphemism the US made infamous in the counterinsurgency wars it sponsors in Central America, then-Chief of Staff Gen. Dogan Gures designated the overall operation "low-intensity conflict." [Kürkçü, 1997, footnote 9]

officer and trainer of the Special Team of the Security General Directorate; and the deputy Chief of the Special Operations Office of the General Directorate of Security. As legal proceedings concerning Susurluk Affair imply, the authorization of use of the state power is legally defined by laws and the Constitution of the Republic of Turkey. For instance, decisions made regarding Aĝar case shows that it is possible to bring his actions to court, in principle. The article 2 of the Constitution of the Republic of Turkey sets forth that the Republic of Turkey is a state of the rule of law. Then, how could such extra-legal activities of the state be interpreted in the legal order? How can one understand such extra-legal activities of state in regard to the constitutional order? For understanding Susurluk Affair, we need to refer to the legal-political theory. How can Susurluk Affair, as narrated above, be interpreted, in regard to legal-political theory? Following two chapters intend to answer this question in the context of the theories of the state, which either conceptualizes the state as a legal institution, or as a political institution. How one can locate Susurluk Affair as a case of extra-legal activities of the state in a legally regulated system? Since in principle, the state functions in legally regulated spheres, as defined by the Constitution of the Republic of Turkey, how can one understand Susurluk Affair? How far one may interpret Susurluk Affair as a practice of a legal institution? The theories of the state that conceptualizes the state as a legal institution may answer this question. In that manner, how the theory of the rule of law, and theory of legal positivism “understand” such a case of extra-legal activities of the state? The following chapter asks these questions, and tries to answer them through interpreting Susurluk Affair from these two viewpoints.

CHAPTER 3

SUSURLUK AFFAIR FROM THE VIEWPOINT THAT UNDERSTANDS THE STATE AS A LEGAL INSTITUTION

Turkey is a state of the rule of law. The authorities and competent ranks that have to implement laws are defined. They do not have the right to use force beyond the legitimate forces of the state. If one has done so, he is the assailant. The assailant is not the state. (Demirel, Milliyet, January 1, 1997)

The then president of the Republic of Turkey approached Susurluk Affair as stated above. This view is based on two combined inter-related premises. The first premise is that the rule of law attribute of the state provides a framework to approach Susurluk Affair. The second premise is that one cannot impute a delict to the state for unlawful actions of an individual, even if he-she is employed by the state. The first sentence of the quotation cited above says that Turkey is a state of the rule of law. The following sentences open the first sentence, and set forth the fundamental principles of the rule of law state. Accordingly, those authorities and ranks who have to implement laws have the right to use force as legal instruments of the state, they do not have the right to use power beyond this limit. "Legitimate instruments of the state" signifies legitimacy conferred on those instruments by laws. This logical construction leads to the conclusion that who uses force beyond the legitimate forces of the state is guilty individually, he-she does not represent the state since he-she uses force beyond the legitimate force of the state. The concept of the rule of law, in general, was the main reference for approaching Susurluk Affair. This argument about the legal order in Turkey, which is pointed out above, concur with certain presumptions of theoretical standpoint that conceptualizes the state as a legal institution. Such a similarity deserves to be analysed further. However, this study intends to locate Susurluk Affair as a case of extra-legal activities of the state, and such kinds of arguments cannot be evaluated further before having a theoretical reflection on Susurluk

Affair. For having a theoretical reflection on the Susurluk Affair, and locating it in legal-political theory, on the other hand, theoretical standpoints that these arguments rest, offer an analytical framework, since these standpoints are two main perspectives that conceptualize the state as a legal institution in legal-political theory. These two standpoints are the theory of rule of law and legal positivism. While the latter understands the state as a legal institution, without any mediation, the former emphasizes necessity of legitimacy of the state, as a legal order. How could a case of extra-legal activities of the state be understood from these two theoretical standpoints? Answering this question is utmost important for locating Susurluk Affair in legal-political theory. Therefore, this chapter intends to have a reading of Susurluk Affair in the light of these two theoretical standpoints which conceptualize the state as a legal institution. Thus, these theories will be examined, particularly in regard to views they offer for understanding of a case of extra-legal activities of the state, each. These two perspectives have different presumptions about law and the state and yield different viewpoints for understanding extra-legal activities of the state.

The theory of the rule of law, which conceptualizes the state as a legitimate legal order, bears two trajectories of interpretation. Accordingly, the rule of law is either interpreted as formal rationality and autonomy of legal order, or as formal rationality that is combined with the question of the democratic legitimacy. While Weber was one of the first figures thinking about formal rationality of law, Habermas is a contemporary theorist who thinks about the rule of law as incorporated into the question of democracy. Weber and Habermas are two prominent names for the theory of the rule of law, and their theories provide an adequate material for a detailed analysis of the state as a legitimate legal institution. Therefore, Weber's and Habermas's theories of the rule of law are accepted as main references for locating Susurluk Affair, as a case of extra-legal activities of the state in regard to theory of the rule of law. Weber's and Habermas's theories reflect a distinction between two conceptions of the idea of

the rule of law. While Weber's theory is a formal interpretation of the rule of law, Habermas's theory is a substantive, democratic interpretation. Weber's theory is also valuable for this study, since it brings functioning of the administrative apparatus to the light, and offers a comprehensive approach for interpreting this apparatus from the viewpoint of theory of the rule of law. Weber is a distinguished name in social and political theory, and he has contributed to the legal theory, as well. Furthermore, since his theoretical contribution is promising for connecting legal theory and political theory, it would provide an account of interpretation of Susurluk Affair, as a case of extra-legal activities of the state. Habermas's theory, on the other hand, incorporates the question of democratic legitimacy to the idea of the rule of law. It is a contemporary perspective of the rule of law, and it would yield to another way of interpreting Susurluk Affair. Habermas's theory has a reflection on administrative apparatus, too. As a conclusion Weber's and Habermas's theories are preferred for evaluating of Susurluk Affair, as a case of extra-legal activities of the state from the point of the theory of the rule of law, on the ground of reasons that are given above. Theory of legal positivism, which is the second trajectory that defines the state as a legal institution, on the other hand, is derived from Kelsen's "the pure theory of law". There are two reasons that promotes this preference. Hans Kelsen is a distinguished name in legal theory, he proposes a neo-Kantian interpretation of legal positivism, and Kelsen's theory is in dialogue with Carl Schmitt's theory, which would be brought into view in the following chapter evaluating the state as a political institution. That's why, Kelsen's theory is preferred for reading Susurluk Affair from the point of legal positivism. Additionally, it would be interesting to have a Kelsenian reading of Susurluk Affair on another reason. It is striking that the former president and certain members of the government has referred a Kelsenian conception of the state, even probably they did not read Kelsen's theory. That's why, it would be interesting to bring Kelsen's theory, and have a Kelsenian reading of Susurluk Affair, as a case of extra-legal activities of

the state. The first part of this chapter focuses on theories of the rule of law, and the second part focuses on legal positivism. In brief, in following two main sections, the focus will be on Weber's and Habermas's; and Kelsen's theories. While the section A reflects on the idea of the rule of law in Weber's and Habermas's theories, in regard to extra-legal activities of the state, and interprets Susurluk Affair from these perspectives; section B presents Kelsen's pure theory of law.

3.1. Interpreting Susurluk Affair as a Case of Extra-Legal Activities of the State from the Viewpoint of the Theory of the Rule of Law

For interpreting Susurluk Affair, as a case of extra-legal activities of the state, in regard to the theory of the rule of law, Weber's and Habermas's perspectives are preferred on the ground of the reasons that are set forth above. For understanding Weber's and Habermas's theories of the rule of law, first, discussions in the theory of the rule of law, and historical background of the appearance of the idea are briefly narrated. In the light of this narration, Weber's conceptions of formal-rational legal order, and bureaucracy, which are incorporated into Weber's theory of the modern state, and his conception of secrecy are narrated and analysed from the point of approaching a case of extra-legal activities of the state. Similarly, Habermas's conception of the rule of law is focused and analysed for approaching a case of extra-legal activities of the state. These analyses are presented in the section of the partial conclusion. Then, Susurluk Affair is interpreted through the main points of analyses in Weber's and Habermas's theories of the rule of law.

3.1.1. A General Introduction to the Theory of the Rule of Law

The theory of the rule of law brings the question of legitimacy of legal order. There are different approaches to models of legitimate legal order, which are conceptualized as the idea of the rule of law. Certain authors classify these approaches according to the basic presumption that each offers regarding the

legitimacy of law. Presenting some of these classifications would give an idea about the conceptual distinctions of the theory. Shalkar, Craig (referred in Dyzenhaus, 1999), Dyzenhaus (1999) and Sancar (2000) propose models of classification for approaches to the rule of law. Shalkar's classification makes a distinction between two models of the rule of law (Dyzenhaus, 1999: 1). While the first model, which is associated with Aristotle, "represents the rule of law as the 'rule of reason'", the second one, which is associated with Montesquieu, "sees the rule of law as those institutional restraints that prevent governmental agents from oppressing the rest of the society" (Shalkar, cited in Dyzenhaus, 1999: 1). Shalkar prefers the second model (Dyzenhaus, 1999: 1,2). Craig's classification contributes to discussions on the rule of law, too. He distinguishes "formal" conceptions of the rule of law from "substantive" conceptions. According to Craig's classification, formal conceptions of the rule of law focus on the process "in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.)" (Dyzenhaus, 1999: 5), but does not focus on the content of law. While formal conceptions focus on formal aspects of law, substantive conceptions approach to the cases in the framework of question of justice, and "on this view the rule of law is nothing more or less than a synonym for a rights based theory of law and adjudication" (Dyzenhaus, 1999: 5). Craig says that the rule of law is better to be considered formally. Dyzenhaus (1999) makes a distinction between the views on the rule of law, too. He distinguishes democratic-positivist interpretations of the concept of the rule of law from liberal anti-positivist interpretations. He says that while democratic-positivist conception emphasizes a legislature grounded opinion, and "argue that the legislature is the sole source of law and that its legitimacy derives from its accountability to the people", liberal anti-positivist conception emphasizes a common law grounded opinion (Dyzenhaus, 1999: 2,3). Similarly, Sancar (2000) makes a distinction regarding approaches of the rule of law. According to Sancar, the first approach conceptualizes "the rule of law as a structural construction of the state" and the

other approach conceptualizes “the rule of law as a social organization model” (2000: 40). The first model, which coincides with the concept of *Rechtsstaat*, aims to construct a mechanism of control within the state (Sancar, 2000). Positivist interpretation of the rule of law faces challenge of moral criticisms of certain legal systems, such as legal order of the National Socialism (Dyzenhaus, 1999. 3, 4). For instance, Gustav Radbruch says that positivist perspective accepted by German lawyers paved the way for National Socialism in Germany. This claim is a cornerstone of a debate about the rule of law.³⁴ These discussions bring a controversy about optimum way of use of review power by judges.³⁵ Besides this controversy, the question about efficiency of review power of judiciary is discussed, too. According to Sancar (2000), controlling the executive organs by judiciary may not be efficient, if one considers that the judiciary has a limited power and it may have a fragmented composition. Sancar (2000: 40) says that formal mechanisms of control of the state within, say model of *Rechtsstaat*, can only be significant in relatively stagnant period of times. If there are real or manufactured threats against the order, it would be a reason for departure from the formal mechanisms of control. He says that the rule of law attribute of the state as a formal mechanism is not effective for refraining power of state and maintaining freedoms (Sancar, 2000: 41). He claims that the second model of the rule of law, which is conceived as a social organization model, may have such a

³⁴ Sebok’s (1999) analysis on cases regarding slavery and Harel’s (1999) analysis on cases in Israel show that presuming an optimum way of use of review power by judges is not easy.

³⁵ Discussions about the rule of law in the context of the U.S. Presidential Election in 2000 show that “the rule of law” may be an ambivalent concept, for interpreting legal cases, so it can be employed by opposite parties of a conflict. Please look at the following articles for those discussions:

J. Waldron (2002). “Is the Rule of Law an Essentially Contested Concept (in Florida)?” in Law and Philosophy 21: 137-164. Kluwer Academic Publishers. Netherlands.

K. Abrams (2002). “Extraordinary Measures: protesting Rule of Law Violations After *Bush V. Gore*” in Law and Philosophy 21: 165-196. Kluwer Academic Publishers. Netherlands.

power. This model, he says, is produced to form a civil society against the power of absolute monarch in the 19th century, and can be formulated as a departure from authoritarianism (Sancar, 2000: 41). This definition implicitly requires presence of a democratic state. Civil society, separated from the state would frame principles of using power by the state. What is required for public control of the monopoly of violence that the state has, is presence of a pluralist democracy and of mechanisms of accountability (Sancar, 2000: 43). As Dyzenhaus (1999) and Fagan (1999) discusses, one cannot easily assert that one of those models provides a more legitimate political regime than the other one (Dyzenhaus, 1999: 4, 5). Dyzenhaus (1999), unlike Craig, claims that there may be another conception that combines democratic-positivist and liberal anti-positivist interpretations of the idea of the rule of law. Similarly, Habermas does not accept that these two interpretations are contradictory. These four classifications presented above make a distinction in accordance with two parallel processes of the rise of modern law and legal order. The first one is the course of formal rationalization of law, the second one is the course of defining legislation as a democratic will formation. These two parallel developments rest on secularization of law. Then, having a look at these courses of developments would be helpful for understanding different conceptions of the rule of law. Following section narrates transformation of conceptions of legal order and law, in form and substance.

3.1.1.1. Secularization of Law and Appearance of Formal-Rational Law

The medieval legal system had consisted of the sacred law, bureaucratic law and the tribal law. This system was the characteristic of “the legal cultures of ancient empires in general” (Habermas, 1986: 260). Sacred law was the main reference of legitimacy, and it legitimized the bureaucratic law. In Cicero’s conceptualization, for instance, established law was defined as part of a whole, say natural law or divine law, and all enacted laws were supposed to be nourished by one divine law (d’Entreves, 1994: 51). “The unwritten law of nature

and of divinity” which “is supposed to be the source of statute law”, was “eternal and unchangeable, directed towards the realisation of the common good” (d'Entreves, 1994: 51). Enacted law, on the other hand, “has to be adapted to local and temporary conditions, it is particular law, which must not contradict the universal natural law” (d'Entreves, 1994: 51). According to this conception, law “was closely tied to the order of the cosmos and to the sacred history” (Habermas, 1986: 261). Thus, law was defined as “the basis”, “the standard of measurement”, “a regula artis with the help of which the just decision is arrived at” (d'Entreves, 1994: 53). For instance, in Christianity, natural law was decisive for securing the authority of God and of the church against man-made laws and customs. Natural law was the law that was granted to Adam by God. In *Decretum Gratiani* this premise was emphasized as follows: “natural law absolutely prevails in dignity over customs and constitutions. Whatever has been recognized by usage, or laid down in writing, if it contradicts natural law, must be considered null and void” (Decr. Grat., I, viii, 2 cited in d'Entreves, 1994: 38). The power, that natural law stems from was supposed to be the power of God. The divine law was beyond the disposal of the political ruler, “in this sense, it was indisponible (unverfügbar)” (Habermas, 1986: 261). Natural law was thought as the law of God, and it was always superior to the law of man. Cicero says that the law would not be an enacted law if it had contradictions with the natural law. In his words: “Nations and princes may make laws, but they are without the true character of law if they are not derived from the original source of law, which existed before the State was established” (De Legibus, cited in Willey, 1986:15). However, this divine conception of natural law was not totally beyond the limits of human reason. The concept of natural law was constructed on human beings’ capacity of reasoning. Human beings were supposed to be equal in having sense of justice. Cicero constructed the connection between law and reason as follows:

For those creatures who have received the gift of reason from Nature have also received right reason, and therefore they have also received the gift of

Law, which is right reason applied to command and prohibition. And if they have received law, they have received justice also. Now all men have received reason; therefore all men have received justice. (De Legibus, I, x, 29, xii, 33 cited in d'Entreves, 1994: 26)

Both Cicero's and Gaius's concepts of natural law have "laid the emphasis on the inherent capacity of man to discover the universal principles of law" (D'Entreves, 1994: 39). Aquinas has dealt with the concept of natural law in detail and reconstructed it as a concept of the Christianity. Accordingly, natural law is accepted as the law that God inscribed into the hearts of human beings, and human beings could understand it by way of true reason. It was the Old Law that was sent to Israelites, and they could understand it through the wisdom of Moses, for Aquinas. Aquinas constructed a "bridge of reason" between the divine order and the man. This view changed the ground upon which the ethics of Christianity was constructed on. Ethics was thus formulated as a matter of reason, rather than a sense of shame engendering from the first sin of humanity. Aquinas claimed that human beings were capable of discerning good from evil, and they had the sense of justice, which was granted by God and could be investigated by reason, the trace of God on humanity. Aquinas mentioned different categories in natural law. The first group of precepts of natural law is the most fundamental and general precepts of the natural law (Smith, 1995: 625). God has not mentioned them in the Old Law sent to Israelities. The Old Law was about the precepts of the natural law that could not be easily known. Therefore, God gave these precepts to Jews in an unnatural way, "so that they would not be mistaken about something so fundamentally important" (Smith, 1995: 625, 626). The natural law was the object of reason, and it was better to have the best laws made by wise men according to Aquinas.

Grotius' theory of law is almost a secular theory, because natural law is directly founded on reason again. Natural law once recognized by reason thus becomes independent even from God. Divine and human nature are separated. Grotius's conceptualization of natural law was a turning point in the history of

the concept of natural law. Although the Schoolmen before Grotious defined the concept in a similar vein; what was novel in Grotious's theory was his emphasis on possibility of constructing a theory of law independent from theological presuppositions (d'Entreves, 1994: 54-55). Therefore, "if natural law consists in a set of rules which are absolutely valid, its treatment must be based upon an internal coherence and necessity" (d' Entreves, 1994: 55). In this turning point the bends of morality and legal system were shattered. After Grotious, morality has been defined on the ground of rationality and turned into a matter of science. Grotious expresses this view as follows:

Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend . . . Just as even God cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil. (*De Iure Belli ac Pacis*, I, i, x cited in d'Entreves, 1994: 56)

For Grotious's theory, "even God cannot cause that two times two should not make four", and natural law cannot be beyond the human reason. Separation of established law and divine law was parallel to the changes in economic sphere and changes in political regimes. The rise of the bourgeoisie, with networks of trade and information, shattered the feudal organizations and established a new base of commodity and information exchange (Habermas, 1994: 15-17). The tripartite structure of the legal system, which is legitimized by the sacred law, has been divided into parts, and "the political power of the ruler was emancipated from its tie to sacred law and became independent" (Habermas, 1986). Justice and political order are separated through disintegration of the feudal society. Such a disintegration brought the question of sovereignty, so "the relations between natural and positive law became problematical" (Habermas, 1986). One should consider definition of political power in feudalism in order to understand the concept of sovereignty. Conception of political power introduced through the concept of sovereignty was a departure from Roman conception of political power, since "theorists of sovereignty recognized each person's free control over

his own body" (Kriegel in Scheuerman, 1999: 744). The medieval natural law transformed into "secular human rights, serving as a limitation of the power of the state" (Scheuerman, 1999: 4). Redefinition of religion in private sphere and incorporation of scholarly law into the common law were basic stages in the rise of positive law. The process, which involves emergence of positive law, "extended from the end of Middle Ages to the great codifications of the eighteenth century" (Habermas, 1986: 262). Rise of the positive law was an outcome of the separation of bureaucratic royal law from the sacred law. Secularization of bureaucratic law strengthened the political power. Concept of sovereignty was utmost important for suspension of theologically administered natural law. Theologically administered natural law was replaced by sovereign will of the political legislator. Accordingly, "making, executing, and applying laws became three moments within a single, politically controlled feedback process", and "it remained so even after the institutional differentiation into three balanced powers of the state" (Habermas, 1986: 262). Secularization of law, on the other hand paved the way for a new basis of legitimacy of law. Weber is one those theorists who first deal with the question of a secular basis of legitimacy of law. The following section presents Weber's conception of formal rationality of law, as a principle of legitimacy for legal order and for political power.

3.1.2. Weber's Theory of the Rule of Law

Let me present and discuss Weber's conception of the rule of law and reflections of these conceptions on functioning of the modern state, including functioning of administrative apparatus.

3.1.2.1. Weberian Conception of Formal-Rational Legal Order and Modern Bureaucracy

Since basic question of the theory of the rule of law is the legitimacy of legal order, it would be better to focus on Weber's theory in regard to this question. Question of legitimacy of legal order is incorporated into a broader question of

“domination” in Weber’s theory. Accordingly, any domination is legitimized on “rational grounds”, “traditional grounds” or “charismatic grounds”.³⁶ He defines domination “as the probability that certain specific commands (or all commands) will be obeyed by a given group of persons” (Weber, 1968: 212).³⁷ Domination on rational grounds rests on “legality of enacted rules” and on the competence of those who issue commands under such rules (Weber, 1968: 215). An authority may meet with obedience on rational, traditional or charismatic grounds. For maintaining legitimacy, the authority has to claim legitimacy of formal-legal commands. These commands legitimated on the basis of legality can be obeyed by a given group of person, who believe in the validity of legal commands. As a conclusion, Weber brings the question of validity of a command, and says that “in the case of legal authority, obedience is owed to the legally established impersonal order” (Weber, 1968: 215). Legally justified form of domination is legitimized on the ground of “rationality” for Weber. Concept of “legitimacy”, on the other hand, refers to self-justification of certain privileged groups (Weber, 1968: 954). Maintaining legitimacy means justification of domination, thus, it “constitutes the basis of very real differences in the empirical structure of domination” (Weber, 1968: 953). Therefore, the ground that any authority meets with obedience is concretized in the structure of domination. Authority that is legitimized on the ground of rationality, thus, has to propose a legal framework of legitimacy. Weber calls such an authority that rests on rationality of legal order as “legal authority” (1968). Legal authority legitimizes every single bearer of

³⁶ Weber says these the “‘pure’ types of domination correspond to these three possible types of legitimation”, however, “the forms of domination occurring in historical reality constitute combinations, mixtures, adaptations, or modifications of these ‘pure’ types” (1968: 954)

³⁷ Weber defines the issue of “domination” as follows:

To be more specific, *domination* will thus mean the situation in which the manifested will (*command*) of the *ruler* or rulers is meant to influence the conduct of one or more others (*the ruled*) and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of the command the maxim of their conduct for its very own sake. Looked upon from the other end, this situation will be called *obedience*.. (1968: 946)

power of command by the system of rational rules. Obedience is thus made to the rational rules, rather than to certain person who implements those rules (Weber, 1968: 954). This model supposes to impersonalize the power command. According to Weber, "the 'validity' of a power of command may be expressed, first, in a system of consciously made rational rules" in a rationally legitimated domination (1968: 954). He admits that those rules are either rules which are "agreed upon or imposed from above" (Weber, 1968: 954). Therefore, there is no need for a principle of democratic representation in legislation process for maintaining rational legitimacy. According to the principle of rational legitimacy, any person "whom the rule designates" meets with obedience "whenever such obedience is claimed by him" (Weber, 1968: 954). Thus, power imposed by those whom the rule designates is "legitimated by that system of rational norms", "insofar as it corresponds with the norm" (Weber, 1968: 954). Therefore, legitimacy is derived from these rational rules, which are imposed by those who are designated in the corresponding rule. The principle of legitimacy on rational ground is concretized, distinctively in the modern state.

According to Weber, the modern state is founded on two premises. The first one is the monopoly of use of legitimate violence, the second one, which sets the conditions of the legitimacy, is the rational legal order functioning through the rules regarding use of violence (Weber, 1968: 909). Thus, the modern state is conceptualized as "the ultimate source of every kind of legitimacy of the use of physical force" on the ground of "monopolization of legitimate violence by the political organization" (Weber, 1968: 909). Legitimacy conferred on the modern state, on the other hand, rests on "rationalization of the rules" of its use of physical force "which has come to culminate in the concept of the legitimate legal order" (Weber, 1968: 909). The modern state with guarantee of political coercive apparatus, "monopolizes the legitimate application of violence for its coercive apparatus and is gradually transformed into an institution for the protection of rights" (Weber, 1968: 908). Modern adjudication is different from traditional

forms of adjudication. It would be better to remember traditional forms of adjudication for understanding the construction of legal order on rational premises. For Weber, in traditional form of domination that deserves legitimacy by tradition, conflicts that cannot be settled by tradition were either settled by “concrete revelation” or by “informal judgments”, or by “empirical justice” (1968: 976). While “concrete revelation” refers to settling ways such as oracle, prophetic dicta, or ordeal, “informal judgments” refer to settling through discretion “in terms of concrete ethical or other practical valuations” by a certain person, for instance as in the case of “*Kadi-justice*”. The third way of rendering verdict, “empirical justice”, in which “formal judgments rendered, not by subsumption under rational concepts, but by drawing on ‘analogies’ and by depending upon and interpreting concrete ‘precedents’” was open for systematization and rationalization (Weber, 1968: 976). These three ways of rendering verdict are different from “rational” interpretation of law.³⁸ While “concrete revelation” and “informal justice” do not propose a rational method of rendering verdict, “empirical justice”, indeed “can be sublimated and rationalized into a ‘technique’ (Weber, 1968: 976). However, these political orders had not asked for separation of the legal order and substantive goals, and ethics, “the aim is rather to find a type of law which is most appropriate to the expediential and ethical goals of the authorities in question” (Weber, 1968: 810). Therefore these political orders has not required separation of ethics and legal order (Weber, 1968: 810).³⁹ In some of

³⁸ Weber says “*Kadi-justice* knows no rational “rules of decision” (*Urteilsgründe*) whatever, nor does empirical justice of the pure type give any reasons which in our sense could be called rational” (1968: 976)

Weber says that methods of “informal justice” and “empirical justice” are used even today. He says that in England and Germany “*Kadi-justice*” is still in use:

Even today in England, as Mendelssohn has demonstrated, a broad substratum of justice is actually *Kadi-justice* to an extent that is hardly conceivable on the Continent. The justice of German juries, which excludes a statement of the reasons for their verdict, often functions in practice in the same way. (1968: 976)

³⁹ They did not need a system that provides a formal justice, “the aim is rather to find a type of law which is most appropriate to the expediential and ethical goals of the authorities in question” (Weber, 1968: 810).

these political regimes, religious command, *fas*, was separated from the established law, *ius*, thus certain human conflicts which had no religious relevance could be settled (Weber, 1968: 810). This separation cleared the way for “an independent course of development” of *ius* “into a rational and formal legal system, in which emphasis might be either upon logical or upon empirical elements” (Weber, 1968: 810). Weber (1968: 809) says that rationalization of “the administrative machinery of the princes or hierarchs” was the first step in rationalization of legal procedures, in form and substance. Employment of “officials” in the administrative machinery paved the way for rationalization of the administrative machinery (Weber, 1968: 809). This process, which led to systematization of the substantive law, and elimination of irrational forms of procedure was “driven in this direction” either by the needs of rational administration of those who exercise power, such as “the administrative machinery of Papacy, or by powerful interest-groups” such as “the bourgeois classes of Rome, of the late Middle Ages, or of modern times” (Weber, 1968: 809). Either the “authority of princes or magistrates (*imperium*, ban) or, in certain situations, of an organized priesthood” interrupted and converted irrationality of “the older forms of popular justice”, which “had originated in conciliatory proceedings between kinship-groups”, and legal procedure is reconstructed on more rational grounds (Weber, 1968: 809).⁴⁰ However, rationalization of legal order was not a systematical process at the beginning, and it was open to breaks (Weber, 1968: 809, 810). Rationalization of legal order, as well as the rise of the modern state resting on rational legal order was supported by “all those groups which have a direct or indirect economic interest in the expansion of the market community” (Weber, 1968: 908). Certain groups “attempted, in cooperation with

⁴⁰ The most important value that Western civilization bears, is stated as ‘rationality’ by Weber (1958). In the introduction chapter of *The Protestant Ethic and The Spirit of Capitalism*, Weber (1958) narrates some shared practices of humanity through the World, by stating that though all the civilizations share certain activities, such as sciences, arts, law, administration, etc. in no where they are developed in the manner that they are in the West. The difference of Western culture, he says, springs from its ‘rationality’ (Weber, 1958: 13-26).

the church, to limit feuds and to establish temporary, periodical, or permanent leagues for the maintenance of public peace” in the Middle Ages (Weber, 1968: 908, 909). Those groups, “especially the burghers of the towns, as well as all those who are interested in river, road, or bridge tolls and in the tax-paying capacity of their tenants and subjects” were interested in pacification of the society and maintenance of peace (Weber, 1968: 908). Previous basis of “community of interests on which the legitimacy of their violence had developed” were shattered through the expansion of the market (Weber, 1968: 909).

Was rationalization of law an outcome of change in political organization, or change in economic organization? Weber does not give affirmative answers to these questions. Rational adjudication, he says, had not arisen in accordance with needs of capitalism. He says that rational adjudication has been proceeded from Roman law, whereas, “all legal institutions specific to modern capitalism are alien to Roman law and are medieval in origin” (Weber, 1968: 977). Roman law, indeed, was not a purely rational law.⁴¹ He says that “technical factors of trial procedure” is an important factor “in the development of rational law” (Weber, 1968: 978). However, he emphasizes that technical factors of trial procedure were “resulted only indirectly from the structure of the state” (Weber, 1968: 978). Therefore, the courses of development of rational adjudication and of the modern state as a political organization have promoted each other. Economic developments, and “the demands of an increasingly rationalized economy for a rational procedure of evidence rather than the ascertainment of the truth by concrete revelation or sacerdotal guarantee” promoted development of rational adjudication. Thus, rationalization of jurisprudence was “strongly influenced by structural changes in the economy”, too (Weber, 1968: 977). This necessity brought “the technical necessity to place the trial procedure in the hands of rationally trained experts” (Weber, 1968: 977). Rationalization of law, on the other hand, requires a

⁴¹ Weber says that, “during the time of the republic, Roman law itself presented a unique mixture of rational and empirical elements, and even of elements of Kadi-justice” (1968: 978). Weber narrates details of this integration.

distinction that is set between lawmaking and lawfinding processes.⁴² Weber says that separation of lawmaking and lawfinding processes depends on factors of legal technique; both political and economic factors, on the other hand, “had an indirect influence only” (1968: 654, 655).⁴³ “Rationalization” of law is carried out through “generalization” for embracing different cases in general rules (Weber, 1968: 655). These general rules are hierarchically ordered through systematization of legal corpus (Weber, 1968: 655).⁴⁴ This complex process of rationalization of law, which cannot be attributed just one factor, but many, “was brought to

⁴² Weber defines “lawmaking” as “the establishment of general norms which in the lawyers’ thought assume the character of rational rules of law” (1968: 653). He defines “lawfinding” as the “‘application’ of such established norms and the legal propositions deduced therefrom by legal thinking, to concrete ‘facts’ which are ‘subsumed’ under these norms” (Weber, 1968: 653).

Even if, lawmaking and lawfinding processes are separated, and law is systematized and generalized, still, it may not be rational. Weber defines condition of irrationality of formal aspect of law as follows: “they are *formally* irrational when one applies in lawmaking or law-finding means which cannot be controlled by the intellect” (Weber, 1968: 656). He defines condition of substantial aspect of the irrationality of law, on the other hand, as follows: “lawmaking and lawfinding are *substantively* irrational on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms” (Weber, 1968: 656).

⁴³ Weber says, “those aspects of law which are conditioned by political factors and by the internal structure of legal thought have exercised a strong influence on economic organization” (Weber, 1968: 655).

He narrates influence of the economy on intensification of this process of separation as follows:

To be sure, economic influences have played their part, but only to this extent: that certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law or have intensified the institutionalization of the polity. We shall have occasion to observe this time and again. (Weber, 1968: 655)

⁴⁴ Formalism may propose two ways of interpretation. In a strict way of interpretation, which is founded on “the legally relevant characteristics are of a tangible nature, i.e., that they are perceptible as sense data” (Weber, 1968: 657), or a logical interpretation: “the other type of formalistic law is found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied” He calls this process as “logical rationality”. (Weber, 1968: 657)

perfection only during the period when the polity itself underwent bureaucratization" (Weber, 1968: 978).

According to Weber, bureaucracy has a crucial role in rationalization of law, and it appeared in perfect form in the modern state. He claims that, "the concept of the state has only in modern times reached its full development" (Weber, 1968: 54). Then, concept of the state has to embrace the characteristics of "the modern state" in Weber's theory (Weber, 1968: 54). Weber defines the state as compulsory political organization, with an "administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order" (Weber, 1968: 54). He says that the modern state "possesses an administrative and legal order subject to change by legislation" (Weber, 1968: 56). Though "it is thus a compulsory organization with a territorial basis", it is a compulsory political organization that is legitimated on the basis of legality (Weber, 1968: 56). Use of force "regarded as legitimate only so far as it is either permitted by the state or prescribed by it", in the modern state (Weber, 1968: 56). The modern state, Weber says, prohibits use of force in the hand of individuals (Weber, 1968: 56). Accordingly, legitimate legal order of the modern state is concretized in modern officialdom (Weber, 1968: 956). "Modern officialdom", on the other hand, is constructed on "the principle of official jurisdictional areas", which "are generally ordered by rules" such as "by laws or administrative regulations" (Weber, 1968: 956). Then, functioning principle of the officials are ordered by the legal corpus. Thus, regular activities of those officials, "which are required for the purposes of the bureaucratically governed structure are assigned as official duties" (Weber, 1968: 956). Accordingly, certain "rules" are decisive for those officials who are competent to use coercive means (Weber, 1968: 956). Competence is also ordered in general rules. Thus, competence is assigned through "methodical provision", that are "made for the regular and continuous fulfillment of these duties and for the exercise of the corresponding rights", so that "only persons who qualify under general rules are employed" (Weber, 1968:

956). Weber says that there is no difference in these principles regarding bureaucracy, either in the state or in the private sector (Weber, 1968: 956). Bureaucracy operates in accordance with a given official hierarchy, so that lower offices are supervised by higher offices. Hierarchically organized structure clears the way for “channels of appeal”, so that it “offers the governed the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority” (Weber, 1968: 957). Hierarchically organized structure of the bureaucracy, “with the full development of the bureaucratic type”, provides a “*monocratically* organized” system (Weber, 1968: 957). The management of the office, Weber says, “follows *general rules*”, and is a relatively stable and clearly defined practice (Weber, 1968: 958). That’s why, any regulatory action of office does not regulate an individual case, rather regulates it abstractly (Weber, 1968: 958). In brief, bureaucracy functions in accordance with legal texts, and with official hierarchy that provides a monocratically organized system operating according to general and abstract rules. The following sentence presents Weber’s idea about bureaucracy:

“*Rationally regulated* association” within a structure of domination finds its typical expression in *bureaucracy*. (emphasis is original, Weber, 1968: 954)

Bureaucracy is a rationally regulated as-sociation. In a bureaucratic organization, human beings work together in accordance with a certain rationale, so that they are regulated according to certain rules. Does this “perfect”, rational organization always comply with rules? Weber says that bureaucracy has to comply with rules, even if it may not be the case. Weber’s theory is not blind to the defects of the supposedly rational system of bureaucracy. He mentions the significance of secrecy in state affairs, and additionally, he thinks about the role of *raison d’etat* in operation of bureaucracy. His accounts of official secrets and *raison d’etat* must be considered in this study, since these considerations may have a reflection for locating Susurluk Affair in Weber’s conception of legally legitimated

authority. Let me now present his account of the role of secrecy, and *raison d'etat*, in state affairs.

3.1.2.1.1. Secrecy and *Raison d'etat* in Weber's Theory

Weber focuses on the question of "administrative secrets", and explains their reasons. Though he explores the issue, and sets forth a definite answer to the question whether official secrets are necessary, he says that such kind of inclination for official secrets cannot be adequately explained on functional grounds, with exception of certain specific administrative fields, such as military. According to Weber, bureaucracy always aims to increase the "superiority of the professional . . . through the means of keeping secret its knowledge and intentions" (Weber, 1968: 992). Bureaucracy has a tendency "to exclude the public, to hide its knowledge and action from criticism as well as it can" (Weber, 1968: 992). This inclination, he says, is natural and can be explained on functional grounds in certain administrative fields, since "power interests of the given structure of domination toward *the outside*" can be protected through secrecy, for instance in the "case of economic competitors of a private enterprise or that of potentially hostile foreign polities in the public field" (Weber, 1968: 992). Similarly, military administration as well as political parties demand administrative secrets, though political parties propose "publicity of the party conventions" (Weber, 1968: 992). Weber conceptualizes the need of secrecy as a general condition of any "dominance" and says that "every fighting posture of a social structure toward the outside tends in itself to have the effect of buttressing the position of the group in power" (Weber, 1968: 992). However, he admits that it is difficult to concern and explain bureaucrats' general inclination of official secrets on functional grounds (Weber, 1968: 992). In Weber's words:

The concept of the "office secret" is the specific invention of bureaucracy, and few things it defends so fanatically as this attitude which, outside of the specific areas mentioned, cannot be justified with purely functions arguments. (Weber, 1968: 992)

Weber says that inclination for official secrets cannot be translated into power instinct on functional grounds. He explains the inclination for secrecy on the basis of bureaucracy's own power instincts. According to Weber, "bureaucracy naturally prefers a poorly informed, and hence powerless, parliament" (1968: 993). However, he mentions that "official secrets" are crucial for continuity of any domination, so in entirety, need for official secrets cannot be explained as only an outcome of bureaucracy's power instincts. He sets necessity of secrecy for any domination as follows:

Wherever increasing stress is placed upon "official secrecy," we take it as a symptom of either an intention of the rulers to tighten the reins of their rule or of a feeling on their part that their rule is being threatened. But every domination established as a continuing one must in some decisive point be *secret rule*. (emphasis is original Weber, 1968: 952)

Then, emphasis on the necessity of secrecy can be read either as an intensification of control power of rulers for increased effectiveness of regulative power of rulers; or as a response to the threats to their rule. The point is that, "every domination established as a continuing one must in some decisive point be *secret rule*", for Weber (1968: 952). Thus, according to Weber, any domination cannot be carried on if it denies to be a secret rule. Thus, secrecy cannot be expelled from the World, as long as struggle for domination is the rule. Weber says that information about confidential military and diplomatic matters should be known only by a small group of people, and the leaders of parties must have "unlimited authority for making important decisions (or they must be able to get this authority within a few hours from committees that can be called together at any time)" (Weber, 1968: 1421). He emphasizes that authority of deciding "in very tense political situations" should be granted to "a small group of men" (Weber, 1968: 1421). He states the condition that a small group be authorized as follows:

Under the wartime conditions it was perhaps appropriate to establish such a mixed committee uniting the representatives of the government with those of all major parties. In peacetime, an arrangement that would draw in party representatives on a similar basis might be

equally useful for the deliberation of sensitive political issues, especially in foreign politics. (Weber, 1968: 1421)

Those claims regarding issues of secrecy seem contrary to Weber's conception of legally legitimated domination. Though Weber seems to be a realist analysing the "social", tracing dynamics that it is constructed through, he valorizes formal rationality as the basic principle of organization of the modern state. Therefore these claims do not lead to denying the validity of formal-rational basis of legitimacy for the modern state. That's why, he denies demands for a more informally functioning bureaucracy. He is critical of arguments against "the idea of 'law without gaps'" (Weber, 1968: 979). These arguments, which Weber is critical of, either assert that individual cases can be hardly approached in the framework of definite abstract rules, or emphasize that these rules suppress creative capacity of officials (Weber, 1968: 978, 979). He says that bureaucratic forms of use of power is remarkably different from "pre-bureaucratic forms", and even "'freely' creative administration (and possibly judicature) would not constitute a realm of *free*, arbitrary action and discretion, of *personally* motivated favor and valuation" (emphasis is original, Weber, 1968: 979). Thus, bureaucratic action coincides neither with arbitrary action and discretion, nor with personally motivated favor and valuation. In bureaucratic form, "the rule and the rational pursuit of 'objective' purposes, as well as devotion to these, would always constitute the norm of conduct" (Weber, 1968: 979). Weber criticizes these arguments that emphasize the role of creative discretion in public administration and calls them as "the specifically modern and strictly 'objective' idea of *raison d'etat* (Weber, 1968: 979). Indeed, Weberian conception of bureaucracy leads to limitation of the idea of *raison d'etat*. He aims to domesticate inclinations for *raison d'etat* under the bureaucratic imperative. Bureaucracy, he says, has "instincts" "for the conditions of maintaining its own power in the home state (and through it, in opposition to other states)" (Weber, 1968: 979). According to Weber, these instincts, "are inseparably fused with this canonization of the abstract and 'objective' idea of 'reasons of state'" (1968: 979). Power interests of the

bureaucracy, he claims, may “give a concretely exploitable content” to the ideal of *raison d’etat*, which is not an “unambiguous ideal” (Weber, 1968: 979). Therefore, most of the time, particularly “in dubious cases” “it is always these interests which tip the balance” for Weber (1968: 979). However, even bureaucracy acts according to reasons of state, it always has debatable rational reasons for these actions. He emphasizes that, in principle, “a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means” (Weber, 1968: 979). Rationality of bureaucracy leads to instrumental construction of bureaucracy. As a conclusion, Weber’s conceptualization of bureaucracy as an instrument that functions in accordance with abstract and general rules, or rationally weighting means and ends, is incorporated into the conceptualization of formal rational legitimacy. In that manner, he distinguishes a public official and a political leader, according to the “kind of responsibility” (Weber, 1968: 1404). Accordingly, “an official who receives a directive which he considers wrong” has to carry out this objective “as if it corresponded to his innermost conviction” (Weber, 1968: 1404). Thus, an official has to behave in accordance with the sense of duty, rather than with his personal preferences. Weber defines such a priority attributed to official duty as “ethos of office” (Weber, 1968: 1404). “Whether the imperative mandate originates from an ‘agency,’ a ‘corporate body’ or an ‘assembly’”, on the other hand, does not matter (Weber, 1968: 1404). A political leader, on the other hand, would “sacrifice the less important to the more important” and demand authorization, he-she would be responsible before the people (Weber, 1968: 1404).⁴⁵ In brief, legitimacy on rational basis is maintained through a formal and

⁴⁵ Weber says that the parliament has to supervise and control the bureaucracy, not only negatively, confronting administrative chiefs as a hostile power, but also positively, through mechanisms of accountability (1968: 1408). Parliamentary supervision of leaders has to be institutionalized (Weber, 1968: 1408). Weber valorizes parliaments, since, they are “the means of manifesting this minimum consent” (1968: 1408). He admits that “caesarist element is ineradicable” in mass states, therefore political action is conducted by small groups, leading the action (1968: 1414). Such a system is also useful for guaranteeing the responsibility toward the public (Weber, 1968: 1414). A public official should not

rational legal order, which operated a rationally organized apparatus, say the bureaucracy. Official secrets, on the other hand, in principle, has to be supervised by leaders who are responsible and may demand authorization.

While Weber's perspective offers a legal order legitimized on rational-formal basis, and does not even acknowledge the concept of "democratic legitimacy", Habermas criticizes Weber's approach on the rule of law and incorporates democratic legitimacy into formal legal legitimacy. Habermas is one of those theorists that denies Weber's conception of legitimacy of formal rationality of legal order. He is a distinguished name for the theory of the rule of law, because he constructs a theory of law that integrates the ideas of democracy and formal rationality of law in a dynamic conception of moral argumentation. His theory denies the supposition of antagonism between democracy and formal rationality of law, and provides a different conception of the rule of law, and of the legitimacy of legal order. The following section gives Habermas's criticism of Weber's concept of rational-legal legitimacy, and outlines Habermas's alternative concept of the rule of law, which is integrated to the concept of democratic legitimacy.

interfere with the political struggle, but maintain "impartiality", for Weber (1968: 1417). However, "the heads of the bureaucracy must continuously solve political problems", which are supervised by the parliament (Weber, 1968: 1417). Politicians have to countervail against dominance of public officials. However, it is not an easy task to supervise the bureaucracy, since it "is resisted by the power interests of the administrative policy-makers, who want to have maximum freedom from supervision and to establish a monopoly on cabinet posts" (Weber, 1968: 1417). For an appropriate supervision, a parliamentary commission must have the authority to examine administrators. Such an examining, on the other hand, is only possible if those who examine have the expert knowledge and official information, that administration holds (Weber, 1968: 1417, 1418). According to Weber, right to investigation of the parliament should be used for controlling administration (Weber, 1968: 1418). He says that public control imposed upon parliamentary investigation means that "the nation keeps itself informed about the conduct of its affairs by the bureaucracy, and continuously supervises it" (Weber, 1968: 1419). Thus, Weber proposes that parliament supervise the administration, through cooperation between civil servants and politicians has to be promoted (Weber, 1968: 1419, 1420).

3.1.3. Habermas's Theory of the Rule of Law

Habermas's conception of the rule of law is radically different from Weber's conception, since Habermas claims that formal rationality of law cannot be the basis of legitimacy of legal order, but has to rest on democratic legitimacy. Additionally, he says that democracy and formal rationality of law are not contradictory, but complementary. His theory does not merely connect the concepts of autonomy of law and democracy, rather it founds the concept of democracy on the *arche* of autonomy of law. Therefore, formal autonomy of law has to be maintained for maintaining democratic legitimacy. Habermas is critical of Weber's argumentation of legitimacy. He says that Weber's concept of "rationality" is not value-free, rather it is founded on liberal presumption of presence of autonomous subjects. According to Habermas, there is no reason to admit a regime as legitimate on the basis of rational legal order. For Habermas, legitimacy can only be maintained on the basis of morality. Habermas questions Weber's suppositions regarding rationality of formal law. According to Habermas, bourgeois formal law which is abstract and general in form, and implemented by a judiciary and administration bound by law, may be called "rational", but cannot be legitimated on the basis of rationality (Habermas, 1986: 221, 222). Therefore, legitimacy of domination on the basis of rationality cannot be maintained even if formal properties of law are maintained. Habermas says that, though Weber supposes so, Weber's conception of rationality and legitimacy is not morally neutral, on the contrary, it is founded on certain moral presumptions (Habermas, 1986: 234).⁴⁶ In Habermas's words:

⁴⁶ Habermas reminds that Weber "calls rational the result of the intellectual work of experts who analytically master transmitted symbolic systems such as, for example, religious worldviews or moral and legal conceptions" (Habermas, 1986: 224). According to Habermas, "the systematic elaboration of the legal corpus depends on the scientific rationality of experts". Therefore, legal corpus is scientifically rational for Weber (Habermas, 1986: 224). It serves to purposive rationality, and consequently "public, abstract, and general rules secure spheres of private autonomy for the purposive rational pursuit of individual interests" (Habermas, 1986: 224).

Max Weber was right: only regard for the intrinsic rationality of law can guarantee the independence of the legal system. But since law is internally related to politics, on the one side, and to morality, on the other, the rationality of law is not only a matter of law. (Habermas, 1986: 259).

The passage cited above also expresses Habermas's conception of law. He conceptualizes law in connection with morality and politics. Law should integrate and does integrate these two spheres of human practices, for Habermas. The question of legitimacy of law appears in terms of relation of morality and law, in Habermas's conception. Could one attribute legitimacy on the ground of morally neutral "rationality", as Weber did, to modern law? Habermas does not give an affirmative answer to this question. Bourgeois formal law, is not morally neutral, but it can still demand legitimacy beyond the attribute of value neutral rationality, for Habermas. Thus, legitimacy of a legal order is an utmost important question that has to be answered beyond a supposed value neutrality, for Habermas. The question of legitimacy of law, Habermas says, historically appeared with annihilation of metaphysical indisponibility of law. Habermas claims that law did not rise as a mere instrument of political power, and it cannot be conceptualized so, today. He says that law historically precedes the state and the political power. According to Habermas: "as we learn from anthropology, law as such precedes the rise of the state and of political power in the strict sense" (Habermas, 1986: 263). He reminds that law and adjudication were prior to political organization (1996: 138) He says that "institutions of conflict resolution and collective will-formation" were possibly prior "step to state-organized power" (Habermas, 1996: 138). According to Habermas, "political power and binding law emerge as the two components that make up a legally organized political order" (1996: 142). Thus, law, as mechanisms of both conflict resolution and collective will-formation, has been incorporated into political organization, and political organization has been constructed on law. Thus, law was sanctioned by a certain group of people before it was used instrumentally. One can say that "politically sanctioned law and legally organized political power arise

simultaneously" (Habermas, 1986: 263). According to Habermas, "it seems that the archaic development of law in tribal societies first made possible the emergence of a political rule in which political power and compulsory law mutually constituted one another" (1986: 263, 264). Therefore, law cannot be reduced to mere coercive power, and it cannot be totally legitimized as positive law. According to Habermas, law has to be "indisponible", say not at the disposal of the political power. Accordingly, law cannot be reduced either to morality, or mere coercion. Law cannot be reduced to morality, since it cannot be identified with the moral principle (Habermas, 1996: 453). He says that morality and law is different, and "law has a more complex structure than morality" (Habermas, 1996: 452). Law, "simultaneously unleashes and normatively limits individual freedom of action", and it "incorporates collective goal setting, so that its regulations are too concrete to be justifiable by moral considerations alone" (Habermas, 1996: 452). Habermas claims that positive law functionally complements morality. Thus, law has a political moment, moment of instrumentality, besides moment of indisponibility. However, it cannot be reduced to a political instrument, either. The residue that cannot be translated to mere political instrument is the moment of indisponibility of law, which is founded on morality. Secularization of law dissolved the old, metaphysical grounds of indisponibility, but law has to be justified on moral grounds, since any legal order requires a ground of legitimacy, besides coercive power. Therefore, indisponibility of law has to be maintained, if the question of legitimacy of law cannot be assumed void and meaningless. Habermas says that there has been a tension between the moment of "the indisponibility of law presupposed in the courts" and the moment of "the instrumentality of law used for political domination" (Habermas, 1986: 262). He says that most of the theories of law do not overcome this tension, but assume that there is no such a tension, and suppose that "the metasocial guarantee of the validity of law on the basis of sacred law can be dropped without any functional equivalent replacing it"

(Habermas, 1986: 263). "Moral consciousness" Habermas admits, have played an important role both in "the emergence of the symbiosis between compulsory law and political power", and "in the passage from traditional law to a secular and positive law backed by the power of the state and handed over to the disposition of the political legislator" (Habermas, 1986: 264). Indisponibility of law, which is founded on morality, cannot completely be consumed by politics (Habermas, 1986: 267). He says that in modern times law could not be "either completely absorbed by politics or wholly split off from it" (Habermas, 1986: 264). However, if law is reduced to political instrument, the "concept of the political would thereby be undermined", since "under this premise political power could no longer be understood as legal authority" (Habermas, 1986: 267). Such a reduction means dissolving the legitimating force of law, since "a law which has become completely at the disposal of politics would lose its legitimating force" (Habermas, 1986: 267). Accordingly, law cannot be legitimized merely by politics (Habermas, 1986: 267).

If the normative validity of law were to lose all moral relation to aspects of justice that reach beyond the contingent decisions of the political legislator, the identity of law itself would become diffuse. In this case, legitimating criteria would be lacking under which the legal system could be tied to the preservation of a specific internal structure of law. (Habermas, 1986: 267)

Habermas's opinion presented and discussed above can be understood as a criticism of Weberian conception of legitimacy of formal rational law. Since the question concerning the legitimacy of law cannot be overcome through "preservation of internal structure of law", there is a need for another basis of legitimacy. One needs of "an equivalent" "for a disenchanted sacred law — and for a hallowed customary law — which could preserve a moment of indisponibility for positive law" (Habermas, 1986: 268). According to Habermas, positive law has the potent to dissolve the question of indisponibility of modern law, but there is a need of an adequate mechanism for justification of law, since "with the positivity of law the problem of justification did not disappear"

(Habermas, 1986: 268). According to Habermas, “it only shifted to the narrower basis of a post-traditional, secular ethic, decoupled from metaphysical and religious worldviews” (Habermas, 1986: 268). Habermas evaluates natural law theories, and social contract theories and asks if they offer an answer for the question of legitimacy of legal authority (Habermas, 1986: 268). He says that modern natural law theories articulated “a new, post-traditional level of moral consciousness”, so that they could conceptualize “modern law dependent on principles and standards of procedural rationality” (Habermas, 1986: 268). The question is “reconstruction of law without the support of a higher or prior law enjoying moral dignity” (Habermas, 1996: 454). According to Habermas, constructing a legal system that subjective rights, “liberty rights, conceived as human rights” are supposed “in the same dimension of positive law as political rights” cannot be the answer of the question of indisponibility of law (Habermas, 1996: 454). He says that it is impossible to suppose subjective rights, as human rights, above positive law, either. These rights can be acknowledged from the moral point of view, but as far as they are integrated into the constitution, they should be a part of positive law (Habermas, 1996: 445, 446). Human rights converted to “constitutional rights” would have a different status from moral norms, and the question regarding their status appears.

Social contract theories, on the other hand, advanced in two trajectories. While the first group, authors like Hobbes, valorizes positivization of law; the second group, authors like Kant, emphasizes that there is no need for justification, since they conceive “the positivization of law as the realization of the basic principles of rational natural law” (Habermas, 1986: 269-271). Habermas says that “in either variant they were unable to establish a plausible relation between the moments of the indisponibility and the instrumentality of the law” (1986: 268). Remembering the meaning of moment of “indisponibility”, would help to understand Habermas’s claim on deficiency of the social contract theories. These theories cannot “establish” a relation between the moment that law is not at the

disposal (indisponible), say not open for control of the political authority and the moment that law becomes the instrument of the political authority. The question is about the moral foundations of law that have to be maintained, since “otherwise law would lose all of its noninstrumental aspects” (Habermas, 1986: 274). Habermas proposes a solution to this question, in the framework of positive law. It would be better having a look at Habermas’s solution to the “dilemma” for understanding his conception of the rule of law. He uses the metaphor of “spiral” for narrating self-referential definition of law when he narrates idea of the rule of law:

The idea of the rule of law sets in motion a spiraling self-application of law, which is supposed to bring the internally unavoidable supposition of political autonomy to bear against the facticity of legally uncontrolled social power that penetrates law *from the outside*. (emphasis is added, Habermas, 1996: 39)

As Habermas says, the idea of the rule of law initiates a motion that law departing from itself approaches to itself. It is a motion of “self-application of law”. It is law itself, to be referred to for making and implementing law. Law is evaluated through law, and connections between law and the social is supposed to be restricted or limited, but not totally suspended. The idea of the rule of law acknowledges a moment of closing of law to “uncontrolled social power”. “The facticity of legally uncontrolled social power” cannot penetrate law “*from the outside*”, and social power can only penetrate law through the ways that are set forth by law. Penetration of the social power into law does not and cannot change the essential principle of “self-application of law”. “Self-application of law” implies presence of an autonomous legal sphere that brings the “the facticity of legally uncontrolled social power” aside. Use of coercion is authorized in the theory of the rule of law, if it complies with the universal law of freedom. The principle of universality sets forth the condition of coercion, and consequently “legal rules posit conditions of coercion” (Habermas, 1996: 29). For the theory of the rule of law, these conditions of coercion are “conditions ‘under which the will

[*Willkür*] of one person can be unified with the will of another in accordance with a universal law of freedom” (Habermas, 1996: 29). Legal validity, say “the validity claim of law” is supposed to be “expressed in this internal ‘conjunction of the universal reciprocal coercion with the freedom of everyone’” (Habermas, 1996: 28, 29). Thus, the idea of the rule of law aims integrating different parts of the social body, through the normative mechanism of legal system, it proposes. The social body is supposed to be integrated through legal validity, which is founded on the idea of equality of human beings. The point is that, in formal conception of the idea of the rule of law, Kant’s concept of “universality” is reduced to “the *semantic* universality of abstract and general laws”, and is not interpreted as the universal will of people (emphasis is original, Habermas, 1986: 275). Habermas’s theory on discursive formation of legal norms opens the trajectory that is not focused in formal conception, and integrates two principles of universality expressed in autonomy of law and universality expressed in legislative will formation. Accordingly, he says that, given that there is no “religious or metaphysical support”, “the coercive law tailored for the self-interested use of individual” can serve to integrate the social body, only if “the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational *authors* of those norms” (Habermas, 1996: 33). Thus, positivity of law, rests on “the promise that democratic processes of lawmaking justify the presumption that enacted norms are rationally acceptable” (Habermas, 1996: 33). In this system, “the ‘conditions of coercion’ need only be perceived by the addressees as the occasion for norm-conformative behavior”, so that, “morally motivated obedience to the law, cannot be brought about by coercion” (Habermas, 1996: 29). According to this principle, one who acknowledges normatively valid rules, from moral point of view, is not anymore coerced when complying with concerned rules. Thus, Habermas, referring to Kant says that, “legal norms are at the same time but in different respects enforceable laws based on coercion and laws of freedom” (Habermas, 1996: 29). In a sense, he turns

Weber's conception of rationality of law upside down, and claims that "proceduralized law and moral justification of principles mutually implicate one another" (1986: 243). He says that the principle of autonomy of legal sphere is not contrary to the principle of democratic representation, since the arche that both the idea of the rule of law and the idea of democracy share, is the Kant's "universal law of freedom" (Habermas, 1996: 28, 29). He proposes to "look at moral argumentation itself as the adequate procedure of rational will formation (Habermas, 1986: 243). This perspective does not coincide with the "empirical approach", in which "the law is considered to be whatever acquires the force of law on the basis of legally valid procedures" (Habermas, 1996: 29). It proposes more than a mere empirical approach, since it opens two parallel lines in defining legal validity: "de facto validity or acceptance", and the "legitimacy or rational acceptability" (Habermas, 1996: 29). As a consequence, this system provides a guideline "for a rationally choosing actor who expects norms to be enforced", additionally, "the legal precept forms a de facto barrier, with calculable consequences in the case of a violation" (Habermas, 1996: 30, 31). In this condition, "free will" of the actor is limited by the norm which is the outcome of the free wills of those actors constituting the social body. Habermas narrates the principle that one realizes his-her free will through restricting it as follows:

On the other hand, for an actor who wants to reach an understanding with others about the jointly observed conditions for each's successful actions, the norm's claim to validity, along with the possibility of critically reexamining this claim, binds the actor's "free will" (*Willen*). (1996: 31)

Keeping the possibility of critically reexamining the norm's claim to validity, can be read as an "invitation" for obeying law (Habermas, 1996: 31). The democratic idea of substantive justice, rests on the principle that is presupposed for formal rationality of law. These two trajectories, both, rest on presumption of free and equal citizens (Habermas, 1996: 32). Thus, substantive approach of the rule of law always presupposes classical liberal rights, if these rights are annihilated, substantive justice cannot be maintained, and "without this

guarantee of private autonomy”, “something like positive law cannot exist at all” (Habermas, 1996: 455). Accordingly, those individuals who participate in democratic process of will formation, have to comply with certain basic principles of democratic will formation. Habermas expresses the concerned condition as follows:

Subjects who want to legitimately regulate their living together by means of positive law are no longer free to choose the medium in which they can realize their autonomy. (Habermas, 1996: 455)

Therefore, those who participate in democratic will formation already acknowledge the principles maintaining the autonomy of legal subjects, and the autonomy of legal order vis-à-vis the democratic legislative processes; otherwise one cannot mention presence of a process of democratic will formation. Habermas expresses this condition as follows:

They participate in the production of law only as *legal subjects*; it is no longer in their power to decide which language they will use in this endeavor. (emphasis is original, Habermas, 1996: 455)

Habermas implies a new conception of the rule of law. Accordingly, the idea of rule of law is presumed in democratic will formation. He calls this idea as “the demanding idea of the Rule of Law” (Habermas, 1986: 279). Thus, concept of “autonomy of legal system” implicitly presupposes democratic mechanisms of will formation. The autonomy has to be maintained, but autonomy cannot be acknowledged as a given fact, it has to be open to argumentation, so that one can discern the meaning of “autonomy of law” (Habermas, 1986: 279). Thus, Habermas proposes a demanding idea of the rule of law, which asserts, “the dimension in which the legally institutionalized mode of justification remain pervious to moral argumentation” (Habermas, 1986: 279). In other words, the idea of the rule of law, which is concretized in the constitutional state, is founded on the principle of evaluating normative validity of the facticity, and the evaluation can only be realized if normative self-understanding of the legal system is

maintained, through moral argumentation. While maintaining normative validity of the legal system demands “precautionary measures against the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding”, those precautionary measures cannot be closed off moral argumentation (Habermas, 1996: 39). How could such a perspective, integrating the idea of the rule of law and democracy, offer a model for functioning of the administrative system? Answering this question is utmost important for having an interpretation of Susurluk Affair, as a case of extra-legal activities of the state, from Habermasian point of view. Thus, following section aims to reach an answer to this question.

3.1.3.1. The Rule of Law and the Administrative System in Habermas’s Theory

Habermas’s conception of “communicative power”, which he borrows from Arendt, is the basis that his models regarding constitutional state, and administrative system of the constitutional state, are constructed on. Habermas, referring to Arendt’s concept of “communicative power”, proposes a model of collective will formation (1996: 147). Arendt’s concept of the power can be delineated as “the potential of a *common will formed* in noncoercive communication” (Habermas, 1996: 147). With Arendt’s words, “power corresponds to the human ability not just to act but to act in concert” (cited in Habermas, 1996: 148). Thus, human will is expressed as power of those who “act in concert”. Accordingly, no one can “posses” power, it “springs up between men when they act together, and it vanishes the moment they disperse” (Arendt, cited in Habermas, 1996: 147). According to Habermas, Arendt’s conception of power always presupposes inclusion of the other by whom departing from him-herself. However, this departure is not radically different from a departure for an object of cognition. This relation with the other, which is called “power” by Arendt, can be recognized as “reaching understanding to the capacity for instrumentalizing another’s will for one’s own purposes” (Habermas, 1996: 148). Thus, it springs from one’s inclination for instrumentalizing the other. One instrumentalizes the

other's will to his-her own purpose, through understanding it and using "the consensus-achieving force of a communication" (Habermas, 1996: 148). Then, the other is not be reduced to a mere object of one's will, and is not reduced to an object that one's will imposed upon, thus, this relation is radically different from the practice of violence. The other is included to whom trying to understand the other. According to this model, law has to be justified on the basis of communicative power, in other words: "if the sources of justice from which the law itself draws its legitimacy are not to run dry, then a jurisgenerative communicative power must underlie the administrative power of the government" (Habermas, 1996: 147). Habermas says that, "a communicative power of this kind can develop only in undeformed public spheres" (1996: 148). The public sphere, on the other hand is defined as a social phenomenon by Habermas (1996: 360). He defines the public sphere as "a network for communicating information and points of view" (1996: 360). He points out that while Arendt's concept can be employed for focusing the parallel between generation of communicative power and of political power, it does not explain "the administrative employment of *already* constituted power, that is, the process of exercising power" (Habermas, 1996: 149). Habermas adds that Arendt's concept does not "explain the struggle for access to administrative power", either (Habermas, 1996: 149). Habermas advances Arendt's theory and proposes a perspective for evaluating administrative power. Accordingly, he conceptualizes law as "the medium through which communicative power is translated into administrative power" (Habermas, 1996: 150). Constitutional state serves for translation of communicative power into administrative power, so that administrative system is empowered "within the framework of statutory authorization" (Habermas, 1996: 150). Administrative power should be "kept free of illegitimate interventions of social power (i.e., of the factual strength of privileged interests to assert themselves)" for an appropriate translation (Habermas, 1996: 150). Additionally, it "should not reproduce itself on its own

terms but should only be permitted to regenerate from the conversion of communicative power” (Habermas, 1996: 150). Habermas explains the mission of the constitutional state vis-a-vis the functioning of the administrative system as follows:

In the final analysis, this transfer is what the constitutional state should regulate, though without disrupting the power code by interfering with the self-steering mechanism of the administrative system. (Habermas, 1996: 150)

Thus, for a legitimate legal order, the constitutional state has to regulate administrative practices, so that they would comply with the legal code and serve the communicative power, expressed as a legal code. Remembering of Weber’s and Habermas’s conceptions of the rule of law and their reflections on administrative system would be helpful for the main purpose of these two theories of the rule of law. Let me now present main points of Weber’s and Habermas’s theories, so that extra-legal activities of the state could be interpreted from the point of these theories.

3.1.4. A Partial Conclusion on the Idea of the Rule of Law in Weber’s and Habermas’s Theories

As presented above, the idea of rule of law can be understood as an aim to give an answer to the question of legitimacy of law in an era that law is not legitimated on metaphysical grounds. The idea of the rule of law formulated either as the autonomy of legal sphere maintained through formal rationality of law, or as a part of democratic will formation. The preceding sections focus on these two perspectives in Weber’s and Habermas’s theories. According to the first formulation, the rule of law can be summed up in three principles regarding the legal order. These principles are presence of a systematized legal corpus, of general and abstract rules, which constitutes the legal corpus, and of an administration and judiciary bounded by these rules. These principles are referred for evaluating legitimacy of legal system, in general, and seldom for

evaluating legitimacy of political power. However, Weber conceptualizes rational legal order as one of the possible grounds of legitimizing domination, in general, and as the basis of legitimacy of the modern state, in particular. He conceptualizes the modern state as a legal order, which is legitimized on rational grounds. He says that formal-legal rationality is concretized in bureaucratic organization. However, he discusses the questions of official secrets, and of modern *raison d'etat*, too. Accordingly, bureaucracy has an inclination for demanding official secrets, though necessity of secrecy cannot be explained on functional basis, for each case. Weber criticizes those who demand use of informal methods by bureaucracy, and calls such an informal practice as modern form of *raison d'etat*. However, bureaucracy functions, in principle, rationally for Weber, and it has to be supervised by political leaders who may demand authorization for political decisions.

Habermas is critical of Weber's conception of formal rational legitimacy of legal order, which does not rest on morality. While Weber supposes that legal authority is legitimate because it is rationally constructed, Habermas criticizes this argument, and says that Weber's conception of 'rational' is not free from morality, but grounded on morality (1986). While Weber approaches to the idea of the rule of law as a basis of rational legitimacy, Habermas conceptualizes the idea as a precondition of democratic legitimacy. Habermas says that democracy and autonomy of legal sphere are not contradictory, but complementary. He says that law cannot be reduced to a mere political instrument, it always bears a moment of indisponibility, otherwise it cannot be legitimated. He proposes a theory of the rule of law, in which democratic legitimacy can only be grounded on the idea of rule of law. Thus, according to Habermas, coercion proposed by law can only be legitimized on the ground of normative validity of legal system, and normative validity of legal system can be maintained in accordance with communicative power, which converts into legal codes. Thus, administration has to comply with legal codes which supposedly reflect and have to reflect

communicative power, otherwise legitimacy that system is constructed on melts away.

In brief, both Weber's and Habermas's perspectives conceptualize the state as a legitimate legal order. However, how could one understand a case of extra-legal activities of the state from these perspectives that define the state as a legitimate legal order? As Susurluk and similar cases substantiate there are cases of extra-legal activities of the state in concrete, thus, how could these cases, particularly Susurluk Affair, be evaluated from these perspectives? Following section try to have such an interpretation.

3.1.5. Interpreting Susurluk Affair as a Case of Extra-Legal Activities of the State from the Viewpoint of Weber's and Habermas's Theories of the Rule of Law

For answering this question, this section focuses how extra-legal activities of the state are approached in Weber's and Habermas's theories of the rule of law, first. Then, it interprets Susurluk Affair as a case of extra-legal activities of the state in Weber's and Habermas's theories of the rule of law.

3.1.5.1. Extra-legal Activities of the State in Weber's and Habermas's Theories

How can one interpret Weber's and Habermas's theories of the rule of law in regard to extra-legal activities of the state and extra-legal forces of state? Is there a reference, or a reflection on extra-legal activities of the state in these theoretical standpoints? For Weber, the modern state functions through bureaucratic apparatus, even in periods of turbulence, and revolution. Thus, how could this perfect system operating in accordance with definite jurisdictional areas be distorted, and depart from these definite rules? Can one understand extra-legal forces of state from the standpoint of Weber's conception of formal legality that legitimizes use of physical force on rational ground? Bureaucracy functions according to certain principles, and bureaucrats has to comply with certain specifications, such as training, education, etc. Extra-legal forces, who are

not bureaucrats, and do not comply with those specifications distort rational and legal functioning of bureaucracy and legitimacy of legal authority. If there are extra-legal activities of the state, beyond rules governing bureaucracy, that means those activities cannot be legitimated on formal-legal grounds. Another important point is the issue of secrecy. Weber acknowledges necessity of secrecy and affirms this necessity.⁴⁷ However, he does not think that secrecy distorts formal-legal legitimacy. On the contrary, he proposes to regulate state affairs according to the principles of secrecy, and establish a formally-rational and legally guaranteed system of secrecy. Thus, necessity of secrecy cannot be interpreted as a question of extra-legal activities of state from Weber's point of view.

Weber's standpoint in regard to extra-legal activities of the state is presented above. Habermas's standpoint produces another conception of extra-legal activities of the state. For Habermas's theory of the rule of law, extra-legal activities of the state cannot be acknowledged, and cannot be accepted legitimate, since the constitutional state has to regulate the circulation of power through self steering mechanisms. Therefore, if the communicative freedom cannot be protected through necessary institutions; and the administrative power does not comply with communicative power expressed through the medium of law, that means a deficiency in legitimacy of legal order and of political rule. How could one understand Susurluk Affair in the light of these two approaches on extra-legal activities of the state?

⁴⁷ Weber (1968: 1431-1438) criticizes cases of disclosure of foreign policy issues by the monarch through private statements; and affirms necessity of secrecy.

3.1.5.2. Reading of Susurluk Affair as a Case of Extra-legal Activities of the State in Weber's and Habermas's Theories of the Rule of Law

Weberian reading of Susurluk Affair as a case of extra-legal activities of the state leads to interpreting Susurluk as a deficiency in formal legal legitimacy.⁴⁸ From Habermasian point of view, one may approach to Susurluk Affair in two ways. One may approach to Susurluk as a question of deficiency in communicative will formation and in institutionalization of use of communicative freedom and democracy; and as a deficiency in constitutional regulation of power. Following sections give Weberian and Habermasian interpretation of Susurluk Affair as a case of extra-legal activities of the state, so that it would be possible to locate Susurluk Affair in Weber's and Habermas's theories of the rule of law.

3.1.5.2.1 Weberian Reading of Susurluk Affair as a Case of Extra-legal Activities of the State: A Question of Legitimacy of the Legal Order

If one does not focus the character of the Turkish state, and the legal order, but acknowledges that Turkish state is a modern state in Weberian sense, such a presumption clears the way for a Weberian reading of Susurluk Affair.⁴⁹

⁴⁸ Legal case can be interpreted in a Weberian way, too. One may focus on the legal case, regarding Susurluk Affair and ask questions about role of formal rationality of the legal case. This question brings the question of influence of public opinion on the case, too. Weber emphasizes that, in principle, "a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means" (Weber, 1968: 979). However, rationality of bureaucracy may be distorted through democratic argumentation. Thus, if public opinion influences judges or administrators' rational evaluation of law, formal rationality of legal order might be distorted. With his words: "any intensive influence on the administration by so-called 'public opinion'" melts away the rational grounds of justice (Weber, 1968: 980). Therefore, it is problematic to accuse certain persons and demand substantive justice, according to Weber's theory of formal legal order.

⁴⁹ A Weberian reading of Susurluk Affair may call the question of if there was rationally regulated legal sphere in the period that Susurluk Affair had taken place. This question calls another question about character of the Turkish state, say if it is a modern state in a Weberian sense. Since any authority that is legitimized on the ground of rationality has to propose a legal framework of legitimacy, as it is proposed by the Constitution of the Republic of Turkey, one has to acknowledge that there is such an authority.

Accordingly, Turkish state operates in accordance with laws and regulations, say legal orders, in principle, and has a bureaucratic apparatus, which is hierarchically and monocratically organized, as it is set forth in the Constitution of the Republic of Turkey. Thus, bureaucracy operating in accordance with jurisdictional areas, defined by laws and regulations, has to comply with laws, and regulations. This apparatus has to maintain the monopoly of legitimate use of physical force, since the modern state is a legal organization, and “possesses an administrative and legal order subject to change by legislation” (Weber, 1968: 56); and it functions through administrative staffs, who hold monopoly of legitimate use of physical force. Then, has rationality of bureaucracy failed in Susurluk Affair? Could employment of someone who, by definition, is not a public official for conducting and carrying out state affairs, in regard to monopoly of physical force, be acceptable from the viewpoint of Weberian definition of the modern state? Could one understand transmission of monopoly of use of physical force to those who are not public officials? Weberian conception of the modern state, founded on premise of monopoly of legitimate use of physical force, which is delineated accordingly rational legal order, collapses in Susurluk Affair. While official forces of the state can be acknowledged as the bearers of impersonal authority of law, from Weberian standpoint, it is hard to recognize the status of concealed forces. Remembering that there were three such groups of people employed for fighting against the PKK, Weberian definition of bureaucracy could only understand one of those groups, which is composed of public officials. The first group, which was employed to fight against the PKK, was composed of members of Turkish army and police force. The second group was composed of villagers embraced by clans, but either paid or supported by the Ministry of Internal Affairs. The third group was composed of criminals. Thus, from Weberian point of view, neither villagers nor criminals cannot be acknowledged as part of legal-rational mechanism of administration. A village guard’s status is suspicious as well as Çatlı’ status from Weberian definition of the modern state.

According to Weberian conception of formal-legal legitimacy, one who obeys a public official, for instance to a policeman, does not obey an individual, he/she obeys the rules that concerned individual, as a public official, imposes. That's why, a power command that people comply with is impersonalized. However, this principle is not relevant for other groups which are composed of villagers and criminals, who were not member of the army or the police force. Çatlı and other private persons were not public officials, and they do not have a culture, an "ethos of office" in Weberian sense. Then, how can one evaluate the position of those who are not defined as competent according to laws and still permitted by competent bodies, such as Çatlı? Is he a person who qualify under general rules? What is his status regarding hierarchy of offices? Is the principle of official hierarchy relevant for those who are involved in Susurluk Affair? For instance, could one appeal to the corresponding superior authority, regarding Çatlı's acts? It is not easy to say that administrative apparatus held monopoly of legitimate use of physical force in compliance with laws and regulations, so physical force was not used in accordance with formal-legal legitimacy, in the context of Susurluk Affair.

Additionally, besides the question of extra-legal forces, such as criminals who were employed to fight against the PKK, there is a question of extra-legal activities of legal forces. In Weberian modern state, every single bearer of power command, such as a policeman or gendarme is legitimated as legal authority, through rational legal norms, which are expressed as abstract rules. Commands of a legal authority, on the other hand, are legitimate so long far as they comply with legal rules regulating these commands. Official jurisdiction areas that modern officialdom functions accordingly can be defined in the context of fighting against the PKK. Certain actions of officials are ordered according to laws or administrative regulations, such as regulations regarding working principles of gendarmerie. Related laws and regulations set forth the course of action that a gendarme can act through when carrying out a duty. Those who are competent to

use violence are supposed to act according to rules regarding their duties. Their competence is ordered by rules, too. Then, how could one evaluate Aĝar's behaviour in this legally defined framework? Did Aĝar follow general rules that were set forth a relatively stabile and clearly defined practice when he issued a fake green passport with authentic signature? How could extra-legal activities of a legal force, the *gendarmerie*, in the form of an extra-legal organization of JITEM, be interpreted in terms of Weberian conception of modern bureaucracy? These incidents cannot be acknowledged as legally legitimate from Weberian point of view. Since, if there is a deficiency in rules regulating functioning of the state in abstract and general manner, that means accepting different outcomes for different cases, so that the principle of equality of citizens before legal authority cannot be maintained, and the legal authority cannot be legitimized on formal-legal basis.

Another aspect of Susurluk Affair that should be interpreted from Weberian point of view is official secrets. For instance, Aĝar demanded a closed meeting for revealing information concerning Susurluk Affair, similarly Eken demanded a closed hearing for submitting information concerning missing arms; and a part of Savař's report was censured. How could these demands for secrecy in the context of Susurluk Affair be approached from a Weberian point of view? Have not official secrets paved the way for covering up Susurluk Affair? Weber acknowledges functional necessity of official secrets in specific areas such as military, foreign policy, etc. Then, according to Weber, one has to acknowledge functional necessity of certain official secrets regarding administrative offices, which were fighting with the PKK. He acknowledges need for secrecy in general, since "power interests of the given structure of domination toward *the outside*" can be protected through secrecy. Does not secrecy disturb legality and rationality of bureaucracy? Weber does not mention such a risk. According to Weber, official secrets are also demanded and maintained by bureaucracy, on the ground of power instincts of bureaucracy. Secrecy is normality, rather than exception for

Weber. However, admitting necessity of secrecy does not mean admitting necessity of extra-legal activities of the state from Weber's point of view. Thus, according to Weber, these spheres of secrecy have to be regulated jurisdictionally, too. From Weberian point of view, bureaucracy should be supervised by the parliament. For him, bureaucracy operates rationally and legally, even in extraordinary conditions, since Weber says that no extraordinary condition can distort rational functioning of bureaucracy (1968: 224).⁵⁰ Therefore, bureaucracy by definition, cannot act extra-legally. On the other hand, if a decision made by a small group, which is competent to decide on "sensitive political issues", secretly, that cannot be accepted legally legitimate if it is beyond legal limits. From Weberian point of view, even if certain political leaders behave according to legally regulated spheres of secrecy, they bear the burden of this decision, ask for authorization when necessary. Therefore, concept of official secrets cannot validate extra-legal activities and forces of the state from Weberian point of view. Bureaucracy functioning according to jurisdictional areas, monocratically organized have to comply with rules, and be supervised by the parliament, which also operates according to rules. Political leaders, on the other hand may "sacrifice the less important to the more important" and demand authorization, only according to relevant procedures. Thus, political leaders are responsible for decisions made in the legal framework. In brief, from Weberian point of view, Susurluk Affair is illegitimate on the basis of formal legal legitimacy.

⁵⁰ However, there is another question that has to be asked before the question of bureaucracy's compliance with law. One has to ask if there were "abstract, general, clearly defined" laws valid, legitimizing a power command, in provinces of the state of emergency. It is hard to answer this question, especially if one considers laws regarding the region of state of emergency.

3.1.5.2.2. Habermasian Reading of Susurluk Affair: A Deficiency in Self Steering Mechanisms of the Constitutional State

As it is presented above, there are two trajectories in Habermasian conception of the rule of law. The former is institutionalization of the use of communicative freedom, and latter is regulation of power through self-steering mechanisms of the constitutional state. How could Habermas understand extra-legal activities of the state, in Susurluk Affair? For instance, if one focuses on the Susurluk Affair, beyond the questions regarding background⁵¹ that paves the way for the Susurluk Affair, how could blowing up the headquarters of *Özgür Gündem* by security forces be understood from a Habermasian point of view? Though institutions of freedom of communication, and freedom of press are regulated by the Constitution of the Republic of Turkey⁵², it seems that these limitations that are set forth on use of freedom of communication are not admitted adequate for maintaining security of the country, by certain statesmen. Thus, it is difficult to assume that democratic mechanisms and the use of freedom of communication can be protected by the regulations that are set forth by the Constitution. Habermas (1996: 360) emphasizes the role of communication in reproduction of the lifeworld. From a Habermasian viewpoint, one can interpret this incident as illegitimate on two grounds. Accordingly, law cannot be interpreted as a mere instrument of politics, it has to be morally acceptable. Therefore, the state has to be established on morally accepted law, though law cannot be reduced to morality. Law cannot be entirely at the disposal of political authority, and has to

⁵¹ Could “the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational *authors* of those norms” (Habermas, 1996: 33) in the period that paved the way for Susurluk Affair? Can one mention a problem of morally motivated obedience to law in the concerned period? Those questions may be asked from Habermasian perspective and one may say that there was a problem of social integration regarding the background of Susurluk Affair. Possibly, there was a problem of constituting a collective free will, because of deficiency in undistorted public spheres, from Habermasian point of view.

⁵² Freedom of press is regulated in articles 28, 29, 30, 31 and 32 of the Constitution of the Republic of Turkey.

bear both moments of indisponibility and instrumentality. According to Habermas, “a law which has become completely at the disposal of politics would lose its legitimating force” (Habermas, 1986: 267). One may ask if there were communicative public spheres, so that different opinions could be expressed through the practices of lawmaking, and produced a communicative power.

The second trajectory of Habermasian conception of the rule of law is conversion of communicative to administrative power. Habermas conceptualizes law as “the medium through which communicative power is translated into administrative power” (Habermas, 1996: 150). According to Arendt’s concept of “communicative power”, Habermas refers, power appears when human beings act in concert. Power appears when one “reaching understanding to the capacity for instrumentalizing another’s will for one’s own purposes” (Habermas, 1996: 148). According to this model, laws have to be justified, and administrative power has to be legitimated through communicative power. Thus, the constitutional state has to provide the translation by interfering with the self-steering mechanism of the administrative system (Habermas, 1996: 150). Administrative power should be kept free of illegitimate interventions. Additionally, administrative power has not be permitted to depart from the communicative power, say for reproducing itself on its own terms. From Habermasian point of view, one would say that Susurluk Affair is a case of failure in the regulatory competence of the political system, which is supposed to maintain social integration through “constitutionally regulated circulation of power” (Habermas, 1996: 386). Thus, it means a very serious deficiency in legitimation of the political system, and leads the political system is to be “pulled into the whirlpool of legitimation deficits and steering deficits that reinforce one another” (Habermas, 1996: 386). Thus, according to Habermas’s conception of legitimacy, there is a deficiency in translation of communicative power to administrative power and a deficiency in the self-steering mechanism of the administrative system of the constitutional state, in Susurluk Affair. Blowing up *Özgür Gündem* is a precise

case that shows two facets of the question of legitimacy for Habermas. Thus, extra-legal activities of the state can only be recognized as a deficiency in legitimacy for Habermas. Since the political subjects cannot recognize themselves as authors of politics that they are subjected to, the administrative power, which departs from communicative power cannot be legitimized on democratic grounds. The deficiency in democratic legitimacy, on the other hand, rests on deficiency in self steering mechanisms of the constitutional state, in this manner, it is a deficiency in the rule of law, from Habermasian point of view. Therefore, all extra-legal activities of the state in the context of Susurluk Affair, such as employment of criminals, fake identity cards, etc. can be understood as a deficiency in the rule of law. From Habermasian point of view, one may say that though the constitutional state should regulate circulation of power, and should keep free administrative power of illegitimate interventions of social power, it could not succeeded in the context of Susurluk Affair.

3.1.6. A Partial Conclusion on Susurluk Affair and the Idea of the Rule of Law

What kind of framework can be constituted from the idea of the rule of law for approaching to Susurluk Affair? It provides a framework that is founded on the concept of legitimacy that is achieved through legality. Though the idea of rule of law, in general, is referred for interpreting legal cases and consistency and legitimacy of a given legal order, in Weber's conceptualization, it constitutes the rational ground upon which authority is legitimated. Weber's conception of the modern state, as the source of legitimate use of physical force, and as a political organization functioning through rationally organized administrative apparatus, offers a reading of Susurluk Affair as an anomaly. Habermas's theory provides a radically different view on the legitimacy of legal order. According to Habermas, coercion proposed by law can only be legitimized on the ground of the communicative power, which is concretized in legal codes. Thus, administration has to comply with legal codes which reflecting communicative power, otherwise, legitimacy that the legal system is constructed on melts away. When one focuses

Susurluk as it is revealed, it appears as a deficiency in a deficiency in constitutional state's regulatory mechanisms of power. Thus, administrative power has been used illegitimately, and paved the way for Susurluk Affair, as a case of extra-legal activities of the state.

As a conclusion, Susurluk Affair is illegitimate in Weberian and Habermasian readings.¹ Reasons of supposed illegitimacy, on the other hand, are different. These two standpoints in the rule of law tradition provide could not provide a view of insider, so that one may understand Susurluk and similar cases. Though the modern state is established as a legal institution, Susurluk Affair and similar cases show that it may function beyond legality. Legal positivism may provide a perspective that one may evaluate Susurluk Affair beyond the question of legitimacy. While the theory of the rule of law emphasizes role of legitimacy of the legal order, legal positivism intends to theorize the actual operation of the legal order, beyond the questions of legitimacy. Hans Kelsen is a distinguished theorist of the positivist approach to law. Kelsen's 'pure theory of law' is a prominent reference in this perspective. Possibly, Kelsenian legal positivism, which understands the state as a legal institution beyond the question of legitimacy, may provide a view of the Susurluk Affair, as a case of extra-legal activities of the state. Therefore, the next section focuses on Kelsen's "the pure theory of law" and intends to interpret Susurluk Affair, as a case of extra-legal activities of the state from this point of view.

3.2. Interpreting Susurluk Affair as a Case of Extra-Legal Activities of the State from the Viewpoint of Kelsen's Legal Positivism

How could Susurluk Affair be approached, as a case of extra-legal activities of the state, from the point of Kelsen's theory of state and law? This section presents and discusses Kelsen's view on the idea of the rule of law and basic premises of Kelsen's "pure theory of law", and Kelsen's conception of the state. Furthermore, it evaluates Kelsen's pure theory of law in regard to extra-legal activities of the state and tries to have a Kelsenian reading of Susurluk Affair as a

case of extra-legal activities of the state for locating Susurluk Affair in legal-political theory.

3.2.1. Kelsen's View on the Idea of the Rule of Law his Legal Positivism

Though Kelsen admits that the concept of the rule of law in general refers to certain features such as; the judiciary and the executive authority are bounded by the laws that are set forth by a parliament elected by a public suffrage, members of the parliament are responsible for their actions, courts are independent, certain freedoms of citizens, particularly freedom of religion and conscious, and freedom of thought and expression are granted by laws, he says that any state is a rule of law (Kelsen, 2000: 452). He claims that any state is a rule of law, and expression of 'rule of law' is not significant indeed. The standpoint of the pure theory of law, thus, is not normative evaluation of law, and in this respect it is radically different from Weber's and Habermas's theories. It is different from Weber's theory, since it does not bring the question of legitimacy of formal-rational law, and it is different from Habermas's perspective, since it does not bring any conception of normative validity of law. In this respect, it also denies normative conceptions of law on the basis of natural law. Furthermore, Kelsen's (1945) theory challenges political definitions of legal sphere, and insists for definition of the state and the political sphere in terms of legal order. Indeed, he claims that the pure theory of law is a "scientific" theory of law. "Scientific" character of pure theory of law is constructed through refusal of normative and political attributes of law. Focusing these points one by one would help to understand basic premises of Kelsen's pure theory of law.

Kelsen's (1945) view of law is radically different from Weber's and Habermas's views, since there is no question of legitimacy of legal order for him. Thus, it is different from natural law tradition, too. He criticizes the theoretical perspective of natural law tradition and emphasizes that justice and jurisdiction must be separated. Kelsen (1945) claims that his theory is scientific for it excludes

concerns on ideologies, morality and justice. The pure theory of law has no room for judgments of morality and politics, either, since they are based on ideologies for him: "moral and political judgments of value and, in particular, judgments of justice, are based on ideologies which are not, as juristic judgments of value are, parallel to a definite social reality" (Kelsen, 1945: 49). Morality and politics are equally valueless for the pure theory of law. He says that though moral and political judgments "intent to express an objective value" and they suppose that "the object to which they refer is valuable for everybody", say "an objectively valid norm", they cannot be verified by facts (Kelsen, 1945). Therefore, moral and political judgments are not derived from real situation, but from subjective judgments for Kelsen, since he says that content of moral and political judgments of value is "determined only by a subjective wish of the subject making the judgment" (1945: 49). The question of legitimacy of law is totally out of consideration for the pure theory of law, since "the theme of a pure theory of law is the real law, created by human beings" (Kelsen, 1945: 13).

Therefore, the pure theory of law is not a normative theory: "it presents the law as it is, without defending it by calling it just, or condemning it by terming it unjust" and "seeks the real and possible, not the correct law" (Kelsen, 1945: 13). The pure theory of law excludes the concept of justice for it is not a scientific concept, since positive law is defined as "law as distinguished from justice" by Kelsen (1945: 5). He emphasizes that "law and justice are two different concepts" (Kelsen, 1945: 5). Therefore, a science of positive law must be clearly distinguished from a philosophy of justice (Kelsen, 1945: 5). He says that the value of law and the value of justice are radically different, while the former is objective, the latter is subjective, and "subjective" values have to be removed from law, if they cannot "be tested objectively by help of facts" (Kelsen, 1945: 49).

According to this principle, judgments of justice, cannot be tested objectively, therefore, "a science of law" cannot have a room for them (Kelsen, 1945: 49). He says that the exclusion of justice from law rests on the fact that

norms of justice cannot be evaluated in regard to a certain social reality (Kelsen, 1945: 49). Thus, he claims, questions about justice cannot be answered scientifically (Kelsen, 1945: 5). That's why; Kelsen's "pure theory of law" excludes interpretation and evolution of laws from the viewpoint of justice. Accordingly, "if there were an objectively recognizable justice, there would be no positive law and hence no State; for it would be necessary to coerce people to be happy" (Kelsen, 1945: 13). The problem with "the tendency to identify law and justice", on the other hand, is "the tendency to justify a given social order" and this tendency is a political one, for Kelsen (1945). His emphasis on relativity of justice is an expression of premise of philosophical relativism in Kelsen's theory of law. He opposes the view that there is a transcendental just order: "it is, in fact, nothing but euphemistic paraphrase of the painful fact that justice is an ideal inaccessible to human cognition" (Kelsen, 1945: 13). Such an attempt of excluding of justice, on the other hand, clears the way for definition of justice that is founded on positive law and legality. Kelsen asserts that there is a need for "to withdraw the problem of justice from the insecure realm of subjective judgements of value, and to establish it on the secure ground of a given social order" (1945: 14). The power of the positive law, on the other hand, is produced through the coercive character of law, since "what distinguishes the legal order from all other social orders is the fact that it regulates human behavior by means of a specific technique" (Kelsen, 1945: 13). The concerned technique is the technique of use of violence in execution of law. According to Kelsen, "if we do not conceive of the law as a specific social technique, if we define law simply as order or organization, and not as a coercive order (or organization), then we lose the possibility of differentiating law from other social phenomena" (1945: 26). However, this assertion does not lead to political definition of the pure theory of law. He challenges political definitions of law, too.

Kelsen's theoretical framework on relation between the state and law challenges all the approaches which presume the state and law as separate

entities. Accordingly, the dichotomy between the state and law vanishes if it is acknowledged that the state is a relatively centralized oppressive order and the legal personality of the state is an outcome of personalization of this oppressive order (Kelsen, 2000: 445). Though he supposes that the jurisdiction is separated from value judgments and submitted to the political authority, he challenges political definitions of jurisprudence, and demands “complete separation of jurisprudence from politics” in the name of “a science of law”. However, political authority creating the law may not demand “a purely scientific cognition of its products, free from any political ideology” (Kelsen, 1945: xvi). Similarly, opponents of the law creating authority, “the forces tending to destroy the present order and to replace it by another one”, may not “have much use for such a cognition of law either” (Kelsen, 1945: xvi, xvii). Differences between the political conceptualization and scientific conceptualization of law are obvious for Kelsen. The pure theory of law, he says, is the scientific essence of law because it is anti-ideological, with his words: “it is precisely by this anti-ideological character that the pure theory of law proves itself a true science of law” (Kelsen, 1945: xvi).

How can such a view be put forward after admitting instrumental character of law, and supposing that law is significant as far as it is supported by threat of violence? Is ‘the pure theory of law’ just a normative theory that has no claim of reflecting the actual life? Is it just an idealistic whip for Kelsen? Kelsen thought that his theory is significant for concrete life, say, it can and must be applied. However, he admits that “the ideal of an objective science of law and State, free from all political ideologies, has a better chance for recognition in a period of social equilibrium” (Kelsen, 1945: xvii).⁵³ Thus, though he says that any state is a

⁵³ Kelsen develops the theory for an Anglo-American world, where he supposes that the political power is better stabilized. He says that “pure theory of law” can be better applicable in the Anglo-American world:

It seems, therefore, that a pure theory of law is untimely today, when in great and important countries, under the rule of party dictatorship, some of the most prominent representatives of jurisprudence know no

rule of law, and law has to be separated from politics, he valorizes democracy and political relativism. Indeed the pure theory of law is an outcome of Kelsen's political preference. He tries to construct a legal theory that defines the legal sphere and law as "impartial", so that relation among human beings can be appropriately reflected to legal sphere. Therefore, he presumes a relativist point of view, and this presumption paves the way both for valorization of democracy and for construction of a "impartial" theory of law, though these two outcomes seem contradictory. Accordingly, philosophical and political relativism is founded on presumption that there is no absolute good; political absolutism, on the other hand, has parallelism with theological definition of the World as an absolute entity (Kelsen, 1945: 284). Defining the state as an absolute entity independent of its subjects leads a totalitarian perspective of politics for Kelsen (1945). He says that there is a parallelism between philosophical and political absolutism as well as between philosophical and political relativism (Kelsen, 1974: 25). Accordingly, a totalitarian political philosophy is founded on an absolutist epistemology, and a democratic political philosophy is founded on relativist epistemology (Kelsen, 1974). He narrates the parallelism between democracy and philosophical relativism as follows: "for just as autocracy is political absolutism and political absolutism is paralleled by philosophical absolutism, democracy is political relativism which has its counterpart in philosophical relativism" (Kelsen, 1974: 25). In political relativism legislation means "to determine the contents of a social order . . . according to what these individuals, or their majority, rightly or wrongly believe to be their best" (Kelsen,

higher task than to serve – with their "science" – the political power of the moment. If the author, nevertheless, ventures to publish this general theory of law and State, it is with the belief that in the Anglo-American world, where freedom of science continues to be respected and where political power is better stabilized than elsewhere, ideas are in greater esteem than power; and also with the hope that even on the European continent, after its liberation from political tyranny, the younger generation will be won over to the ideal of an independent science of law; for the fruit of such a science can never be lost. (Kelsen, 1945: xviii)

1974: 27). Foundation of this principle is the presumption that “there is no absolute answer to the question as to what is the best, if there is no such a thing as an absolute good” (Kelsen, 1974: 27). The relativist perspective legitimizes only the view of the majority, since if “it is recognized that only relative values are accessible to human knowledge and human will, then it is justifiable to enforce a social order against reluctant individuals only if this order is in harmony . . . with the will of majority” (Kelsen, 1974: 28). Kelsen claims that the relativist perspective clears the way for discussion, and compromise: “only if it is not possible to decide in an absolute way what is right and what is wrong is it advisable to discuss the issue and, after discussion, to submit to a compromise” (Kelsen, 1974: 28). The relativist philosophy, thus, paves the way for a democratic political regime, which means coincidence of subjects’ will and the legal order for Kelsen. In other words, “democracy means that the ‘will’ which is represented in the legal order of the State is identical with the wills of the subjects” (Kelsen, 1945: 284). Therefore, he insists that democracy makes those who are subject to legal order, politically free, since they participate the creation of the legal order they are subject to (Kelsen, 1945: 284). He has a Kantian point of view, and supposes, as Habermas does, coincidence of what one “‘ought to’ do according to the social order” and what one “‘wills to’ do” makes an individual free (Kelsen, 1945: 284). Absolutist philosophy, on the other hand, is a belief that leads “to a situation in which the one who assumes to possess the secret of the absolute good claims to have the right to impose his opinion as well as his will upon the others who are in error” for Kelsen (1974: 28). This view bears the danger of legitimizing punishment of those who are supposed to be in error for him (Kelsen, 1974: 28). These presumptions about value of political relativism, on the other hand, are not emphasized in the general structure of the pure theory of law. In this point, his theory is radically different from Habermas’s theory. Kelsen intends to incorporate political relativism into the pure theory of law, which is presumed “impartial”, and in this sense “objective” and “scientific”. His theory of law is

grounded on philosophical and political relativism. He defines metaphysical premises about democracy and totalitarianism. His approach of the state is implicitly founded on premises that the idea of democracy is founded on. He explains the meaning of preference of the pure theory of law as follows:

Diametrically opposed to this absolutistic theory of the state is the one which conceives of the state as a specific relation among individuals, established by a legal order or, what amounts to the same, as a community of human beings constituted by this order, the national legal order. (Kelsen, 1974: 25)

Thus, “the pure theory of law” is an expression of a political standpoint, which is defined against the metaphysical conception of law, that leads to totalitarianism, for Kelsen. It can be argued that, though he definitely wants to exclude politics from legal sphere, he makes a political preference in conceptualizing the state as a legal institution. However, Kelsen abstains from directly integrating his standpoint of political relativism and democracy into the pure theory of law. Additionally, he admits, “legality is sometimes better ensured under a comparatively autocratic organization of administration than under a radically democratic one” (Kelsen, 1945: 300).⁵⁴ Though he valorizes democracy and political relativism, he denies to reflect this principle directly to the pure theory of law, rather aims to have a “scientific” theory of law, distinguished from morality and politics.

For Kelsen, the state cannot be separated from law, because there is no such entity as the state beyond law. He opposes to the approaches on duality of the state and law, that conceptualize state and law as two different objects. He says that what is imagined behind the law in these theories is “its hypostatized personification, the State, the god of the law” (Kelsen, 1945: 191). He criticizes this approach, for it conceptualizes the state not as merely a group of individuals; but

⁵⁴ Then, democracy is not defined as a premise of legality, it is rather an optional method since, “when legislation is democratic, the best method of guaranteeing legality of execution is democratic, too.” (Kelsen, 1945: 300)

as “more than the sum-total of its subjects” (Kelsen, 1975: 24). Kelsen challenges this dualism and claims that “this dualism is theoretically indefensible” (1945: 182). The reason of denying the dualism of state and law is that, “the State as a legal community is not something apart from its legal order, any more than the corporation is distinct from its constitutive order” for him (Kelsen, 1945: 182). His conception of the state is founded on the premise that there is nothing beyond the norms and individuals when the state is concerned. However, “the dualism of law and State is an animistic superstition” for Kelsen (1945: 191). He says that one can mention “the only legitimate dualism here is that between the validity and efficacy of the legal order” (Kelsen, 1945: 191). Thus, one can translate the duality of law and the state into a simple difference between “the validity of the legal order” and “the efficacy of the legal order”. He emphasizes that from the point of epistemology, dichotomy between the legal personality of the state and the legal order and the dichotomy between God and the World are similar (Kelsen, 2000: 445).⁵⁵ He challenges this dichotomy, and tries to materialize the World as an integrity. The pure theory of law, on the other hand, is founded on the positive law that is an outcome of the real situation, and does not include metaphysics of the law, for Kelsen (1945). Accordingly, only positive law can be an object of science; say, “object of a pure theory of law, which is a science, not metaphysics, of the law” (Kelsen, 1945: 13). He assumes that the pure theory of law, in this sense, a realistic and empirical theory and does not intend to evaluate the positive law (Kelsen, 1945: 13). The premise of positive law, thus, is founded on expelling the metaphysical remnant from the law for constructing a “scientific” theory of law. However, this “scientific” theory defines law as a medium that equal individuals enter into relation, and is founded on certain political premises as

⁵⁵ There are two levels in definition of the state as a legal order, for Kelsen (1945). For the first one the state is a legal order of the people, say the people is organized as a legal order. For the second one, on the other hand, the legal order only covers legal organization of government. He criticizes the latter perspective on the ground that it deifies the state and it employs “concept of sovereignty serving the purpose of this deification of the state which implies the worship of the ruler as a god-like being” (Kelsen, 1974: 24).

presented above. Could Kelsen's scientific theory of law provide a view of Susurluk Affair, as a case of extra-legal activities of the state? Kelsen's theory is promising for understanding Susurluk Affair, since he says "the theme of a pure theory of law is the real law, created by human beings" (Kelsen, 1945: 13). Therefore, the pure theory of law, which "presents the law as it is, without defending it by calling it just, or condemning it by terming it unjust" and "seeks the real and possible, not the correct law" (Kelsen, 1945: 13) should reflect and explain real and possible phenomena, which appears in reality, say extra-legal activities of the state. Thus, the next section focuses Kelsen's conception of state as a legal institution, for evaluating a case of extra-legal activities of the state from his conception of state.

3.2.2. Kelsen's Conception of the State

Could all properties of the state "be presented as a legal order"? The question of "could the state be limited to its legal order?" is a wrong question for Kelsen; because one cannot assume any remnant of the state beyond the legal order. "The State as social reality falls under the category of norms; it is a system of norms, a normative order" for Kelsen (1945: 182). Kelsen's view is grounded on conceptualization of the state as a legal order.⁵⁶ He (Kelsen, 2000: 429) says that

⁵⁶ Kelsen (1945) says that conceptualizing the state as a social organization is not significant, because the state cannot be covered by the concept of the 'social'. He inquires those approaches conceptualizing the state a 'social reality', or a 'territorial unity', or an expression of the peoples' 'collective interest', too; and concludes that neither of these conceptualizations cover what the state is. The first approach that conceptualizes a sociological foundation for the juristic concept of state supposes that "just as there is the juristic concept of person beside the biological-physical concept of man, a sociological concept of State" exists beside its juristic concept and even to be logically and historically prior to the latter". (Kelsen, 1945: 182) The state cannot be conceptualized as a territorial unity either, just because this supposed territorial unity of the state has no significance if it is not derived from a legal unity: "the unity of the State territory, and therefore, the territorial unity of the State, is a juristic, not a geographical-natural unity. For the territory of a State is in reality nothing but the territorial sphere of validity of the legal order called State". (Kelsen, 1945: 208)

Kelsen (1945: 85) says that the ideological purpose of the approach that considers the real unity of the State as 'collective interest' is undeniable, because "in reality, the population of a State is divided into various interest-groups which

the state can be conceptualized as a corporation from the point of law. It is a corporation created by the national legal order. Legal order creates the community of the state, not vice versa: "the State is the community created by a national (as opposed to an international) legal order" (Kelsen, 1945: 181). Kelsen says that only such legal proceedings that are related to possessions of the state can be asserted as proceedings of the state (2000: 445). He challenges the doctrine, which supposes that the state as a social reality antecedes law. He says that it is impossible to suppose a state that is not subject to law. He claims that the state can only exist as the state's actions that are carried out by individuals and attributed to the state as a legal personality. And such an attribution can be made by referring to the legal norms that prescribe these actions. Any state does not exist before law. Law regulates behaviors of human beings, and makes them subject to law (Kelsen, 2000: 450). He says "the State as juristic person is a personification of this community" or a personification of "the national legal order constituting this community" (Kelsen, 1945: 181). That's why, "from a juristic point of view, the problem of the State" "appears as the problem of the national legal order" (Kelsen, 1945: 181).

Kelsen's theory asserts that the people of a state are subject to one and the same legal order. He points out that the legal order, to which those people are subjected, is the essential reference in defining the unity of the people of a state (Kelsen, 2000). That's why community of the state is established by the legal order. Such a community is not formed through voluntary wills of the people, but through a certain legal order. He asserts that "the State is a politically organized society because it is a community constituted by a coercive order, and this coercive order is the law" (Kelsen, 1945: 189, 190). Then, one cannot formulate the state as a combination of a political element, say authority to use of force, and a legal element, conditions of use of force, "since it suggests the existence of two

are more or less opposed to each other". He (Kelsen, 1945: 192) concludes "that there is no sociological concept of the State different from the concept of the legal order."

separate entities where there is only one: the legal order" (Kelsen, 1945: 190, 191). So, according to Kelsen (1945), the "political" can be translated to the "legal", and it is nothing more than the legal, too. He answers the question of "in what does the "political" character of this order lie?" as "the State is a political organization because it is an order regulating the use of force, because it monopolizes the use of force" however, he reminds that this "is one of the essential characters of law" (Kelsen, 1945: 189, 190). Political power, on the other hand, is "the efficacy of the coercive order recognized as law" (Kelsen, 1945: 190, 191). The state as a political organization of a society is a legal order, and definition of the political is founded on effectiveness of this order.⁵⁷ Then, the "political" is grounded on the "effectiveness" of execution of laws. He says that organization of the executive power has to guarantee the legality of execution. This responsibility is defined on the level of organization:

Since execution, by its very definition, is execution of laws, the organization of the executive power has to guarantee the legality of execution. The administrative and judicial function has to conform as well as possible with the laws enacted by the legislative organ. (Kelsen, 1945: 299)

What is the role of the state in this legal order, or can the state as "the authority from which the legal order emanates . . . be subject to this order and, like the individual, receive obligations and rights therefrom?" (Kelsen, 1945: 197) Answering this question is crucial for a Kelsenian reading of Susurluk Affair. Briefing Kelsen's view on how the state receive obligations and rights in regard to a given legal order would be helpful for such a reading. Kelsen refuses conceptions of the state based on simulation of a human being. The state cannot be conceptualized as a person, beyond the legal norms it creates. Since Kelsen conceptualizes the state as a legal order, "all problems arising within a general theory of the State must be translatable into problems that make sense within the

⁵⁷ However, any legal order cannot be defined as a state. For Kelsen, a legal order can be called as a state if it has a centralized structure of legal order (2000).

general theory of law” (Kelsen, 1945: 207). Could the state be limited to its legal order? He claims that the state is subject to the legal order which produces it.

The state is composed of the norms and individuals who are creating and implementing these norms for Kelsen (1945). He asserts that “prisons and electric chairs, machine guns and cannons ... are all dead things which become instruments of power only when used by human beings” (Kelsen, 1945: 190). The point is that “human beings are generally moved to use them for a given purpose only by commands they regard as norms” (Kelsen, 1945: 190). Political character of the state lies in its coercive character and the law sets forth the conditions of use of power.⁵⁸ There is nothing more beyond the figurative expression of “the state” as a “subject”. Kelsen (1945) criticizes the perspectives defining the state as a separate subject. The conception, which attributes features of a human being to the state, has no room for “the idea of an auto-obligation of the State, . . . since the authority from which an obligation springs can be only normative order, and it is impossible to impose duties or confer rights upon an order” (Kelsen, 1945: 198). That’s why, it is impossible to think about auto-obligation of the state, but this premise does not lead *de facto* justification of actions of those persons employed by the state. Does Kelsen set forward an alternative formulation for defining obligations and rights of the state? Does he propose anything different from the view he criticizes? What are the obligations and rights of this legal order, the state?

The state is constituted of norms, and it is subject to these norms, since “law, in reality, is created by human individuals”, those “individuals who create law can undoubtedly themselves be subject to law” for Kelsen (1945: 198). Therefore, the state is subject to law as long as individuals who create and

⁵⁸ Kelsen says that “power in a social or political sense implies authority and a relation of superior to inferior” (1945: 190). However, “social power is always a power which in some way or other is organized. The power of the State is the power organized by positive law – is the power of law; that is, efficacy of positive law” (Kelsen, 1945: 190).

implement the law as organs of the state organs. The state is subject to law “only insofar as” those individuals “act in accordance with the norms regulating their law-creating function” (Kelsen, 1945: 198). These individuals are “organs of the State; and law is created by the State only insofar as it is created by a State organ, and that means, as law is created according to law” (Kelsen, 1945: 198).⁵⁹ This definition is grounded on a simple premise of “to be legally obligated or to be legally authorized (entitled) means to be the object of legal regulation” (Kelsen, 1945: 198). He reminds that “only human beings, or – more correctly – only human behavior, can be the object of legal regulation” (Kelsen, 1945: 198). Thus, human beings and human behaviour are not expelled from the sphere of law, but are encompassed in the pure theory of law. He argues that “there is not the slightest reason to doubt that human beings, even in their capacity of State organs, can and must be subjected to law” (Kelsen, 1945: 198).⁶⁰ The state can be a subject of obligations and rights due to individuals working as state organs.⁶¹ One who asserts that “the state cannot have obligations and rights as other legal persons” does not have to acknowledge that “the government, the men representing the State, are not bound by legal norms in their relation to the citizens” (Kelsen, 1945: 198). Then, the state as a legal order and persons employed, empowered for implementing the norms of the legal order is distinguished in Kelsen’s (1945) theory.

Kelsen deals with the question, if an individual can represent the state. He

⁵⁹ Then, according to Kelsen, “the difficulty of conceiving of obligations and rights of the State does not consist – as the traditional theory assumes – in the fact that the State, being the law-creating power, cannot be subjected to law”. (1945: 198)

⁶⁰ An argument claiming the opposite is not an argument for absolutism, it is just a theoretical problem for Kelsen: “to deny the possibility of an auto-obligation of the State does not imply an argument for absolutism” (1945: 198).

⁶¹ Kelsen criticizes opposite views:

But the statement that the State cannot be a subject of legal obligations or legal rights in the same sense as individuals are subjects of obligations and rights has not the meaning which some writers attribute to it, when they advocate the thesis that the State, by its very nature, cannot be subjected to law. (1945: 197,198)

asserts that “certain actions of individual human beings are considered as actions of the State” and asks “under what conditions do we attribute an action of an individual to the State” (1945: 191). How can an act or a duty of an individual be supposed to be an act, or duty of the state? For Kelsen, “obligations and rights of the State are the obligations and rights of those individuals who . . . perform a specific function determined by the legal order”, since those people are considered as the state organs (Kelsen, 1945: 199). From the legal point of view, he says, a duty can only be acknowledged as a duty of the state if it is defined so in the legal order (Kelsen, 2000: 431). In general, a duty proposed by a legal order can only be attributed to the state if it is carried out by a person who is employed for this task due to a method that is prescribed by the legal order (Kelsen, 2000: 432). Thus, if an action carried out by a state organ does not comply with the legal order, this action cannot be imputed to the state. A state organ, on the other hand, may create norms if it complies with the superior norms. He proposes a multiple process of creation of norms. Therefore, an individual operating as a state organ creates lower level norms which have to comply with higher level norms.

Kelsen’s (1945) theory defines creation and implementation of law as integrated practices. It supposes a dynamic process for creation of the legal order. Law is re-created in implementation. Therefore, question of how such a legal order is created cannot be answered by focusing just legislation process (Kelsen, 1945). The distinction between the three powers of the state is indeed the expression of the difference between the creation and application of law, for Kelsen (1945). Accordingly, functions of the state are identical with functions of law, and separation of powers indicates differentiation of legislative and executive functions of state.⁶² He says that “the differentiation of the executive power into a governmental (political) and an administrative function has . . . a

⁶² Kelsen emphasizes that “where all the functions of the State are centered in the person of an absolute monarch, there is little ground for the formation of a concept of legislation as a function distinct from other functions of the State, especially if general norms are created by way of custom” (1945: 256).

political rather than a juristic character" (Kelsen, 1945: 256). Thus, "from a legal point of view, one might designate the whole domain of the executive power as administration" (Kelsen, 1945: 256). Accordingly, there are two main functions of the state, these are producing and implementing law.⁶³ Kelsen defines members of the parliament as a part of the state as legal order, and the parliament is a state agency, since they carry out a duty, in the framework of specialized activity, defined in the concerned legal order⁶⁴ (2000: 437). A state organ "is an individual fulfilling a specific function" for Kelsen (1945: 192). Therefore, "the State as a subject of imputation, the State as acting person, is only the personification of the total or partial legal order" (Kelsen, 1945: 194). He formulates these functions and administrative process as a part of both execution and creation of law. Thus, the administrative execution as a process is as powerful as the judicial function in interference to life and property. It means that even if "the constitution prescribes that no interference with the property, freedom, or life of the individual may take place except by 'due process of law'", "this does not necessarily entail a monopoly of the courts on the judicial function" (Kelsen, 1945: 278). "The administrative procedure in which a judicial function is exercised" as well as courts can interfere of life and property "in such a way that it corresponds to the ideal of 'due process of law'" (Kelsen, 1945: 278). Such an interference is supposed to be done on behalf of public safety: "administrative organs are authorized to

⁶³ According to Kelsen, separation of powers means separation of executive and legislative powers:

The concept of "separation of powers" designates a principle of political organization. It presupposes that the three so-called powers can be determined as three distinct coordinated functions of the State, and that it is possible to define boundary lines separating each of these three functions from the others. But this presupposition is not borne out by the facts. As we have seen, there are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coordinated but sub- and supra-ordinated. (1945: 269)

⁶⁴ The parliament that enacts the penal code, and the citizens who elect the parliament, are organs of the State, as well as the judge who sentences the criminal and the individual who actually executes the punishment (Kelsen, 1945).

interfere with the property or freedom of the individual in a summary procedure, when such interference is the only way of quickly averting dangers to public safety" (Kelsen, 1945: 279). He says that "in all civilized States" administrative organs are "authorized to evacuate buildings in order to stop the spread of fires, to slaughter cattle stricken with certain diseases, to intern individuals whose physical or mental condition is a danger to the health or life of their fellow citizens" (Kelsen, 1945: 279). Acts carried out by "the police that are empowered to carry out such coercive acts" "are often no less important to the individuals concerned than sanction executed in a judicial procedure or coercive acts preparatory to such sanctions as, e.g., the imprisonment of individuals accused or suspected of a crime" (Kelsen, 1945: 279). According to Kelsen, "the legal order makes an exception to the rule that coercive measures are allowed only as sanctions" "by authorizing administrative organs to perform such coercive acts which are not sanctions" (1945: 279). If these actions are not stipulated by law they are delicts for Kelsen: "these encroachments upon the property or freedom of the individuals are not sanctions, but they would be delicts if they were not stipulated by law" (1945: 279).

For understanding Kelsen's (1945) concept of "stipulation by law", one has to understand his proposition of hierarchy of norms. According to Kelsen, norms are created either through a decentralized or through a centralized method. According to the first method, norms are created case by case, and they accumulate as law. Customs and traditions can also be accepted as a part of the system, if they are validated by an authority. According to the second method, on the other hand, norms are created in a hierarchical order. The basic norm creates the founding norms and these norms define general norms, say statutes. Norms are also created in the process of implementation of these norms (Bobbio, 2000). While "the general norms created by the legislative body are called 'statutes'", "the general norms issued by organs of the executive power" are usually called "ordinances" or "regulations" (Kelsen, 1945: 257). This process is defined

according to a span of hierarchy of norms: "since the law regulates its own creation, the creation of general norms, too, must take place in accordance with other general norms" (Kelsen, 1945: 258). The process of creation of general norms, say "the legislative process", "is divided into at least two stages" (Kelsen, 1945: 258). One is "the creation of general norms which is usually called legislation (but comprises also the creation of customary law), and the second is "the creation of the general norms regulating this process of legislation" (Kelsen, 1945: 258). These general norms "form the essential contents of that normative system which is designated as the 'constitution'" (Kelsen, 1945: 258). This system can be recognized as a hierarchy of norms. The modern concept of legislation requires "the deliberate creation of general norms by special central organs" (Kelsen, 1945: 256). He says that the modern concept of legislation proposes that norms are created by a representative body "an organ which was characterized as the representative of the people or a class of the people" (Kelsen, 1945: 256). Parliamentary democracy is the essence of creation of legal norms in modern sense. The basic principle for creating norms is setting them in compliance with the hierarchy of norms. Persons who have the power of creating norms are those who are assigned by an authority for Kelsen (Bobbio, 2000: 468). If an action is considered within the context of execution of the legal order, it can be admitted as an act of the state (Kelsen, 1945: 192). Both legislative and executive actions are actions of the state and both can be admitted as executive actions; in a wider sense, the legal order is executed by all those actions which sanction-stipulating norms are created" (Kelsen, 1945: 192). From legal point of view, a person who carries out a duty for the state is responsible before the state. When an administrative affair is defined as a duty of an organ, this organ has a discretionary power that is granted by the government. This power may be defined in an exact or loose manner. It may be defined so loosely that obligations of the organ may seem vanished (Kelsen, 2000: 435). But in the last instance, since the state is constructed of norms, any action of an individual cannot be defined as

an act of a state organ if her/his behavior does not comply with the legal order, then, her/his action cannot be imputed to the state.⁶⁵ Kelsen formulates this assertion as follows: “we impute a human action to the State only when the human action in question corresponds in a specific way to the presupposed legal order” (1945: 192). For instance, from legal point of view, the state cannot be hold responsible for not punishing an assailant, because this fault can only be attributed to a person. This deficiency in execution of laws can only be a fault of a person that molds the substance of the rule in his/her behaving way (Kelsen, 2000: 441). Kelsen sets the concerned principle as follows:

The violation of the duty of a State organ, the delict constituted by the fact that a State organ has not performed his function in the way prescribed by the legal order, cannot be imputed to the State, since an individual is an organ (in particular, an official) of the State only insofar as his behavior conforms with the legal norms determining his function. (1945: 199)

Then, the subject of the duty that is attributed to the state, say the state agency is the person who carries out this duty⁶⁶ (Kelsen, 2000: 441). Kelsen (2000:

⁶⁵ According to Kelsen (1945) a norm is inviolable as it is explained below:

The normative rule “If someone steals, he ought to be punished,” remains valid even if in a given case a thief is not punished. This fact involves no exception to the ought statement expressing the rule that if someone steals, he actually will be punished. The validity of a norm remains unaffected if, in a concrete instance, a fact does not correspond to the norm. A fact has the character of an “exception” to a rule if the statement establishing the fact is in a logical contradiction to the rule. Since a norm is no statement of reality, no statement of a real fact can be in contradiction to a norm. Hence, there can be no exceptions to a norm. The norm is, by its very nature, inviolable. (46)

⁶⁶ In this narrower and material sense, a human action is imputed to the State, is considered to be an act of State, not because it presents itself as creation or execution of the legal order, but only because the action is performed by an individual who has the character of a State organ in the narrower and material sense of the term. (Kelsen, 1945: 193)

The individuals whose actions are considered to be acts of the State, whose actions are imputed to the State, are designated as “organs” of the State. Not every individual, however, is capable of performing an act of the State, and only some actions by those capable are acts of the State. (Kelsen, 1945: 191)

These are the essential characteristics of a State-organ in the narrower sense of the term: The organ is appointed or elected for a specific function; the

439) says that it is necessary that any person who represents the state must recognize that from legal, or at least from moral and political points of view, he/she has to behave according to interests of person or the people he/she represents.⁶⁷ As a conclusion, since the state is nothing beyond the legal order, from Kelsen's point of view a delict cannot be imputed to the state. His argument is founded on the basic principle that one cannot both delict and sanction: "the State cannot - figuratively speaking - 'will' both delict and sanction. The opposite view is at least guilty of a teleological inconsistency" (Kelsen, 1945: 199). That's why, "the imputation to the State does not refer to actions or omissions which have the character of delicts" (Kelsen, 1945: 199). A mechanism of compensation, on the other hand, is proposed for non-fulfillment of state's obligations: "though no delict in the sense of national law can be imputed to the State, the State can nevertheless be obligated to repair the wrong which consists in the non-fulfillment of its obligation"⁶⁸ (Kelsen, 1945: 200). The distinction between lawful and unlawful, on the other hand, is determined through a procedure of judgement. This procedure is outstandingly simple: "the juristic value judgement

performance of this function has to be his main or even legally exclusive profession; he has the right to receive a salary from the treasury of State. (Kelsen, 1945: 193)

⁶⁷ Kelsen says what is crucial in representation of a people or the state by an organ is not the procedure of establishing the organ. Then, the way that the organ is established through is not significant in representation. What is significant for presence of a representation? Kelsen says one can mention representation of an organ by another organ, only if this organ behaves according to the interests of the organ represented. Similarly, one can mention representation of a people by a deputy, if the deputy behaves according to interests of the people. (Kelsen, 2000: 438)

Who fulfills or breaks a legal obligation cannot be the state, but can only be a person. A break of a legal obligation can be attributed to the state in an international legal order, because legal order of a state may permit an action that is prohibited by the international legal order. (Kelsen, 2000: 442, 443)

⁶⁸ According to Kelsen,

This means that an organ of the State is obligated to annul the illegal act committed by an individual who, as an organ of the State, was obligated to, but did not, fulfill the State's obligation, to punish this individual, and to repair out of the property of the State the illegally caused damage. (1945: 200)

that certain behavior is lawful or unlawful is an assertion of a positive or negative relation between the behavior and a legal norm whose existence is presumed by the person making the judgement” (Kelsen, 1945: 48). Focusing main arguments of the pure theory of law would be helpful for evaluating this theory in regards to extra-legal activities of the state.

3.2.3. A Partial Conclusion on Kelsen’s Pure Theory of Law

Kelsen criticizes the approach that defines the state and the law separately. He challenges the duality of law and the state. Therefore, the category of “political” appears in difference between validity and efficacy of the legal order for Kelsen. He says that there are two ways of defining the state as a legal order. The first approach defines the state as an organization of people. The second one defines the state as an organization of the government. He criticizes the latter on the basis that the concept of sovereignty deifies the state. He says that these two approaches have different epistemological presumptions. The first one presumes a materialist perspective, and the second one presumes a theological perspective. His theory is founded on a relativist epistemology and presumes a materialist point of view. Kelsen’s theory of law does not include a conception of justice and morality, since question of justice is context bounded and cannot be answered scientifically for Kelsen. As presented above, the state is identical with the legal order that defines it for Kelsen. He defines the “political” as effectiveness of execution of laws. He denies conception of the state as an individual who acts beyond the legal norms it is created by. Kelsen constructing a juridical approach of the state, excludes struggles for power from the theory of the state and law, if they are not directly translated into the sphere of law. The state is stripped of struggles for power in Kelsen’s theory, since defining the state as integrated in the jurisprudence requires such a presumption. This assumption produces a conception of the state as a set of norms, and individuals creating and executing these norms. However, such a view admits that one can impute duties and rights upon the state. Since law is created by individuals, those individuals are also

subject to laws for Kelsen. Therefore, "human beings, in their capacity of State organs, can and must be subjected to law" (Kelsen, 1945: 198). How could this subjection be defined? It is founded on two premises. According to the first premise, the state has two functions; creation and application of law. Administration has the power of creation and application of law as judiciary has, and administrative execution can be as powerful as judiciary in interference to life and property. Therefore, administration and judiciary both create and apply law. According to the second principle, Kelsen proposes a hierarchical order for creation of laws. Administrative, judicial or legislative bodies contribute to creation of laws, in accordance to hierarchy of legal order. Therefore, administrative actions must be in compliance with general norms, and these norms must be in compliance with the constitution. The point is that, these specific norms must comply with higher order norms. Those who hold the authority of creating law represents the state only if they act "in accordance with the norms regulating their law-creating function" (Kelsen, 1945: 198). Then, an act of an individual can be accepted as the act of the state as far as it complies with the norms regulating the law-creating function. Those persons do not represent the state if their actions do not comply with the norms regulating law-creating function. The concerned people are individuals who are responsible for their actions, in person. Any interference of life and property is supposed to be done for public safety. If any action of a public official, including such an interference, does not comply with law, and is not stipulated by law according to hierarchy of norms, it is a delict. Therefore, a public official represents the state as long as his law creating actions comply with law. Discretionary power of an administrative organ, on the other hand, can be defined in a loose manner, and consequently obligations of this organ may seem vanished. However, if an action of an individual who is supposed to represent the state does not comply with norms regarding his/her action, concerned action is a delict, and it cannot be imputed to the state. The basic reason behind this claim is that one cannot both sanction and

delict for the same action, “the opposite view is at least guilty of a teleological inconsistency” (Kelsen, 1945: 199). Decision about what is lawful and what is not, on the other hand, is assigned to the person making the judgment. How could one interpret extra-legal activities of the state in this clearly defined theory of law?

3.2.4. Extra-Legal Activities of the State in Kelsen’s Pure Theory of Law

As it can easily be discerned, it is difficult to have a room for extra-legal activities of the state in Kelsen’s pure theory of law. Such a conception of extra-legal activities of the state, indeed would be a “teleological inconsistency” for Kelsen, since the state is defined by the constitution, and activities which are contradictory to the constitution cannot be imputed to the state. Therefore, any action, even if a public official has carried out through using mechanisms of the state, is the personal action of whom has carried out it. However, how can one understand Susurluk Affair from this perspective? Since the state is a legal institution for Kelsen, beyond normative attributes, how could one understand a case such as Susurluk Affair from a Kelsenian point of view? It would be better directly to have a look at the Susurluk Affair, from the viewpoint of Kelsen’s pure theory of law, and ask for an appropriate approach to understand it as a phenomenon covered by the legal theory.

3.2.5. A Kelsenian Reading of Susurluk Affair as a Case of Extra-Legal Activities of the State

How could Susurluk Affair be “understood” from a Kelsenian point of view? For Kelsen, the state cannot be separated from law, because there is no such entity as the state beyond law. Thus, all activities of the state should have a corresponding expression in law, and the concerned activities are supposed to be activities in legal sphere. Then, could Susurluk Affair be expressed in law as Kelsen proposes? For instance, how could Kelsen express a fake license –that does not comply with regarded standards- issued in the name of another, with a criminal’s photograph and the then Ministry of Internal Affairs (Ağar’s)

authentic signature? Probably Kelsen would say that the competent judicial body would decide if Aĝar's concerned act complies with norms regulating his behaviour, and with the Constitution of the Republic of Turkey. If one asks to Kelsen for a more detailed analysis of Aĝar's extra-legal activities, he may say that he has not acted in accordance with the concerned norms, therefore he has not acted as a state organ, therefore, Aĝar and the others are guilty individually. However, since Aĝar's case has not been brought to the competent judicial authority (the Constitutional Court), one cannot say that he is guilty in person from Kelsen's point of view, because only the competent organ, as defined in the norms constituting the state, can decide on if his actions comply with law. According to Kelsen's principle of hierarchy of norms, Aĝar both in executing and creating norms, has to comply with the higher norms, and only the competent judicial organ can decide if his behaviour complies with law. Then, one cannot accuse him of committing organized crimes such as employing criminals for state affairs and producing fake legal documents, either. However, even if he would be found guilty, he would be guilty, in person. As a result, Kelsen's approach intends to persuade one, who focuses on Susurluk Affair, that Aĝar personally issued fake identity cards for criminals, beyond the strategies that are set forth by competent organ of the state in fighting with the PKK. Then, can one presume this outcome true?

How could one understand, and interpret JİTEM from Kelsenian point of view? Was JİTEM not an extra-legal force of the state? Were not Çatlı and his companions extra-legal forces of the state, either? Should one presume true that Korkut Eken, İbrahim Şahin, and 7 policemen were guilty of concealing a wanted criminal (Çatlı), individually, given that Çatlı was bearing fake identity cards with authentic signature and travelling with a deputy and the then security director of İstanbul? From this perspective, constructed through Kelsen's theory, those who were found guilty in regard to Susurluk Affair, committed crime individually, since the competent judicial organ decided that they are guilty of

concealing a wanted criminal, and forming an armed organization, in person. In brief, certain individuals violated law and were brought to court, and sentenced in Susurluk Affair, from the point of Kelsen's pure theory of law. Thus, Kelsen's perspective understands Susurluk Affair and does not condemn it as illegitimate, but this way of understanding says little about the reality of extra-legal activities of the state, rather make them invisible as actions of individuals.

From Kelsen's theoretical perspective Susurluk Affair can be evaluated to the extent that it can be converted to the sphere of facts, therefore be reduced to a legal case.ⁱⁱ Then, there is no way of approaching the case beyond the judicial aspect of Susurluk Affair. However, this does not mean that Kelsen's point of view does not provide an analytical framework for actions of the State organs. One has to remember that this perspective, which is acknowledged in related laws, paved the way for bringing certain persons to the court. Furthermore, these laws, which presume individual responsibility of those people employed by the state, provided a legal framework that, others, who are not disclosed yet, may be brought to court, later. According to Kelsen, jurisdiction provides a framework which refers to a given social reality, and constitutes an objective realm of justice, in contrast to subjective conceptions of justice. Therefore, judicial process serves to justice, as well. Additionally, this perspective proposes a system of compensation regarding the damages for nonfulfillment of duties of the state, as defined in related norms. The principle of compensation is acknowledged in the Constitution of the Republic of Turkey, too. However, practical usefulness of Kelsen's pure theory of law in solving conflicts among individuals through the legal order does not lead to a serious assessment of Susurluk Affair as a case of extra-legal activities of the state, but translates it to sphere of relations among individuals.

3.3. A General Evaluation of Susurluk Affair as a Case of Extra-legal Activities of the State from the Viewpoint that Understands the State as a Legal Institution

As this chapter shows two main standpoints in legal-political theory, perspectives of the rule of law and legal positivism do not produce a view of Susurluk Affair as a case of extra-legal activities of the state. While Susurluk Affair cannot only be understood as a deficiency in legitimacy in the theory of the rule of law, it can be not be defined as a case of extra-legal activities of the state in Kelsen's pure theory of law. Weber's and Habermas's theories of rule of law have no room for approaching a case of extra-legal activities of the state. Such cases can only be recognized as a "deficiency", a "lack" of legitimacy both for Weber's conception of the modern state, which is legitimized on rational basis through formal-legal order, and for Habermas's conception of the constitutional state with self-steering mechanisms, which is legitimized on democratic basis. Kelsen's legal positivism, on the other hand, does not conceptualize Susurluk Affair as a "deficiency" or a "lack", since it does not conceptualize the state as a legitimate legal institution, but simply as a legal institution. However, Susurluk Affair as a case of extra-legal activities of the state totally disappears in Kelsen's conception, and be recognized as transgression of law by certain individuals. Therefore, two standpoints that conceptualize the state as a legal institution do not offer a perspective for analysis of Susurluk Affair as a case of extra-legal activities of the state. Thus, locating Susurluk Affair in legal-political theory calls a question about dynamics that pave the way for extra-legal activities of the state.

What are these dynamics? Both Weber's and Habermas's approaches, and Kelsen's approach conceptualizes political sphere as incorporated into the legal sphere. For Weber, formal legal order legitimizes use of physical force in the modern state, thus it is integrated into the political power. That's why, Weber assumes that political power is incorporated into legal order, if it is legitimized on rational basis. Habermas, on the other hand, supposes that human will can be organized in communicative power, and can be expressed in the public sphere

and frames the legislative process. Accordingly, political power can be expressed in legislative process of the constitutional state, so that basic rights which establish the constitutional state are protected, though the interests and wills of different groups and persons discursively constitute the common will of the people. Thus, Habermas assumes that the political power can be formed peacefully, by the way of integrating different parts of the society through discursive bargaining mechanisms. While Weber's and Habermas's conceptions of the rule of law propose that the political power is incorporated into legal order in modern state, and take for granted the political power, Kelsen's pure theory of law covers the political power as long as it is expressed as a legal order. Politics become invisible in Kelsen's theory. While the rule of law theory conceptualizes them as incorporated into the legitimacy of legal order, Kelsen's theory recognizes political dynamics as efficacy of legal order, which constitutes the state. These standpoints which presume that the political power is subject to legal order in the modern state may neglect an utmost important feature of the modern state. Though the modern state is a legally constituted institution, politics may not be totally expressed in legal sphere. Thus, theories of the rule of law and legal positivism may neglect the political character of the modern state. Since political dynamics may not be totally subject to legal order, other theoretical standpoints that conceptualize the political dynamics as primary factors in functioning of the state may be helpful in locating Susurluk Affair as a case of extra-legal activities of the state. Therefore, these standpoints that understand the state as a political institution may provide a view of Susurluk Affair as a case of extra-legal activities of the state. Following chapter focuses on two theoretical standpoints that conceptualize the state as a political institution, and tries to interpret Susurluk Affair for these theoretical standpoints. These two theoretical standpoints are doctrine of *raison d'état*, and Carl Schmitt's theories of the political and sovereignty. The doctrine of *raison d'état* covers an old tradition of political conception of the state, against normative approaches, which begins

with Machiavelli. This tradition may offer a view of Susurluk Affair, as a case of extra-legal activities of the state. Carl Schmitt's theories of political and sovereignty, on the other hand, constitutes an utmost important part of the following chapter, since Schmitt is an important name in contemporary legal-political theory and conceptualizes the state as a politically constituted institution that may make a distinction between transgression and implementation of law in accordance with the political dynamics. Furthermore, Schmitt's theories are in dialogue with Kelsen's legal positivism, too.

Endnotes

ⁱ Thus, Susurluk Affair is illegitimate in Weberian and Habermasian readings. However, concept of the rule of law was not used only to refer deficiency in legitimacy in regard to Susurluk Affair. The president, members of the government, deputies of opposition parties, certain judges, generals, and columnists have approached that affair by referring to the rule of law attribute of the state. The phrase “the rule of law” was often repeated in statements of politicians on Susurluk Affair. Both members of the government, and members of opposition parties referred to “the rule of law”. Different groups refer to the rule of law for different purposes. What is striking is that, not only those who are critical of Susurluk Affair but also the ones who want to put an end to criticisms referred to the “the rule of law”. While the first group refers to the rule of law as a demand for lawful prosecution of the accused, the other group refers to the same for putting an end to public debates. For instance, the opinion of the then Presiding Judge of the Constitutional Court, Özden, can be included in the first group. He says that the difficulties proceeded from “the impotence in absorbing democracy”, and adds that “there is only one way out: to meet all the requirements of a state of the rule of law” (Özden). The investigation reports concerning the case refer to the rule of law attribute of the state, too. For instance, the report of the TGNA’s Commission on Investigation of Susurluk Affair states “in order to overcome this problem, which has strong internal and external links” it is necessary “to realize a secular, democratic and social state of the rule of law with all its institutions and rules” (Meclis Susurluk Araştırma Komisyonu Raporu 1997). Those arguments suppose that only the judiciary has the authority to overcome those “problems”. What is striking about the concept of the rule of law is that, it is referred to both by those who are critical of the affair and call for impartial prosecution, and by the ones who want to put an end to public debates. The second group, most of whom are members of the government, refers to the concept on the ground that Susurluk Affair has already been dealt by judiciary, and hence there is no need for further discussion. Jurisdiction is considered as an autonomous sphere that deals with such kind of incidents. The sphere of jurisdiction supposedly excludes those who are not competent for law enforcement. In brief, those views on Susurluk Affair, which

are formulated in the framework of law and democracy, can be pointed out in the concept of the rule of law, and definition of the state as a legal institution.

Opinion of Demirel, the then president of the Turkish Republic, on the Affair was cited at the beginning of the chapter 3. What does the concept of “the rule of law”, he refers to, signify? What does “the legitimate forces of state” means? In the discussions on Susurluk Affair, the concept of “the rule of law” was used both as a part of noninstrumental formulation of law, and in order to emphasize that law is an autonomous sphere. The then executives (the President, the Prime Minister, the deputy Prime Minister, the Minister of Internal Affairs, and the accused former Minister of Internal Affairs) referred to the concept of the rule of law to escape public debates. While doing so they emphasized that the state is a legal-formal institution.

Concept of the rule of law was introduced to public as a demand for formal legality in the context of Susurluk Affair. The Susurluk Affair unavoidably brought questions about “legality”, and the rule of law was introduced within the context of its formal conceptualization. Arguments on the Affair revolve around the formal conception of the rule of law. The then president, the then prime minister, the then deputy prime minister, the then Minister of Internal Affairs, and Ağar, who was the former Minister of Internal Affairs, referred to “the rule of law” and expressed that the state had a neutral stand point in implementing the administrative procedures. The then deputy Prime Minister emphasizes that Republic of Turkey is a state of the rule of law. He utters the following statement:

... Our state is a state of the rule of law. No one, even on the pretext that we act for the sake of the homeland, can act beyond the authority of the state, and commit crime. If national interests require to take action, action should be taken within the borders of the authority and the hierarchy of the state, and in compliance with law. (Erbakan, Milliyet, 20.12.1996)

He defines the appropriate procedure to take action for the state: “the course of action should be taken within the borders of authority and hierarchy of the state and in compliance with law”. The rule of law attribute of the state is formulated as taking action “in compliance with law”, say as “legality”; and administrative procedure in the phrase of “borders of the authority and hierarchy of the state”. He continues as follows:

No one can issue a verdict and make an execution on her/his own. If you face a criminal somewhere, you should bring her/him to the justice. You

should not reach a judgment and execute it on your own. Everything should be within the mechanisms and law of the state. (Erbakan, Milliyet, 20.12.1996)

He emphasizes that individuals cannot use the authority of the state beyond legal authority of the state. Jurisdiction, he says, should be within the mechanism and law of the state. One can discern two themes in this argumentation. The first one is the emphasis on legitimacy of the legal force of the state, the second is the legitimacy of administrative procedures that define ways for use of violence by the state. An interview with the then deputy prime minister is illustrative to formulate 'legal point of view' on the case.

Question: ... there is concern that this issue may be covered up. Can it be covered-up?

Erbakan: The state has many ranks. If one of them attempts to cover-up, another uncovers. No one wants the presence of such a separate formation within the state.

He continued as follows:

Question: It is claimed that there are gangs within the state. It is articulated that certain political murders might also be committed by them.

Erbakan: There are two fundamental principles:

1- Gangs within a state are unacceptable. State is a unique integrity. It has to preserve its authority and order within its hierarchy. There cannot be bodies, ranks that decide and execute apart from the state surpassing this authority and order.

2- The state is a state of the rule of law. Whoever is found out to have acted in this manner is subjected to the sanctions prescribed in laws. Without exception. (Erbakan, in Bila, 03. 12. 1996, Milliyet)

The deputy Prime Minister formulates the fundamental principles concerning Susurluk Affair in two points. The first is about integrity and hierarchy of the state. The second is about neutrality and formal rationality of the jurisdiction. The first "principle", then, underlines that the state is constructed on a hierarchical legal order. The second principle, on the other hand, underlines the rule of law attribute of the state and legal procedures concerning the jurisdiction. According to those principles, he stated, the state is constructed as an integrity operating as a perfect body. What is striking is that he denies any exception to those principles. He referred to the same procedure in a call for silence, in another speech:

If an issue is brought to justice, no one has the right to palaver, to make a judgement, to make an accusation in regard to the issue. Turkey is a state of the rule of law. And anyone is honorable and honest, unless the opposite is proved. (Erbakan, Milliyet, 01.01.1997)

He asks to leave the case in silence of the pages of files. If an issue is brought to justice, no one has the right to talk about it. Jurisdiction is defined as an independent body. The then Prime Minister, Çiller, emphasizes the rule of law attribute of the state, too: “The state is a state of the rule of law, the struggle has been waged within the rule of law” (Çiller in Talu, 11.12.1996, Milliyet). Thus, Çiller defines the formal – legal rationality supposedly embedded in “the struggle” (against the PKK). The concept of the rule of law is used to support the claims that whatever was done is in compliance with law. Former Minister of Internal Affairs Mehmet Ağar referred to the rule of law attribute of the state, too. He reminds that prosecutors and judges are employed for legal proceedings in a state of the rule of law. This statement is a call for putting an end to public debates on Susurluk Affair:

If Turkey is a state of the rule of law, then it has prosecutors and judges. Everyone has to articulate what she/he knows. Whoever commits a crime is punished. However, peace in and security of a country cannot be ruined to this extent. (Ağar, cited in Akyol, 12.12.1996, Milliyet)

Demand for silence is grounded on the rule of law attribute of the state and separation of the jurisdiction from other spheres, and necessity of maintaining “peace in and security of the country”. Then, he asks for putting an end to argumentation on the affair. Those who discusses the Case, then is accused of ruining peace in and security of the country. The then Minister of Internal Affairs emphasizes that what is essential for the Republic is the rule of law attribute of the state.

... Republic of Turkey is a state of the rule of law. . . . In case that there is a crime, who will crop up as the criminals is not the problem of the state. The state is not injured by such and such, either. On the contrary, the state will be injured if it does not find out the criminals. In that case, the rule of law attribute of the state will be injured. (Akşener, 06. 12.1996, Milliyet)

According to this statement, the state is defined as independent of the crimes of individuals. The state, as a neutral structure, can find out criminals, who ever they are, and is not injured. She says that the rule of law attribute of the state

requires such kind of neutrality of the state. When those arguments on the rule of law attribute of the state are interpreted in the context of Susurluk Affair, a controversy over the outcomes of the legal processes arise. Remembering arguments brought by the government may be helpful for an advanced analysis on the issue. In brief, it is argued that the state is constructed on a hierarchical legal order; the judiciary is an independent body, and has a neutrality grounded on a formal rationality; demand for silence, on the other hand, is grounded on the rule of law attribute of the state that supposedly deserves respect for the judicial process. Those arguments follows basic premises of a Weberian understanding of the formal rationality of the law, and the state, as a legal organization. However, as Weberian reading shows, it is almost impossible to present Susurluk Affair as a reflection of the formal rationality of the state as a legal institution. Those arguments focused above, on the other hand, refer principles of organization of the state, as a rational legal organization, and encounter criticisms of Susurluk Affair through referring to these basic principles.

ii According to Kelsenian reading of Susurluk Affair, those who were found guilty in regard to Susurluk Affair, committed crime individually, since the competent judicial organ decided so. From a Kelsenian viewpoint, Susurluk Affair can be evaluated to the extent that it can be converted to the sphere of facts, therefore be reduced to a legal case. That perspective proposes to distinguish the state from persons employed by the state. The then president and certain members of the government claimed that not the state but the individuals are responsible for Susurluk Affair. They challenged arguments on involvement of the state in the Affair in such a framework that shares many premises with Kelsen's theory of state. Most of the members of the government commenting on Susurluk Affairs share basic premises of Kelsenian theory of state. Accordingly, the state is defined as a legal institution. In those arguments, the state is distinguished from the state officers; the judicial system is presumed to be the essential institution for disclosing crimes; and legal limits of using force by a state officer is defined in the legal framework. The fundamental assumption in approaching Susurluk Affairs is that there is a distinction between the state and state officers. The state cannot be translated to an individual working for it. According to the then Minister of Justice, a violation of the legal order cannot be an act of the state. The state covers more than its officials, it is an institution.

First of all, when one says ‘relation between the state and the mafia’, he/she must recognize that the concept of state covers, or may cover both legislation and execution, and the judiciary. It may be claimed that certain persons in the state may be related to the mafia, but it cannot be claimed that the state is related to the mafia. (Kazan, 1996)

Therefore, the state cannot be related to the mafia, only individuals are related to the mafia. Then Minister of Internal Affairs Akşener said, as is the case in all countries, public officers may sometimes be faulty, but those officials are punished. She said, such sordid events, which those officials are involved in, and identities of the involvers cannot be covered. She emphasized that while criticizing such kind of events, to put all public officers under suspicion, and worst than that, to claim that the state is involved in such organizations, is wrong (Akşener, 1997, MT). The President Demirel opened this perspective, which can be understood through Kelsen’s theory of the state as follows:

The claims are very serious. . . . The claims about Susurluk, whatever it covers, will absolutely be disclosed. But, it is wrong to introduce the state as a sordid organization.

“-Is not the state involved in?”

Certain persons within the state have been involved in some events from time to time. Those who have been involved are guilty, not the state. Whether there are involvers, what has been investigated is that. The state will collar the involvers. If you further accuse the state, the country will be ungovernable. Cease to blame the state. Let’s collar those who are sordid. Do not collar the state. (Demirel in Doğan 02. 12. 1996, Milliyet)

From this perspective, as Demirel perfectly expressed, only “certain persons” can be involved in such kind of events, not the state. Pointing out such a distinction between the state and public officials is parallel to Kelsen’s approach of the state. Following Kelsen, a person carrying out a duty for the state is responsible before the state from legal point of view. When an administrative affair is defined as a duty of an organ, this organ may have a discretionary power that is granted by the government. That power may be defined in an exact or loose manner. Kelsen says that this authority may be defined so loosely that obligations of the organ may seem vanished. But in the last instance, since the state is constructed of norms, any action of an individual cannot be defined as an act of a state organ if his behavior does not comply with the legal order, then, his action cannot be imputed to the state. Kelsen says that

an individual represents the state as long as he/she complies with the norms regulating his/her law-creating function. Then, an act of an individual can be accepted as an act of the state if it complies with the norms regarding his/her duties. Those persons do not represent the state if their actions do not comply with the norms regulating law-creating function. Role of judiciary is emphasized in distinguishing the unlawful from lawful. Demirel emphasizes the role of judiciary. Accordingly, procedures are clearly defined:

Everybody must know that no unlawfulness can be covered up or remain unprosecuted. The perpetrator of an act described as a crime in laws, will absolutely be seized by justice. No one has an exclusive right to commit a crime or to force commitment of a crime. Turkey is a rule of law. Authorities and competent ranks that are to enforce laws are definite. Those, except the legitimate forces of the state, do not have the right to use force. If anyone has done so that person is guilty. Who is guilty is not the state. On the other hand, complaints about “corruption”, “bribery” and “abuse” appear in all countries of the world. The antidote to all these is an “open regime.” An overwhelming struggle with “corruption”, “bribery” and “abuse” is imperative. Public sensitivity in this sense is very important. However, law should not be departed from. Judges will find out crime and criminals. (Demirel, Milliyet 01.01.1997)

Examining those sentences may be helpful for understanding the underlying theme. First, he affirms that “no unlawfulness can be covered up or remain unprosecuted”. Then, prosecution is brought as the countermeasure of the unlawfulness. This countermeasure is mediated through definition of the “crime” in laws. If a certain action is described as a crime, those who commit this action would be seized by justice. No one is excluded from the sphere of jurisdiction, the sphere of jurisdiction operating through the mediation of law, is assumed covering all citizens, without any exception. As presented above, one can find the trajectories of Kelsenian theory of state in arguments produced by most of the members of the government. Though it constructs a perfectly systematized framework for encountering criticisms about Susurluk Affairs, it is difficult to recognize Susurluk Affair as a sum of crimes committed by two senior officials and seven policemen, three private citizens and two paramilitaries, for the sake of their private interests. Remembering that while those who were critical of Susurluk Affair referred to the rule of law as a demand for bringing the affairs to court, and of for fair legal proceedings thereon, those who were in power referred to the same as a demand for cessation of public debates on Susurluk Affair. The latter emphasized that the state is a formal legal institution, functioning according to a certain legal order. The theme which is

borrowed from Weber and from Kelsen, by those who were in power, used for deriving legitimacy and for ceasing further argumentation.

CHAPTER 4

SUSURLUK AFFAIR FROM THE VIEWPOINT THAT UNDERSTANDS THE STATE AS A POLITICAL INSTITUTION

On November 3, 1996, by a traffic accident, self-defense of the state was tried to be stained. Those who defend the unity of the homeland were considered similar to the traitors. (Ağar, 2002)

The statement cited above presents Mehmet Ağar's approach to Susurluk Accident. He defines Susurluk affair as "self-defense of the state". Those conductors of Susurluk Affair, is defined as "those who defend the unity of homeland" by Ağar. Ağar's statement sanctions Susurluk Affair on the ground of legitimacy derived from defending "unity of the homeland". Ağar was not alone in defending Susurluk affair, similar arguments were uttered by certain politicians, bureaucrats and columnists. This trajectory of argumentation resting upon "self-defense of the state" and "unity of homeland", can be approached in the framework of the doctrine of *raison d'état*. The doctrine of *raison d'état* can be understood as a doctrine of formulating ways and methods for establishing and maintaining the state. It formulates best means for encountering dangers for the state. It defines the state as a political institution, beyond legal concerns. This doctrine may be valuable for locating Susurluk affair, as a case of extra-legal activities of the state, in legal-political theory. The first section of this chapter intends to interpret Susurluk Affair, as a case of extra-legal activities of the state from the angle of the doctrine of *raison d'état*. The second section intends to interpret Susurluk Affair as a case of extra-legal activities of the state for Carl Schmitt's theories of the political and sovereignty.

4.1. Interpreting Susurluk Affair as a Case of Extra-Legal Activities of the State from the Viewpoint of Doctrine of *Raison d'etat*

For interpreting Susurluk Affair as a case of extra-legal activities of the state, it is necessary first to focus on main trajectory of idea of *raison d'etat*, then interpret this doctrine in regard to the extra-legal activities of the state. Such an interpretation would make possible a reading of Susurluk Affair, from the point of doctrine of reason d'etat. Therefore, this section consists of three subsections. In the first subsection, the doctrine of *raison d'etat* is narrated. Meinecke's *Machiavellism*, and Machiavelli's *Discourses* are basic references of the first section. Though Machiavelli did not employ concept of "*raison d'etat*", he is generally acknowledged as the first empiricist analyst of power struggles for maintaining dynasties and republics. Meinecke's *Machiavellism*, on the other hand, is valuable for it narrates the development of the idea of *raison d'etat* in European political thought. His analysis is also significant for understanding the development of the idea in the context of rise of the modern nation state. Therefore, the idea of *raison d'etat* and its development are traced in Machiavelli's *Discourses* and in Meinecke's *Machiavellism*. The second subsection focuses on conception of extra-legal activities of the state, in the doctrine of *raison d'etat*. Finally, Susurluk Affair, as a case of extra-legal activities of the state is interpreted in the doctrine of *raison d'etat*, so that the question, whether Susurluk Affair can be approached in the doctrine, would be answered.

4.1.1. What is *Raison d'etat* ?

A historical briefing of the development of the doctrine would be useful for examining the idea. According to Meinecke, *raison d'etat*⁶⁹ was sanctioned in city-state, because there was no conflict between politics and ethics and "the thing most worth living for was the State itself" (1998: 26). It was embedded in inter-

⁶⁹ Stark, (1998: ix) says that Meinecke uses the word of "Staatsräson", which can be translated as "statism". Translator of the book asserts that it is replaced by "*raison d'etat*" in English version of the book, since word of "statism" has disappeared from the dictionary.

state relations in city-state. This neutral interpretation of the idea was changed after Christianity. State affairs, as other affairs, were supposed to be subject to divine law and natural law: “the new universal religion set up at the same time a universal moral command, which even the State must obey” (Meinecke, 1998: 27). Doctrine of “*raison d’etat*” signifies ways of founding and maintaining the state. The idea emerged in the context of power struggles of dynasties, and developed in absolutist monarchies. Machiavelli (1975) defined and sanctioned power struggles of dynasties and republics. He focused on the history of Rome, and derived best ways of maintaining a republic powerful in extraordinary conditions. Narration of these ways perfectly exposes main references in the tradition of *raison d’etat*. Thus, this section gives development of the doctrine of *raison d’etat*, in European political thought. It begins with Machiavelli’s *Discourses*, and follows the main trajectory that is drawn by Meinecke (1998).

Machiavelli’s *Discourses* and *Prince* were outcome of an empiricist analysis of power struggles. Machiavelli has not only narrated these tactics and strategies of conquering and maintaining the power, he also sanctioned them in the context of history of Rome, in *Discourses*. He uses concepts of “*virtù*”, “*fortuna*” and “*necessity*” for understanding the rise of Rome (Machiavelli, 1975). Accordingly, one needs of *virtù* for regulating the *fortuna*, otherwise, ““where men have not much *virtù*, the *fortuna* shows its strength clearly enough” (Disc., II, 30 cited in Meinecke, 1998: 36). Since *fortuna* “is full of change”, “there are numerous changes in republics and states” for Machiavelli (Disc., II, 30 cited in Meinecke, 1998: 36). These changes continue “until sooner or later there will come a men” who regulates the *fortuna*, so that “it will not be able to show every twenty-four hours how much it is capable of accomplishing’” (Disc., II, 30 cited in Meinecke, 1998: 36). Meinecke says that Machiavelli proposes *virtù* must be able to use many weapons. Thus, *virtù* “had a perfectly genuine right to take up any weapon, for the purpose of mastering Fortune” (Meinecke, 1998: 36, 36). Though Machiavelli sanctions any weapons, including evil ones, he does not advise rulers violate existing laws if it is not necessary (Disc., III, 5, cited in Meinecke, 1998: 44).

Authority has to comply with common law on the ground of maintaining power for Machiavelli (Meinecke, 1998). He advises rulers appearing as if they possess moral qualities even if they do not. For Meinecke, appearing to be ethical is important for Machiavelli, since it is integrated into *raison d'état*: "the development and creation of *virtù* was for Machiavelli the ideal, and completely self-evident, purpose of the State" (1998: 34). Machiavelli advises that the prince has not "to possess all the good moral qualities of loyalty, sincerity, etc." but he has to "appear to have them", since if "they would always be exercised, would be harmful", but if "he appeared to have them" they would be useful (Meinecke, 1998: 40). Machiavelli's approach is utmost important for understanding doctrine of *raison d'état*. He focuses on extraordinary measures that are taken for maintaining a republic. He emphasizes that dictatorship or a similar form of government is necessary for surviving of the state in the condition of state of emergency (Machiavelli, 1975: 291). With his words: "republics which, when in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them" (Machiavelli, 1975: 291).

Machiavelli (1975) distinguishes two forms of dictatorship. Accordingly, dictatorship may be "bestowed in accordance with public institutions" or "assumed by the dictator on his own authority" (Machiavelli, 1975: 289). He claims that the former one "was always of benefit to the state" (Machiavelli, 1975: 289). Machiavelli says that a dictator is better to be appointed for a limited time, but has to hold unlimited authority. A dictator appointed for a limited time, would have "authority to make what decisions he thought fit in order to meet a definite and urgent danger" (Machiavelli, 1975). He mentions that though the dictator comes to power for a limited period, the power of the dictator should not be restricted and he has to have the authority to make decision without consultation. Since the dictator has the authority "to do this without consultation", "anyone he punished had no right of appeal" (Machiavelli, 1975: 290). However, an appointed dictator is not competent "to diminish the

constitutional position of the government” for Machiavelli (1975: 290). Machiavelli asserts that mechanism of dictatorship gives advantages, since “the institutions normally used by republics are slow in functioning” (1975: 290). Cities, he claims, “will with difficulty find a way out of abnormal situations” with such an institution (Machiavelli, 1975: 290).⁷⁰ Therefore, he says, “in a republic in which no such provision is made, it is necessary either to stand by the constitution and be ruined, or to violate it and not be ruined” (Machiavelli, 1975: 290). There is no other choice, a republic would either violate the constitution, or be ruined. As presented, for Machiavelli (1975), dictatorship is sanctioned for emergency reasons, and for limited time periods in republics. Machiavelli is acquainted with bad results of “extraordinary measures” if it is established as a precedent, “since it sanctions the usage of dispensing with constitutional methods for a good purpose, and thereby makes it possible, on some plausible pretext, to dispense with them for a bad purpose” (1975: 290). He says that granting the dictatorial authority to the consul, instead of appointing a dictator is better (Machiavelli, 1975: 291). However, emergency measures, he states, is valuable for encountering not only attacks, but they also pave the way for a stronger republic (Machiavelli, 1975). He reminds that neighbours of Rome, “caused her to set up institutions which not only enabled her to defend herself but also to attack them with greater force, counsel, and authority” (Machiavelli, 1975: 291).

Machiavelli focuses on essential bonds between a republic and citizens, too. It is the bond between protection and obeying. Security of citizens should not be disturbed, so that they obey. He says that keeping citizens’ minds with fear is harmful for a republic (Machiavelli, 1975). He mentions harms of arousing “every day fresh discontent in the minds of ... citizens by inflicting fresh injuries on this or that person” for a government (Machiavelli, 1975: 314). Therefore, a prince or rulers of a republic are better not “to keep the minds of their subjects in suspense

⁷⁰ Machiavelli (1975) gives example of Venice, which “has reserved to a few of its citizens authority to deal with urgent questions with regard to which, if they all agree, they can make decisions without reference to any other body” (290).

and fear by continually inflicting punishment and giving offence" (Machiavelli, 1975: 314). That's why "unquestionably no practice more pernicious" than continually inflicting punishment, since when citizens "begin to suspect that evil may befall them" they may do anything for protecting themselves, "and grow more bold and less restrained in attempting a revolution" (Machiavelli, 1975: 314). Therefore, he says, the rulers should "either never to injure anyone, or to inflict the injuries at one go" so that, "to reassure men and give them ground to expect peace and security" (Machiavelli, 1975: 314). Machiavelli distinguishes interests of prince and public good and says that only in a republic, public good can be protected against the private advantage, thus "make it possible for the State to achieve greatness" (Meinecke, 1975: 43). He distinguishes *virtù* and civil *virtù*, too.

In brief, Machiavelli (1975) sets forth basic means of maintaining a dynasty or a republic, beyond ethical concerns. He focuses on history of Rome and derives advises for rulers. He suggests to appoint a dictator in extraordinary conditions, and points out that bond between rulers and ruled should not be weaken. Machiavelli (1975) manifestly challenges precise definition of legal sphere, either by the divine law or the constitution. Thus it is difficult to define extra-legal activities of the state in a Machiavellian viewpoint. Though he narrates the real struggles of power, his opening on power politics was not welcomed in the age he lived. Meinecke says that the Massacre of St. Bartholemew in 1572, was supposed to be an outcome of Machiavellism by Gentillet (1998: 51, 52). He says that Machiavellism was criticized as princely struggle for power (Meinecke, 1998: 95-98). According to Meinecke, Machiavellism was accused "for it turned religion into an instrument of political domination, into a source of power, which was indeed indispensable, but which was thought of as utilitarian" (1998: 98).

However, Machiavelli's secular viewpoint in regard to state affairs is not admitted in the period he lived. Meinecke (1998) focuses criticism of Machiavellism by Gentile. Meinecke says that according to Gentile, human

behaviour can be regulated in accordance with the Law of Nature, precepts of Christianity and the Statute Law, therefore it is better if a ruler “generally acted in accordance with . . . *puissance civile*, which was limited by what was reasonable, just and fair” (Meinecke, 1998: 53). Thus, Gentile’s formulation was a call for restricting methods, which rulers use (Meinecke, 1998). Meinecke (1998) says that Gentile expected rulers to comply with what is reasonable, just and fair. Demands for restricting rulers’ authority continued, however following main points in development of the idea in Meinecke’s text and skipping criticisms of the idea would better serve to the purpose of this section, particularly for extra-legal activities of the state for the idea of the *raison d’etat*. Meinecke (1998) narrates the development of the doctrine in historical sequence. Accordingly, Bodin’s conception of sovereignty was an important step taken in development of the doctrine, since while “Machiavelli saw only the vital impulses and laws of the individual States and those in power acting for the States”, Bodin saw the essential structure that “all these spanned by an eternal and unbreakable connection” (Meinecke, 1998: 62). This eternal and unbreakable connection structure was conceptualized as sovereignty by Bodin. Meinecke says that Bodin defined sovereignty as: “the supreme authority over the subjects, independent of all other powers, permanent, not resting on any mandate, but unique and absolved from the laws” (1998: 57). Bodin’s concept of sovereignty is beyond the definition of a limited period of dictatorship by Machiavelli. One cannot assume an emergency measure for calling a dictator, dictatorship is merged into the state authority itself, and conceptualized as sovereignty by Bodin. Meinecke says, for Bodin, laws must serve to the needs of ruler and “freedom in the choice of means, obligation to the goal of State welfare, and moreover both obligation and independence with reference to the changing conditions of the environment” (1998: 58). Thus, the concept of sovereignty leads to an ambiguity in definition of difference between legal and extra-legal activities of the state. Therefore, according to Meinecke (1998: 62), Bodin’s conception of sovereignty “succeeded in freeing the sovereign and self-enclosed Will of the State from the bonds of

medieval life". He mentions that Bodin's theory of sovereignty paved the ground for the constitutional state (Meinecke, 1998: 64).

Concept of *ragiono di stato*, on the other hand, is first used and defined by Botero in 1589, (Meinecke, 1998: 67). Botero defined the concept of *ragiono di stato*, as "a knowledge of the means suitable for founding, maintaining and enlarging a State" (Botero, referred in Meinecke, 1998: 67). Indeed this concept implies a challenge to Machiavellian view point. According to Meinecke, that concept was defined by Chiaramonti, as "good kind of rasion d'etat" and "bad kind of *raison d'etat*" (1998: 120). While the concept of "*ragino di stato*" signifies "statecraft" in general, "the good kind" of "*ragino di stato*" "was directed towards the general well-being and happiness, by methods acceptable to morality and religion; the bad kind made use of impermissible methods, and was aimed at the special and personal advantage of rulers" (Meinecke, 1998: 120). Thus, for Meinecke (1998), the idea of *raison d'etat* is constituted on a criticism of Machiavellian viewpoint which sanctions any action that serves to strengthen the ruler. Meinecke says that Zuccolini was another name who redefined *raison d'etat* (1998: 121). Zuccolini defined the concept as an instrument of establishing a specific "state form": "*raison d'etat* was nothing else but the knowledge and application of the means for establishing and maintaining a particular State form" (Zuccolini, cited in Meinecke, 1998: 121). Meinecke claims that these approaches on *raison d'etat* paved the way for new formulations of the doctrine, and it was defined as a neutral concept, almost as a technique that one can use it either in good or bad way (1998: 122). Those who want to distinguish between the good *raison d'etat* and the bad *raison d'etat* called for setting religious and ethical premises for state affairs.⁷¹ Meinecke (1998) says that Chiaranmonti was one of those who denied to accept bad *raison d'etat* as the nature of government. According to Meinecke,

⁷¹ It also brought an endeavor for harmonizing *raison d'etat* with religious and ethical premises of the age. Meinecke says that "behind their spasmodic eagerness to bring the modern statecraft once more into harmony with the religious and ethical tradition of the West, there lay a concealed skepticism which they only succeeded in mastering with difficulty." (Meinecke, 1998: 126)

Chiaranmonti said that though it is not possible to prevent people from practicing the bad *raison d'état*, it is possible "to prevent anyone from believing that it is 'a consequence of the nature of government'" (Chiaranmonti referred in Meinecke, 1998: 126).

Meinecke (1998) mentions that the concept of *raison d'état* was employed for anti-absolutist state forms, too. Since if, "every form of the State had its own *raison d'état*", the idea of *raison d'état* may be used for anti-absolutist purposes, too (Meinecke, 1998: 134). Another change was replacement of "necessity" of the state by "benefit" of the state. Thus, *raison d'état* is conceptualized in such a way that it could cover all actions carried out for benefit of the state (Meinecke, 1998: 135). Meinecke says that Chemnitz replaced the "necessity" of the state by "benefit" of the state (Meinecke, 1998: 135). With his words: "indeed, even if it was not any *necessitas*, but only the benefit of the State, that made it advisable to set the statute law on one side, the basic principle had to remain valid" (Meinecke, 1998: 135). These views criticize Machiavellian power politics and demand to distinguish benefits of state from private interests of rulers -for instance, Chiaranmonti (referred in Meinecke, 1998: 120); Canonhiero (referred in Meinecke, 1998: 120); Settala (referred in Meinecke, 1998: 123, 124); Chemnitz (referred in Meinecke, 1998: 135); and Kessler (referred in Meinecke, 1998: 138). Accordingly, good *raison d'état* was defined by Chiaranmonti as *raison d'état* that "was directed towards the general well-being and happiness, by methods acceptable to morality and religion" (referred in Meinecke, 1998: 120); similarly Canonhiero set conditions for acting according to *raison d'état* and one of these conditions was "public benefit" (referred in Meinecke, 1998: 120). Meinecke (1998: 138) says that Kessler sanctioned use of a limited *raison d'état* and he said that it can be used "for the sake of general welfare" not for private interests of rulers. This separation is distinctive in the development of the doctrine. Technical details of methods of *raison d'état* were defined for distinguishing good and bad *raison d'état*. For instance, Naudé distinguished *maximes d'état* and *coups d'état* (Meinecke, 1998: 198). While *maximes d'état* refers to previously defined practices that are carried

out for benefit of the state, *coups d'état* refers to practices that are set suddenly (Meinecke, 1998: 198). He accepts only certain forms of *coups d'état* as legitimate (Meinecke, 1998: 199).

As Meinecke claims (1998: 67) the word *stato* signifies more than power used by the ruler, and doctrine of *raison d'état*, which is established in the age of nascent absolutism was different from Machiavelli's advises to rulers. Similarly, Foucault (1988) distinguishes power politics of dynasties and Machiavelli's analysis of real politics from the idea of *raison d'état*. He says that the idea of *raison of state* rests on the thesis "that the aim of a government is to strengthen the state itself" (Foucault, 1988: 150). Foucault refers Botero's Palazzo's and Chemnitz's definitions of *raison d'état*, as "a rationality specific to the art of governing states", each (Foucault, 1988: 148, 149). Accordingly, Botero defines *raison d'état* as "a perfect knowledge of the means through which states form, strengthen themselves, endure and grow" (Botero, cited in Foucault, 1988: 148); Palazzo defines as "a rule or an art enabling us to discover how to establish peace and order within the republic" (Palazzo cited in Foucault, 1988: 148); and Chemnitz defines as preservation, expansion and felicity of the state through "the easiest and the promptest means" (Chemnitz, cited in Foucault, 1988: 148). Foucault (1988) defines that new rationality as an art of government, and says that it was different both from the Christian tradition and Machiavelli's theory. According to Foucault, while "the Christian tradition claimed that if government was to be essentially just, it had to respect a whole system of laws: human, natural, and divine" (1988: 149). Reason of state, on the other hand, "refers neither to the wisdom of God nor to the reason or the strategies of the prince. It refers to the state, to its nature and to its own rationality" (Foucault, 1988: 150). According to Foucault (1988), the idea of *raison of state* differs from Machiavelli's theory, since "the aim of this new art of governing is precisely not to reinforce the power of the prince. Its aim is to reinforce the state itself" (150). He reminds that *raison d'état* is promoted through an international sphere of competition: "these forces have to be increased since each state is in a permanent competition with other

countries, other nations, and other states” (Foucault, 1988: 151, 152). The idea of *raison d’etat*, he says, promoted a kind of rationality, which he calls “governmentality”, which emerged “through a very specific set of techniques of government” in seventeenth and eighteenth centuries (Foucault, 1988: 148). Role and importance of law was marginal for this new rationality, rather it was, perhaps, a kind of engineering that governments could design the powers. Extra-legal activities of the state, on the other hand, is admitted as normal both in terms of natural law and the constitution. Individuals are recognized important as much as they serve to government’s intention and purpose of improving state’s strength, in accordance with *raison d’etat* (Foucault, 1988: 152). Thus, what an individual “has to do for the state is to live, to work, to produce, to consume; and sometimes what he has to do is to die” (Foucault, 1988: 152).⁷² Foucault (1988: reminds that the definition and content of sovereignty has changed after the sixteenth century. He says that sovereignty was defined in the framework of laws before the seventeenth century. However, this limited definition of sovereignty has been extended after introduction of the concept of government, ‘art of government’ to the state affairs. Foucault defines governmentality as “political techniques” “technology of government” that “has been put to work and used and developed in the general framework of the reason of state in order to make of the individual a significant element of the state” (1988: 153). Hobbes conception of sovereignty may be accepted as a perfect example of this project.

According to Meinecke (1998) Hobbes’s concept of Leviathan made a significant remark on the cleavage between human reason and nature, since he formulated sovereignty on the ground of natural right. However, Hobbes’s concept of natural right was not founded on divine natural law. Human beings were given natural right in state of nature, they choose natural law through using

⁷² Therefore, the state “wields its power over living beings, and its politics, therefore, has to be a biopolitics” (1988: 160). However, according to Foucault, “since population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it, if necessary. So the reverse of biopolitics is thanatopolitics” (1988: 160).

their “reason” and prefer to live under the authority of a sovereign. Human reason, then, coincides with the natural law. Reading Hobbes’s concept of *Leviathan*, Meinecke says that Hobbes points out that “not mutual benevolence, but mutual fear, that formed the basis of all the more important and permanent relationships” (1998: 211). However, Meinecke claims that, even in Hobbes “a voracious hunger for mere extension of power and domination was described” as a sickness of the State (1998: 213). Thus, according to Meinecke, Hobbes created a path “which would lead over from the mode of thought that dealt in terms of Natural Law and the Law of Reason . . . to that type of realism and empiricism which threw light on the real State” (Meinecke, 1998: 217). Meinecke (1998) claims that Hobbes’s imaginary journey departing from the Law of Reason, which is “a mode of thought which tried, from the resource of human reason, to conduct the best State, the State that ought to exist” arrived to the real state (Meinecke, 1998: 217). He says that Hobbes affirmed and sanctioned “human nature” as follows: “but neither of us accuse man’s nature in it. The desires and other passions of man are in themselves no sin” (Hobbes, cited in Meinecke, 1998: 217). According to Meinecke (1998: 220) both Spinoza and Hobbes suppose a universal definition of human reason, which would not change historically. Thus, for Spinoza, “human reason remained the same as it appeared in the light of the ideas of natural right —stable, universal, making the same demands everywhere and for all time” (Meinecke, 1998: 221). Meinecke says that Spinoza asked for the best state, the best state for human reason, “which is universal, and identical in all individuals” (1998: 222). These definitions points out a new era that political units were integrated.

In the new era, international politics and introduction of ‘*covenant*’ as “a new principle upon which the leading powers attempted to regulate Europe” degraded significance of power politics used by small states (Meinecke, 1998: 258). Meinecke (1998: 260-266) says that natural and divine law was replaced by positive in 17th the century, and power politics converted into *raison d’etat*, which is formed according to interests of merchants. While power politics that dynasties

used was against divine law and natural law before, *raison d'état* is used against positive law in 17th century (Meinecke, 1998: 260). Meinecke says *raison d'état* was sanctioned and admitted as superior to positive law during the seventeenth century (Meinecke, 1998: 260). According to Meinecke, Rousset's analysis of maritime trade from the point of *raison d'état* shows that "not only the dynastic power-interests of the absolutist rulers, but also the modern mercantile interests of the more freely governed maritime powers" were integrated into analysis of *raison d'état* (1998: 266). These changes have reflected the change in definition of interests of the state. According to Meinecke's (1998: 272-339) narration, Frederick the Great is an utmost important name in history of *raison d'état*, since he reproduced the idea of reason d'état in accordance with changes in interests of the state. Meinecke (1998: 283) says that legitimacy of interests of the state was grounded on humanitarian ideals, in this new era. Frederick the Great has both the idea of the humanitarian state and of the power-state (Meinecke, 1998: 283). According to principles Frederick the Great set forth, ruler is and must be first the servant of the state and promote humanitarian ideals (Meinecke, 1998: 281-283). Frederick the Great approached *raison d'état* as a question of morality of ruler as an individual, say honour of an individual, and interests of the state (Meinecke, 1998: 281). Meinecke says that "the basic principle, which he now laid down, that the ruler 'was obligated to sacrifice' himself and his private ethics for the sake of his people" (1998: 305). What Frederick the Great uttered was almost a call for repelling of nobility from state affairs. He criticized "hereditary rulers" on the ground that "they form a species of individual that is neither sovereign nor private person, and is occasionally very difficult to control" (Meinecke, 1998: 278). Meinecke (1998: 283) says that there were two outcomes of this policy. Accordingly, while, it "threw a bridge across between the old power-State and the new ideal of the Enlightenment which tended to refer everything to what was universally human", "it sharpened the weapons of the power-State", too (Meinecke, 1998: 283). While ideals that *raison d'état* would serve were renewed, through "cleaning from them the rust of the bad princely tradition and of useless

personal and dynastic motives” “the ruler’s belief in the real justification of using his power-methods” was empowered (Meinecke, 1998: 283, 284). One should admit that both outcomes empower doctrine of *raison d’etat*. Meinecke says that the ideal of Enlightenment is sanctioned as an end that may legitimize various means. Meinecke presents this outcome as follows: “the imperative command of State necessity” surpassing “the demands of humanity, and even over the ideas of his philosophy of the Enlightenment” is still grounded on the ideal of Enlightenment (1998: 283). Domestic politics was also shaped according to *raison d’etat* and humanitarian policies were restricted for “maintaining an unusually strong and strictly organized army” (Meinecke, 1998: 284). In this era, scale within *raison d’etat* exercised changed, and need for *raison d’etat* in certain spheres decreased. Meinecke (1998) says that *raison d’etat* is brought more by a deficiency in power. Accordingly, in the period of the Renaissance and Counter-Reformation, “intolerance had been a matter of *raison d’etat*”, whereas “in the more secure military State of the enlightened century this principle had become old-fashioned”, since the “State interest no longer needed to use religious unity of the subject as a guarantee of their obedience” (Meinecke, 1998: 285). Therefore, Meinecke claims that “in general, as the State grew more powerful, it was able to become more liberal and moral, though certainly only in that province where its power was now completely dominant, that is to say within its own frontiers” (1998: 285). In brief, Meinecke (1998) could recognize the modern origins of the idea of *raison d’etat*.

As presented above, power politics is constituted on the idea of maintaining power of dynasties in early periods, later, it is constituted on idea of maintaining the state, as *raison d’etat*. This idea has implied using government for maintaining and strengthening the state. However Meinecke says that “the deamonic influence had always to be counterbalanced by other ideal forces” when the doctrine of *raison d’etat* is concerned (1998: 411). These forces were “the religious idea, afterwards the humanitarian idea of the Enlightenment, and then finally modern individualism with its new ethical content and the new ideals of the State

after the end of the eighteenth century”, for Meinecke (1998: 411). Accordingly, the real state does not coincide with the best state, which is defined normatively, Meinecke formulates this difference as a “cleavage between empiricism and rationalism, between the actual existing State and the rational State” (1998: 348, 349). He says that Hegel overcame this opposition. With Meinecke’s words, in Hegel’s theory of state, “everything, absolutely everything serves to promote the progressive self-realization of divine reason” and the state “forces into its service even what is elemental, indeed even what is actually evil” (1998: 349). Hegel set free real politics for Meinecke (1998). Accordingly, everything actual was also rational (Meinecke, 1998: 349). Meinecke says that Hegel discovered “‘the truth that resided in power’ . . . and that politics was freed from the precepts of ordinary morality and from the ideal claims of individuals” (1998: 356). Thus, for Meinecke, Hegel’s theory of the state sanctions Machiavelli’s doctrine as integrated to the spirit of the state, however he is not contented with defending real politics before morality, as Machiavelli did, he refuses presence of a conflict between politics and morality (1998: 356-357). According to Meinecke, while “the earlier harsher doctrine of *raison d’etat* had admitted the presence of a conflict between politics, and morality and justice, and had only maintained that politics was supreme and victorious in this conflict”, Hegel challenged this diversion and conflict (1998: 357). However, for Hegel, “‘it is impossible that this most important consideration should be taken to be in conflict with right and duties or with morality’; ‘the State has no higher duty than that of maintaining itself’” (Hegel, 129 cited in Meinecke, 1998: 357). Meinecke implies that idea of *raison d’etat* was annulled by Hegel’s theory of the state. Thus, according to Meinecke, Hegel invalidated the duality or rational state and real state: “the old dualism between the individual or actual State, and the best rational State, ceased”, then “the actual State was the rational State” (1998: 363, 364). Meinecke (1998: 361) claims that the state would not “behave immorally, but rather according to the spirit of a higher morality which was superior to the universal and customary morality” for Hegel. Two levels of morality is set in Hegel philosophy, and “the

State's duty to maintain itself was declared to be the supreme duty of the State, and ethical sanction was thereby given to its own selfish interest and advantage" (Meinecke, 1998: 357). Therefore there is no contrast between moral and immoral, "it was rather between a lower and a higher type of morality and duty" for Hegel (Meinecke, 1998: 357).⁷³ He claims that the state is supposed "to form a bond of union between" "the idea of individuality and the idea of identity, between the individual welfare and the general welfare" in Hegel's philosophy (Meinecke, 1998: 365). According to this identification, "it was the State that created 'the unity of the universal and subjective Will'" (Meinecke, 1998: 365). Therefore, the state's moral quality is founded on "this conjunction between the Will of everything universal and the subjective Will of individuals" (Meinecke, 1998: 365).

The modern nation state was a perfect mechanism for *raison d'etat*. It was constituted on the idea of integrity of individual and the state. Meinecke claims that compulsory military service, which first introduced in Prussia, in 1814, changed the configuration of the power, and converted population of a country into an army (1998: 419). Thus, compulsory military service emerged as a defensive mechanism, and "a means of self-defense adopted by the weaker of the great powers against those that were more overpowering and better endowed by nature" (Meinecke, 1998: 418, 419). Following its success, it was "universally adopted on the continent, produced a general armaments race and turned it into an offensive weapon of politics" (Meinecke, 1998: 419). Such a unity between people and the state affected power struggles between states. Meinecke says that the nation state "on account of universal military service and the other achievements of liberalism" may set "its aims which had been governed by

⁷³ Meinecke (1998: 425) focuses on question of morality in the framework of doctrine of *raison d'etat*, which calls question on relation of ethics and politics. He refers Friedrich Wilhelm Föster's Political Ethics, and says "any discussion with him is really impossible, for he does not speak of the intellectual language created by German historicism, but on the contrary the language of the old Natural Law of Christian and medieval times" (Meinecke, 1998: 425). In that respect, another language can provide another framework for approaching morality and ethics.

rulers and cabinets" (1998: 419). This means a radical change in definitions of peace and war, and also affected domestic politics of the states, and "the State now became more strictly policed, and this caused the general security of the population to increase" (1998: 413). Thus, distinction between war and peace was clearly defined in the modern nation state. Meinecke (1998) points out differences of power configurations in feudal, absolutist and modern states. Accordingly, continues wars and power politics were instruments of power struggle in feudal organization, since "men were not strong enough to reach their aims by the great decisive events of war, that they had recourse to all the possible smaller means" in feudal states (Meinecke, 1998: 412). That's why, he claims, "during the sixteenth and seventeenth centuries that, instead of a definite peace being signed, States often agreed only upon a truce for several years" (Meinecke, 1998: 412). This confusion of war and peace paved the way for power politics (Meinecke, 1998: 412). He says that in the era of "mature absolutism", on the other hand, power resources of states grew "through the establishing of standing armies" (Meinecke, 1998: 413). This change, he claims, "was closely connected with the suppression of the feudal and aristocratic oppositions, with the politics of mercantile economies and the newly-acquired opportunities for taxation" (Meinecke, 1998: 413). Thus, this new era brought "a sharper differentiation between the conditions of peace and war" within the states, according to Meinecke (1998: 413). Meinecke claims that, *raison d'etat* was an instrument of relations between states in a period of continuous war (Meinecke, 1998: 415, 416), and in this period, "both war and peace had trespassed on each other's ground", but after war and peace more strictly separated, and "war was curbed by statecraft and military skill" significance of *raison d'etat* changed, too (1998: 414). He says that "power politics of large States" was served by forces of militarism, nationalism and capitalism (Meinecke, 1998: 418). Thus, there will be no war, if powerful states can make a deal: "if everywhere in the world strength dwelt side by side with strength, and no weak and decadent spot remained amongst them, then it would in fact be a supreme pledge of world peace" (Meinecke, 1998: 420).

This principle can be discerned in the succeeding periods of international power politics, such as the Cold War. He says that modern statesman should limit himself in using *raison d'etat*, since modern civilization has become “dangerous for action in accordance with *raison d'etat* (Meinecke, 1998: 429). Meinecke’s (1998) advise can be recognized as a modern form of *raison d'etat*. Furthermore, he says that it is better if power relations through the world is balanced and sets limitations on *raison d'etat* of the nation states (Meinecke, 1998: 430, 431).

4.1.2. A Partial Conclusion on Doctrine of *Raison d'etat*

Principles about power politics of dynasties and city states, which set forth ways of strengthening rulers, have gradually been converted into the idea of *raison d'etat*, in which strengthening of the state, for “general welfare”, itself became the objective of the reason (Foucault, 1988; Meinecke, 1998). Thus, the doctrine of *raison d'etat* is constructed on the idea of use of government for maintaining and strengthening the state, not for benefit of rulers, but for “public benefit” (Foucault, 1988). The modern conception of sovereignty is established on a supposed identification of interests of individuals with interests of the state (Hegel, referred in Meinecke, 1998). This idea was promoted through an international sphere of competition between states (Foucault, 1988). The idea is expressed through different policies in different periods, according to power of the state (Meinecke, 1998). It is advanced in modern nation state, so that population of the state is instrumentally employed to strengthen the state by the government (Foucault, 1988). In modern nation state, with compulsory military service, the population of a country converted into an army, and unity between people and the state affected power struggles between states (Meinecke, 1998). Furthermore, with political mechanisms, individual has become both the object and subject of politics (Foucault, 1988). In new conditions, the general security of the population increased, and it was through that there will be no war, if powerful states can make a deal (Meinecke, 1998). The idea sets forth the purpose of maintaining and strengthening the state for the purpose of “general welfare” as

the main objective, and acknowledge using government for this purpose. Since purpose of this section is to have an interpretation of Susurluk Affair, as a case of extra-legal activities of the state, from the viewpoint of *raison d'etat*, this idea is interpreted in regard to extra-legal activities of the state, and Susurluk Affair is interpreted from this viewpoint in following two sections.

4.1.3. Extra-legal Activities of the State from the Viewpoint of Doctrine of *Raison d'etat*

It is clear that, defining extra-legal activities of the state from the viewpoint of doctrine of *raison d'etat* is difficult, since all actions that serve interests of the state, or which serve “general welfare” and “public benefit”, are sanctioned by the idea of *raison d'etat*. However, different authors may provide different views about the interests of the state, in regard to “general welfare” of the population of the state. The basic criterion for evaluating the practices of rulers from the viewpoint of the doctrine of *raison d'etat* is the benefit of state. Contemporary version of the idea which is formulated by Meinecke (1998) advises to modern statesman to restrict state egoism and *raison d'etat*, since he claims that behaving according to *raison d'etat* in modern international world order that is dominated by powerful countries, is difficult and dangerous. Thus, modern statesman should set limitation on *raison d'etat* for maintaining the state, and “public benefit”, for Meinecke (1998). However, *raison d'etat* implies a way of acting in which public officials or politicians may use any means as long as they serve to “public benefit” and interests of the state. Meinecke’s (1998) modern interpretation of the doctrine, on the other hand, may be incorporated into the doctrine partially. From the viewpoint of both versions, it is difficult to define extra-legal activities of the state, since the sphere of legality is not clearly defined in regard to state affairs. How could Susurluk Affair be interpreted, as a case of extra-legal activities of the state, from the viewpoint of *raison d'etat*?

4.1.4. Reading of Susurluk Affair as a Case of Extra-legal Activities of the State from the Viewpoint of Doctrine of *Raison d'etat*

How could extra-legal forces, such as Çatlı and his accomplices be recognized according to the doctrine of *raison d'etat*? Since the main criterion for legitimacy of suspension of law is “public benefit”, which is concretized as benefit of the state, this view would welcome all actions serving to the benefit of state, beyond the distinction between extra-legal and legal forces. Thus, distinction between transgression and implementation of legal order cannot easily be set from this viewpoint; and Susurluk Affair is sanctioned if it serves to interests of individuals that are concretized as the interests of the state. Therefore, if extra-legal forces of the state are not used for individual interests of politicians and public officials, but used for maintaining the state, they comply with good *raison d'etat*. Thus, although doctrine of *raison d'etat* does not exclude Susurluk Affair as a case of extra-legal activities of the state, it does not provide a framework for legal analysis of Susurluk Affair since it proposes to legitimize all activities of the state. Therefore, it would be better looking for another framework that is founded on connection of transgression and implementation of law. Such a perspective may be found in Schmitt’s theories of the political and sovereignty. Following section focuses on Susurluk Affair from Schmitt’s theories of political and sovereignty and asks if Susurluk Affair, as a case of extra-legal activities of the state, be understood from Schmitt’s viewpoint.

4.2. Interpreting Susurluk Affair as a Case of Extra-legal Activities of the State from the Viewpoint of Schmitt’s Theories of the Political and the Sovereignty

Carl Schmitt’s theory is promising for approaching Susurluk Affair, since he conceptualizes connection between violation and implementation of law vis-a-vis jurisdiction and politics. Schmitt’s theory of “sovereignty”, and “political” is remarkable because his perspective can be interpreted as an extension of the doctrine of *raison d'etat*, but it cannot be consumed by it, since it does not propose methods for maintaining and strengthening state as *raison d'etat* does but instead it brings a view of the structure in which *raison d'etat* is made real in the modern

state. However, having an interpretation of Schmitt's viewpoint in comparison to doctrine of *raison d'état* at the beginning of this section may be a misleading endeavor, since it may lead to understand Schmitt's theory in the light of the doctrine of *raison d'état*. Thus, I prefer to focus on Schmitt's perspective and interpret Susurluk Affair as a case of extra-legal activities of the state from Schmitt's viewpoint, and at the end of this chapter to have a comparison of these two theoretical standpoints: two theories that understand the state as a political institution. This section aims to have a Schmittian interpretation of Susurluk Affair as a case of extra-legal activities of the state. That's why, first, it gives a general introduction to Schmitt's theoretical standpoint, and Schmitt's theories of the political and sovereignty. Then, it gives an interpretation of Schmittian viewpoint vis-a-vis extra-legal activities of the state. Finally, it answers if Susurluk Affair as a case of extra-legal activities of the state be understood from a Schmittian viewpoint.

4.2.1. A General Introduction to Schmitt's Theoretical Standpoint

Schmitt's theory can better be evaluated if his assumption on democracy is presented. Furthermore, such a presentation would provide a view for locating the Susurluk Affair from a Schmittian point of view, because Schmitt's theories on the political and sovereignty are related with his conception of democracy. His conception of democracy is founded on criticism of liberal idea of the state established with a contract. This idea presupposes atomic individuals, that cannot be translated into the political for Schmitt. He criticizes Hobbes's view on necessity of separation of private conscience and public attitudes (Schmitt, 1996). Schmitt (1996: 83) criticizes Hobbes's theory for it "opened the door for a contrast to emerge because of religious reservation regarding private belief and thus paved the way for new, more dangerous kinds and forms of indirect powers". Rousseau's "*Contrat social*", on the other hand, is different from Hobbes's concept (Schmitt, 1992). Schmitt (1992) acknowledges Rousseau's concept of *Contrat social*. He asserts that Rousseau's "*Contrat social*" is not a contract indeed, since it

presumes homogeneity of contracting parties, and establishes a “general will”. Therefore, “according to the *Contrat social*”, Schmitt says, “the state rests not on a contract but essentially on homogeneity, in spite of its title and in spite of the dominant contract theory” (1992: 14). He emphasizes that people’s will cannot be identical with wills of separated individuals. Schmitt (1996) asserts that Rousseau’s concepts of “general will” and *Contrat social* acknowledges integrity of the state and society, while Hobbes’s concept of contract of all with all does not. Schmitt (1992) says that it is impossible to refer to a people, if one assumes that there is nothing beyond separate individuals.⁷⁴ He criticizes liberal conception of individual. He says it is impossible to refer a “people” in the liberal paradigm: “the unanimous opinion of one hundred million private persons is neither the will of the people nor public opinion” (Schmitt, 1992: 16). Schmitt (1992), criticizing atomic view of individual proposed by liberalism, calls for a “people”, that should be identified with who governs, in a genuine democracy. Such a democracy is only possible with a relatively homogenous population for Schmitt (1992). The state theory of the *Contrat social*, he says, also proves that democracy is correctly defined as identity of governed and governors (Schmitt, 1992: 14). He says these dictatorial and Caesaristic methods, are more effective in having constitution of the people, and in ensuring identification of those who command with those who obey (Schmitt, 1992). That’s why he claims, these methods are more democratic than a parliamentary democracy (Schmitt, 1992: 17). “Essence of democratic principle”, Schmitt claims, is “assertion of an identity between law and the people’s will” (1992: 26). What is crucial for a democracy is, “the creation and shaping of the popular will” for Schmitt (1992). Thus, if there is no equality among population, assuming such an equality in political sphere means hollowing of the political sphere for Schmitt (1992). Presupposition of an equality in the political sphere, on the other hand, does not eliminate existing heterogeneity, but shifts it into another sphere. Then, the principle of equality

⁷⁴ Therefore, “the people’, Schmitt asserts, “is a concept in public law” and “the people exist only in the sphere of publicity” (1992: 16).

does not change inequalities, since “substantive inequalities would in no way disappear from the world and the state; they would shift into another sphere” (Schmitt, 1992: 12). Such a power shift from the political, for instance to economic sphere, may leave “this area to take on a new, disproportionately decisive importance”, so that “under conditions of superficial political equality, another sphere in which substantial inequalities prevail . . . will dominate politics” (Schmitt, 1992: 12). He criticizes use of the concept of equality without the “correlate” concept of inequality. He asserts that equality guaranteed in a specific sphere of life, disesteem this sphere and enhance the effects of other spheres on the concerned sphere, “then this area loses its substance and is overshadowed by another sphere in which inequality then comes into play with ruthless power” (Schmitt, 1992: 13). Therefore, “the equality of all persons as persons is not democracy but a certain kind of liberalism” for Schmitt (1992: 13). What he emphasizes is that democracy and parliamentarism is not identical: “democracy can exist without what one today calls parliamentarism and parliamentarism without democracy” (Schmitt, 1992: 32). Democracy, on the other hand, can only be maintained by identifying those who rule with those who are ruled. He adds that a dictatorship can be a more democratic regime than a parliamentarian regime, and “dictatorship is just as little the definitive antithesis of democracy as democracy is of dictatorship”⁷⁵ (Schmitt, 1992: 32). The question for Schmitt (1992) is generating a “common will” for the whole population. How could heterogeneous wills of individuals be translated to a common will? Schmitt (1992) says that gap between people’s will and law cannot be closed. However, people’s will can be manipulated and formed, and an identity can be asserted (Schmitt, 1992: 27). Then, the first principle in such a translation is “homogeneity”, and the second principle is “manipulation”. For Schmitt (1992) a real democracy must be founded on a relatively homogeneous population. The second principle is

⁷⁵ According to Schmitt: “a democracy can be militarist or pacifist, absolutist or liberal, centralized or decentralized, progressive or reactionary, and again different at different times without ceasing to be a democracy”. (1992: 25)

manipulation of people's wills by the state. Thus, Schmitt (1992) sanctions not only the expression of people's will, but manipulation of it by the state. On the other hand, if there is a distinction between those who are governed and those who are governing, this will lead to limitation of the state power. On the contrary, in a democracy enduring identity of those who command and who obey, there is no need for restricting the power of the state, and no need for a contract, either (Schmitt, 1992: 14, 15). He says that making a decision in emergency is also easy, if identity of those who are governed and those who are governing is established. That means the constituting power, say people as the constituting power, holds the power. He argues that "if democratic identity is taken seriously, then in an emergency, no other constitutional institution can withstand the sole criterion of the people's will, however it is expressed" (Schmitt 1992: 15). He promotes Hobbes's theory for it "restored the old and eternal relationships between protection and obedience, command and the assumption of emergency action, power and responsibility" (Schmitt, 1996: 83). These attributes of the authority are very important for Schmitt (1996). An authority has to provide protection for demanding obedience for Schmitt (1996). He promotes Hobbes's theory, on the ground that it points out the differences between an irresponsible and a responsible authority. He says that Hobbes pointed out difference between the responsible authority and the authority "that demands obedience without being able to protect, that wants to command without assuming responsibility for the possibility of political peril, and exercise power by way of indirect powers on which it devolves responsibility" (Schmitt, 1996: 83). Could this distinction provide a viewpoint to locate Susurluk Affair? The correspondence between protection and obedience is essential principle of sovereignty for Schmitt (1996). He esteems Hobbes's assertion of the "relation between protection and obedience" as the essential point in construction of the state (Schmitt, 1996: 83). According to this principle, the state power is founded on "the assumption of total political responsibility regarding danger and, in this sense, responsibility for protecting the subjects of the state" (Schmitt, 1996: 72). Thus, he says that

according to this principle, “if protection ceases, the state too ceases, and every obligation to obey ceases”, too (Schmitt, 1996: 72). Schmitt defines the state as the political institution that holds the authority to decide and mobilize the people in such states of emergency. Thus, Schmitt’s conception of the state is founded on his conception of the political. Following section focuses on Schmitt’s theory of state, in the light of his “concept of the political”.

4.2.2. Schmitt’s Theory of the Political: The State is a Political Institution

Every religious, moral, economic, ethical, or other antithesis transforms into a political one if it is sufficiently strong to group human beings effectively according to friend and enemy. (Schmitt, 1976: 37).

Schmitt (1976) says that the political is an original category. The political is a different category from categories of moral, aesthetic and economic; it has its own defining features. With his words: “let us assume that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable”, then, he asks “whether there is also a special distinction which can serve as a simple criterion of the political” (Schmitt, 1976: 26). Schmitt (1976: 25) answers this question as follows: “a definition of the political can be obtained only by discovering and defining the political categories” and these categories are categories of “friend” and “enemy”.⁷⁶ For serving as an independent category, criterion of the political has to be different from the other criteria: “the nature of such a political distinction is surely different from that of those others. It is independent of them and as such can speak clearly for itself” (Schmitt, 1976: 26). After such a distinction, he states that “the specific political distinction to which political actions and motives can be reduced is that between friend and enemy” (Schmitt, 1976: 26). Could such an isolated sphere of politics be defined? Can politics and categories of friend and enemy be defined apart from the other aspects of life? These questions are not relevant for Schmitt’s

⁷⁶ Schmitt gives examples of approaches in political philosophy such as Hobbes, Machiavelli, Fichte and also Tonnies, and says, “these political thinkers are always aware of the concrete possibility of an enemy” (1976: 65).

theory of the political (1976), since it does not assume an isolated sphere of politics, but asserts that these distinctions of economics, aesthetics and ethics convert to political distinctions if they are redefined in a grouping of friend and enemy. Schmitt's (1976) concept of the political is founded on a pessimist point of view about human nature. He narrates this point as follows: "the question is not settled by psychological comments on optimism or pessimism", since "because the sphere of the political is in the final analysis determined by the real possibility of enmity, political conceptions and ideas cannot very well start with anthropological optimism" (Schmitt, 1976: 63, 64). He recognizes that such an optimism "would dissolve the possibility of enmity and, thereby, every specific political consequence" (1976: 63, 64).

Schmitt (1976) asserts that his definition of the concept of the political has not a substantial content; it just gives the criterion for distinctions. Indeed definition of the political embraces different sorts of oppositions. Accordingly, "a religious community which wages wars against members of other religious communities or engages in other wars is already more than a religious community; it is a political entity" (Schmitt, 1976: 37). Indeed, the basic political category is the authority to decide on who the enemy is, for Schmitt (1976) thus, a religious community is a political entity even "when it is in the position of forbidding its members to participate in wars, i.e., of decisively denying the enemy quality of certain adversary" (Schmitt, 1976: 37). The point is that, the criterion of the political, which is formulated as deciding the enemy, is independent of other spheres, such as morality, economics, aesthetics for Schmitt (1976), since he does not want to deduce the political from other criteria. Accordingly, "the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation" (Schmitt, 1976: 27). That's why, one may be "the political enemy", even if he-she is not "morally evil or aesthetically ugly" for Schmitt (1976). He-she may be the political enemy, even if he-she is not an economic competitor, and even if it is advantageous to engage with him in business transactions (Schmitt, 1976: 27).

However, “he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible” (Schmitt, 1976: 27). For Schmitt (1976) the enemy is “existentially something different and alien”. Then, concept of enmity is constructed on supposed differences.

What Schmitt wants to point out in this definition? Who is “the other”, “the stranger” one who is “existentially something different and alien”? How can the supposed differences produce a conflict? Schmitt asserts that “these can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party” (1976: 26, 27). Schmitt (1976) points out that defining a friend or an enemy springs from a concrete situation, say a political group is somehow the same, has a relative homogeneity, and the enemy is a threat against the existence of this group. He states the case as “to preserve one's own form of existence” (Schmitt, 1976: 27). Though political distinction is not related to other categories of distinction, most of the time, it overlaps with other distinctions, such as aesthetic or moral “because every distinction, most of all the political, as the strongest and most intense of the distinctions and categorizations, draws upon other distinctions for support” (Schmitt, 1976: 27). His statement is illustrative: “the morally evil, aesthetically ugly or economically damaging need not necessarily be the enemy” (Schmitt, 1976: 27). Can one assert this? Is not one, who is economically damaging always dangerous for a political entity and an enemy in potentiality?⁷⁷ A political entity can bear the burden of economic damages, without translating it into friend

⁷⁷ For instance, Schmitt (1976) defines Marxists approach of class struggle as something political, since it requires a distinction of friend and enemy:

Also a class in the Marxian sense ceases to be something purely economic and becomes a political factor when it reaches this decisive point, for example, when Marxists approach the class struggle seriously and treat the class adversary as a real enemy and fights him either in the form of a war of state or in a civil war within a state. The real battle is then of necessity no longer fought according to economic laws but has -next to the fighting methods in the narrowest technical sense- its political necessities and orientations, coalitions and compromises,

enemy distinction. In Schmitt's words: "thereby, the inherently objective nature and autonomy of the political becomes evident by virtue of its being able to treat, distinguish, and comprehend the friend-enemy antithesis independently of other antitheses" (1976: 27). For Schmitt (1976), the political decision of who the enemy is, is decided in the concrete situation, it is an existential confrontation that presupposes the war. He opens up the concepts and emphasizes that these are not metaphors or symbols, but refer to a concrete situation. What is the difference between the fiction and reality? Schmitt says that possibility of a real war, of a real battle is "the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour" (1976: 34). Thus, it is impossible to distinguish the figure of enemy from a real enemy. Schmitt (1976) emphasizes that possibility of real confrontation is necessary for politics. However, the political can not be conceptualized as war, it is the decision on who the enemy is so that it may pave the way for a real war (Schmitt, 34). For Schmitt, "from this most extreme possibility human life derives its specifically political tension" (1976: 35).⁷⁸

From the viewpoint of Schmitt (1976: 28), the question is not "whether one rejects, accepts, or perhaps finds it an atavistic remnant of barbaric times that nations continue to group themselves according to friend and enemy". Rather the reality is that nations still "continue to group themselves according to the friend and enemy antithesis" (1976: 28). Thus, Schmitt focuses on political realities,

and so on (Schmitt, 1976: 38).

⁷⁸ Schmitt (1976: 30) asserts that political concepts are employed in concrete struggles, and they "have a polemical meaning". He (1976) says that the conflict can be found in everyday language. Those concepts, "turn into empty and ghostlike abstractions when this situation disappears" (Schmitt, 1976: 30). He asserts that a word has no content if no one knows who will be affected by it. "A word or expression" on the other hand, "can simultaneously be reflex, signal, password and weapon in hostile confrontation" (Schmitt, 1976: 31). They are significant in the context of the political. With Schmitt's words:

Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term (1976: 30, 31).

rather than on normative ideals (1976: 28). Definition of the enemy requires a public enemy, enemy of a *people*, then, it presupposes existence of a people.⁷⁹ But which comes first, the “people” or the enemy? Could a people be defined without the figure of the enemy? Schmitt asserts that the enemy is not a private enemy; he is a public enemy: ⁸⁰ “an enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity” (1976: 28). Therefore, a political organization of people, a nation is presumed in definition of the enemy: “the enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship” (Schmitt, 1976: 28). He mentions the statement of “love your enemies”, and says that when one defines someone politically as *hostis*, he can not love him,⁸¹ though “the enemy in the political sense need not be hated personally” (Schmitt, 1976: 29). Therefore, only “in the private sphere” “it makes sense to love one's enemy, i.e., one's adversary”, but “it certainly does not mean that one should love and support the enemies of one's own people” (Schmitt, 1976: 29). Schmitt refers to “enemies of one's own people”, but who are one's own people? Existence of one's own people is presumed for defining the stranger, and

⁷⁹ Schmitt's definition of the political is open to criticism. For instance Derrida (1997: 104-105) calls for another politics that would be founded on deconstruction of Schmitt's conception of the political: “we seem to be confirming- but only by way of deploring the fact, as Schmitt does - an essential and necessary depoliticization”. He says that this depoliticization would not be expressed by indifference. Derrida calls for a politics of deconstruction (1997: 104-105). Additionally, he emphasizes that political as Schmitt defines is almost unattainable, since the enemy cannot be defined (Derrida, 1997: 114). He says that those questions Schmitt suggests to ask to define the enemy, public enemy, etc., deserve to be asked, since asking these questions enable us to develop a critical view about ourselves (Derrida, 1997: 106).

⁸⁰ He refers Forcellini's words: “a private enemy is a person who hates us, whereas a public enemy is a person who fights against us” (1976: 29).

Hegel also defines the enemy:

The enemy is a negated otherness. But this negation is mutual and this mutuality of negations has its own concrete existence, as a relation between enemies; this relation of two nothingness on both sides bears the danger of war. “This war is not a war of families against families, but between peoples, and hatred becomes thereby undifferentiated and freed from all particular personality” (cited in Schmitt, 1976: 63).

⁸¹ For instance, Schmitt (1976) defines Turks as *hostis* to Christians.

the enemy. Thus, only a political group can decide on who the enemy is, and it is dissolved if it does not make a decision on this issue, or if the political group does not behave in accordance with this decision. Schmitt says that “every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping” (1976: 29). Then, any antagonism approaching the friend-enemy grouping converts into a political antagonism. The state, on the other hand, is the political entity that decides on who the enemy is for the nation as an integrity (Schmitt, 1976). According to Schmitt, “in its entirety the state as an organized political entity” decides about “the friend-enemy distinction” for itself (1976: 29). The state decides as an integrity, not as parts. Schmitt says that war depends on and presupposes a decision regarding who the enemy is: “war has its own strategic, tactical, and other rules and points of view, but they all presuppose that the political decision has already been made as to who the enemy is” (1976: 34).

Is Schmitt’s concept of “political” valid only for international politics? One can interpret such conception of the political as an outcome of German experience in the First World War. However, it is not easy to claim that Schmitt’s conception of the political is founded on international politics. Schmitt (1976:32, 46) manifestly defines the right to declare a domestic enemy for the states. However, this issue requires a detailed analysis, particularly for having a Schmittian view of Susurluk Affair. That’s why following subsection intends to answer Schmitt’s view on enemy within.

4.2.2.1. The Enemy Within

The question of if Schmitt defines the enemy also as an insider has to be answered. Schmitt’s comments on right to declare a domestic enemy have to be analysed. One may ask if Schmitt’s (1976) definition of enemy is an enemy in international sphere or may it also be defined as an insider.⁸² Schmitt’s following

⁸² Howse mentions that Schmitt’s concept of the political is relevant for declaring an internal enemy: “Moreover, the power to decide concerning the enemy extends

expression on enemy is illustrative to answer this question: “as long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon domestic enemy” (1976: 46). The logical consequence of this statement is that, “every state provides, therefore, some kind of formula for declaration of an internal enemy” (Schmitt, 1976: 46). Thus, the enemy can also be defined as an insider for Schmitt. However, Schmitt (1976) denies to substitute domestic politics for politics, if “antagonisms among domestic political parties” do not “succeed in weakening the all-embracing political unit, the state” (1976: 32). In brief, he does not prefer to substitute domestic politics for “politics”, in general. He defines the condition of replacement of politics with party politics or domestic politics as follows: “the intensification of internal antagonisms has the effect of weakening the common identity vis-a-vis another state” (Schmitt, 1976: 32). In such a condition, with his words, “if domestic conflicts among political parties have become the sole political difference”, it means that “the most extreme degree of international political tension is thereby reached”, and hence “the domestic, not the foreign friend-and-enemy groupings are decisive for armed conflict” (Schmitt, 1976: 32). Such a replacement, on the other hand, implies a danger of civil war: “if one wants to speak of politics in the context of primacy of internal politics, then this conflict no longer refers to war between organized nations but to civil war” (Schmitt, 1976: 32). “War” and civil war is different because while the first “is armed combat between organized political entities”, the latter “is armed combat within an organized unit”⁸³ (Schmitt, 1976: 32). Schmitt mentions that civil war

to the power to declare as (internal) enemy and treat accordingly any internal force or group that questions the primary decision concerning the enemy” (Howse, 1998: 66).

⁸³ Schmitt (1976) narrates the role of real possibility of physical killing in friend-enemy distinction as follows:

The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity. It does not have to be common, normal, something ideal, or desirable. But it must

leads to “a self-laceration” that endangers the survival of the political entity (1976: 32). Then, civil war is a threat for the political entity. The political can be defined in the context of a civil war, Schmitt’s (1976) concept of the political embraces domestic disputes, too. However, he does not found the concept of the political on declaration of a domestic enemy. On the contrary, he says that domestic antagonisms may ruin the political unity.

Böckenförde’s (1998: 38, 39) analysis of Schmitt’s conception of domestic enemy is valuable, since he focuses on the 1963 edition of *Der Begriff des Politischen*, in which Schmitt explicated the concept of the political. Böckenförde (1998) says that there is a misunderstanding about Schmitt’s concept of the political. He asks if Schmitt defines the enemy for domestic politics, too. He claims that it is a misunderstanding to assume that Schmittian conception of friend and enemy propose turning “the domestic debate *within* the state into a relationship between friend and enemy and, where possible, to create a corresponding reality” (Böckenförde, 1998: 38). According to Böckenförde, the state is not supposed to declare a domestic enemy at all in Schmitt’s theory, since it is supposed having a monopoly of coercive power, it does not have a difficulty in integrating of people: “domestic conflict can thus be integrated into a peaceful order guaranteed by the state’s monopoly of coercive power” (Böckenförde, 1998: 39). Therefore, “while fencing itself off against other external political unities, its domestic distinctions, antagonisms and conflicts remain *below* the level of friend-enemy groupings” (Böckenförde, 1998: 39). Definition of the “people” leads that “all these domestic relationships are embraced by the relative homogeneity of the people held together by some sense of solidarity (i.e., friendship)” (Böckenförde, 1998: 39). Böckenförde (1998) interprets Schmitt’s concept of the political for domestic conflicts as if it has a liberal emphasis that valorizes a communicative public sphere for resolution of domestic conflicts.⁸⁴ Böckenförde’s (1998)

nevertheless remain a real possibility for as long as the concept of the enemy remains valid. (33)

⁸⁴ The following statement is such an interpretation:

interpretation seems an exaggeration of Schmitt's theory. However, his opinion on conception of domestic enemy in Schmitt's theory (1976) is acceptable.

This conclusion can be reached also in previous publications of *Der Begriff des Politischen*. First of all, Schmitt (1976) does not propose a homogeneity in political sphere. His conception of politics requires a dynamic process. He supposes a dynamic process of struggle for political power. It is formed through "the intensity of an association or dissociation of human beings whose motives can be religious, national (in the ethnic or cultural sense), economic, or of another kind", and mentions that, "at different times different coalitions and separations" are possible (Schmitt, 1976: 38). However, all these coalitions and separations conclude in a decisive political entity, in the state as an integrity. Schmitt claims that "if such an entity exists at all, it is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there" (1976: 38). Then, friend-enemy distinction is defined by the state. Otherwise, there is no political entity for the people concerned, and one can also say that a people does not exist at all. However, according to Schmitt (1976), the political entity is essential, and "it is the decisive entity for the friend-or-enemy grouping" if "the orientation toward the possible extreme case of an actual battle against a real enemy" is on the agenda. This political entity, he asserts "is sovereign" (Schmitt, 1976: 39). He adds that "otherwise the political entity is nonexistent" (Schmitt, 1976: 39). Then, Schmitt (1976) supposes a fragmentation in the society, but he supposes possible integration of this fragmentation to be achieved by the state. The state beyond the fragmentation, is the decisive entity that integrates the society through the decision on who the enemy is. Therefore, a political power of a group or a class

Domestic politics in its classical sense aims at good order within the community by trying to keep conflicts and debates within the framework of peaceful coexistence. Thus it is the purpose of the state as a political unity to relativize domestic antagonisms, tensions, and conflicts so as to facilitate peaceful debates as well as solutions and ultimately decisions that are in accordance with procedural standards of argumentation and public discourse. (Böckenförde, 1998: 39).

has to control the state. However, if this power dominating the state is “incapable of assuming or lacking the will to assume the state's power and thereby decide on the friend-and-enemy distinction and, if necessary, make war”, it means the state as the political entity is dissolved (Schmitt, 1976: 38).⁸⁵ The concept of political is essential for the state, since “the state is an entity”, “the decisive entity rests upon its political character” (Schmitt, 1976). Then, the state cannot be an entity of people, besides the other entities, it is different in the decisive sense. However, it does not mean that such an entity should determine every aspects of individual's life; say it is not a totalitarian state (Schmitt, 1976: 39). Schmitt considers the political entity as the state, which would decide in friend-enemy distinction. He says that the decisive entity is not similar to groupings and associations, since it has the authority to decide on friend and enemy distinction for people, as an integrity, say it is a decisive entity for the people. Thus, the state is different from other associations, since it is “something decisive” (Schmitt, 1976: 45). Therefore, if this entity disappears, “even if only potentially, then the political itself would disappear” (Schmitt, 1976: 45).

In brief, even if one asserts, like Böckenförde (1998), that Schmitt has a communicative, peaceful vision of domestic politics, it always has a potency to turn into a friend-enemy grouping, when there is a threat of a civil war or revolution. Böckenförde (1998) acknowledges that Schmitt recognizes the potency of friend-enemy grouping in domestic politics, therefore, “the decisive point is only that this grouping must not reach the intensity of a friend-enemy relationship” (Böckenförde, 1998: 39). However, such kind of “grouping can be called political in the Schmittian sense because, if reasonable politics and conflict management fails, it possibly can escalate to the ultimate degree of intensity”

⁸⁵ Schmitt (1976) evaluates a syndicalist movement's aim of death of state and criticizes pluralist conceptions of state. He criticizes “pluralist theory” on the ground that, for pluralist theory of state, unity of the state is approached either “by a federalism of social associations or a theory of the dissolution or rebuttal of the state”. Those conceptions fails in defining a political entity for Schmitt (1976).

(Böckenförde, 1998: 39). He says that one can mention a “second order concept of the political”, for domestic conflicts: “from a logical point of view, it seems appropriate to characterize this as a ‘second order concept of the political,’ since it is connected with, rather than completely detached from, the political friend-enemy definition” (Böckenförde, 1998: 40). Thus, according to Böckenförde such a “second order concept of the political” may be employed for domestic conflicts, in Schmitt’s theory of the political, since “the political unity can be jeopardized both from without, that is by threats and attacks from external enemies, as well as from within” (Böckenförde, 1998: 40). He reminds that Schmitt refers von Stein’s comment on condition for suspension of the constitution (Böckenförde, 1998). Accordingly, Schmitt refers to von Stein’s comment on civil war and says that, if a constitutional state is attacked, “the battle must then be waged outside the constitution and the law, hence decided by the power of weapons” for Schmitt (Böckenförde, 1998: 47). The “constitutional ties to which the state is bound”, on the other hand, are not obstacle for a battle that is waged outside the constitution (Böckenförde, 1998: 47). As a conclusion, Schmitt (1976) does not claim that a political entity has to declare a domestic enemy. On the contrary, domestic antagonisms are better to be dissolved through peaceful methods. However, if a political entity is confronted with a threat of a civil war, it may declare a domestic enemy, and suspend the constitution. Suspension of constitution, on the other hand, requires making a decision on an exception. These issues provide a Schmittian viewpoint in locating Susurluk Affair as a case of extra-legal activities of the state. However, one has to focus on his conception of sovereignty for constructing a Schmittian account of Susurluk Affair. Following section focuses on Schmitt’s conception of sovereignty and exception.

4.2.3. Schmitt’s Theory of Sovereignty: The Centrality of Exception

[W]hat characterizes an exception is principally unlimited authority, which means the suspension of the entire existing legal order. In such a situation it is clear that the state remains whereas law recedes (Schmitt, 1988a: 12).

This statement presents Carl Schmitt's understanding of the state and law. Schmitt (1988a) constructs his theory upon criticism of positivist conceptualizations of the state and law. He says that mission of exclusion of the exception from law fails because "whether the extreme exception can be banished from the world is not a juristic question" (Schmitt, 1988a: 7). He formulates "exception" as a problem, which belongs to the life, not to jurisprudence. Schmitt (1988a) emphasizes the similarity between transgression of laws of nature by direct intervention -say intervention of the God- and sovereign's direct intervention in a valid legal order. Then, for understanding a direct intervention in a legal order, one should understand what the concept of "miracle" signifies. He criticizes positivist conception of law, from epistemological and ontological points of views. "This theology and metaphysics" he says, denies the idea of "miracle", which means "transgression of the laws of nature through an exception brought about by direct intervention" for nature and "the sovereign's direct intervention in a valid legal order" for politics (Schmitt, 1988a: 36, 37). He says that rationalist, procedural conception of law is founded on "the rationalism of the Enlightenment" that "rejected the exception in every form" (Schmitt, 1988a: 37).⁸⁶ Schmitt criticizes employment of concepts of natural sciences in argumentation regarding law.⁸⁷ He distinguishes metaphysical foundation of sovereignty and law in seventeenth century and in the period "after scientific

⁸⁶ For Schmitt, Kelsen "thought Hume's and Kant's critique of the concept of substance can be transferred to the theory of state" (1988a: 41). Accordingly, Kant's concept of will is founded on *reason*:

Everything in nature works according to laws. Rational beings alone have the faculty of acting according to the conception of laws- that is, according to principles, that is have a will. Since the deduction of actions from principles requires reason, the will is nothing but practical reason. If reason infallibly determines the will, then the actions of such a being which are recognized as objectively necessary are subjectively necessary also, that is, the will is a faculty to choose that only which reason independent on inclination recognizes as practically necessary, that is, as good. (Kant, 1949: 30).

⁸⁷ He says "the distinction between the substance and the practice of law, "cannot be grasped with concepts rooted in the natural sciences" (Schmitt, 1988a: 42).

thinking has permeated political ideas” (Schmitt, 1988a). He asserts that “in the seventeenth century, the monarch is identified with God and has in the state a position exactly analogous to that attributed to God in the Cartesian system of the world” (Schmitt, 1988a: 46).⁸⁸ The sovereign is conceptualized as creator, master builder, and legislator. Accordingly, while “the world architect is simultaneously the creator and the legislator, which means the legitimizing authority” in this period, such a conception of sovereign has changed “later, after scientific thinking has permeated political ideas” and law is reformulated in the framework of lawfulness of the nature (Schmitt, 1988a: 48). The problem endangering the legal sphere is outcome of the identification of “the general validity of a legal prescription” “with the lawfulness of nature, which applies without exception” (Schmitt, 1988a: 48).

Schmitt, analysing procedural definitions of the rule of law and metaphysical foundation of these approaches, says that the confidence and hope on elimination of the exception “depends on philosophical, especially on philosophical-historical or metaphysical, convictions” (1988a: 7). He traces the foundation of Kelsen’s “a metaphysics that identifies the lawfulness of nature and normative lawfulness” and says that “identification of state and legal orders” is grounded on the aforesaid identification (Schmitt, 1988a: 41). “This pattern”, he says, “is based on the rejection of all ‘arbitrariness’, and attempts to banish from the realm of the human mind every exception” (Schmitt, 1988a: 41). Schmitt’s (1988a) essential criticism is that, this conception of law cannot cover the irregularities of the World. He criticizes the idea of the modern constitutional state for it “triumphed together with deism, a theology and metaphysics that banished the miracle from the world” (Schmitt, 1988a: 36). He says that in “the nineteenth-century theory of the state”, moments of “the elimination of all theistic

⁸⁸ Schmitt cites Boutmy's claim on Rousseau: “Rousseau applies to the sovereign the idea that the philosophers hold of God: He may do anything that he wills but he may not will evil” (Schmitt, 1988a: 46). He says that “the seventeenth and eighteenth centuries were dominated by this idea of the sole sovereign” (Schmitt, 1988a: 47).

and transcendental conceptions and the formation of a new concept of legitimacy" were apparent (Schmitt, 1988a: 51). However, these moments that brought the positive conception of law, resulted in a dilemma for the theory of public law, it has a tension, bears a dilemma, Schmitt (1988a) asserts, since it has become "positive". This dilemma rests "in the idea that all power resides in the *pouvoir constituant* of the people which means that the democratic notion of legitimacy has replaced the monarchical" (Schmitt, 1988a: 51). Rousseau's "general will" replaced sovereign's will, but people's will was not united. This change in understanding of sovereignty is presented in Kelsen's (1974: 42) words as follows: "democracy is the expression of a political relativism and a scientific orientation that are liberated from miracles and dogmas and based on human understanding and critical doubt." Such relativism, however, could not exclude sovereignty as the power that decides on the conditions that laws are valid, but it just oversees it, for Schmitt (1988a).

As Schmitt (1988a) claims, the idea of 'omnipotent' modern lawgiver is derived from theology. Lawgiver can do anything, can change the laws, pardon penalties, etc. He asserts that "the public law literature of positive jurisprudence for its basic concepts and arguments" is saturated with the state interventions (Schmitt, 1988a: 38). The state operates as "lawgiver, executive power, police, pardoner, welfare institution", and it "acts in many disguises but always as the same invisible persons" (Schmitt, 1988a: 38). This means sovereignty cannot be eliminated at all. He reminds that, "everyone agrees that whenever antagonisms appear within a state, every party wants the general good-therein resides after all the *bellum omnium contra omnes*" (Schmitt, 1988a: 9). Such relativism, on the other hand, ends up with a difficulty of deciding what the general good is. Sovereignty, Schmitt says, "and thus the state itself", he adds, "resides in deciding this controversy" and in deciding "definitively what constitutes public order and security, in determining when they are distributed, and so on" (1988a: 9). Thus, the state, as the political entity that decides who the enemy is, also decides what constitutes public order and security. The constitution can be suspended by the

sovereign, and conditions for making such a decision cannot be covered by the constitution for Schmitt (1988a). Schmitt's theory rests on the presumption that an exception cannot be subsumed by a norm. For defining the exception, one has to define the normal. Thus, definition of "normal" is very important for definition of the exception. How *the norm-al* is defined? Is it possible to set limits, standards of normality? Who decides normality? Schmitt (1988a: 13) narrates relevance of defining normality as follows:

Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subject to its regulations. The norm requires a homogenous medium.

As the citation above suggests, Schmitt (1988a) defines the normal according to "everyday frame of life" to which a general norm can be applied. If such a norm-applicable "everyday frame of life" does not exist, one cannot mention a normal condition. The concerned concrete condition, condition of everyday life, has to be open to regulations of a general norm. It has to be "regulable". Then, one should have the power to regulate that everyday frame of life, for accepting it "normal". Who decides about if a certain frame of life is regulable? Who decides if there is a "homogenous medium" that norm can be applied to? Does any homogenous medium exist at all? What is the meaning of "homogenous" in the context of defining normality? Obviously, Schmitt (1988a) does not presume necessity of an absolute homogeneity. Homogeneity is required for implementing regulation. Thus, everyday frame of life has to be open to regulations homogeneously. All aspects of life, each everyday practice has to be equally open to regulation, so that the sovereign can acknowledge normality. The logical conclusion of this narration regarding the normal is that, who wants to regulate the life decides if there is a situation of normality, a homogenous medium that norms can be valid. This figure is the sovereign for Schmitt (1988a). The sovereign, who is beyond the concerned medium, interprets the medium in totality, and decides if it is regulable or not, produces definition of exception and normality. The authority imposing norms and regulating life according to these

norms decides if there is a medium in which every aspect can equally accept the norm, say the implementation of the norm as a regulation.

How can one decide on relevancy of laws, or if there exists a normal condition in which laws can be relevant? How could these rules be defined? Schmitt says that “this effective normal situation is not mere ‘superficial presupposition’ that a jurist can ignore” (Schmitt, 1988a: 13). Then, it is beyond a presupposition, it cannot be ignored, since “that situation belongs to its immanent validity” (Schmitt, 1988a: 13). What does “immanent validity” mean? This situation is merged to its “immanent validity”, therefore one cannot separate a “situation of normality” from its “immanent validity”. The validity of an “effective normal situation” is always re-interpreted, and cannot be subsumed in one definite decision on normality. This immanent validity shows itself in immanent “invalidity”, in “chaos” since, “there is no norm applicable to chaos” (Schmitt, 1988a: 13). Since “norms” are only valid for a normal situation, and not for chaos, “for a legal order to make sense, a normal situation must exist” (Schmitt, 1988a: 13). This decision on validity, and even more, for “immanent validity” is taken by the sovereign, and who definitely decides whether this normal situation actually exists is the sovereign” (1988a: 13).

Norms can only be relevant if the situation is norm-al. Norms are only relevant for a situation the sovereign decides that they are relevant, “there is no norm applicable to chaos.” What is normal, and whether there is a normal situation that rules can be valid, are defined under the authority of the state, or the sovereign. Who is the sovereign and how he/she copes with a non-homogenous ‘medium’? Schmitt (1988a: 13) reinforces his thesis on sovereignty emphasizing what the law is, or what is required for law. He asserts that “all law is ‘situational law’”, and “the sovereign produces and guarantees the situation in its totality”; and “he has the monopoly over this last decision” (Schmitt, 1988a: 13). State’s sovereignty lies in this principle, he says, and it cannot be reduced to the mere monopoly to decide (1988a: 13). This point is important, since he

emphasizes that the sovereign does not only decide on normality, but also he-she “produces and guarantees the situation in its totality”, too. Thus, it is established on the concepts of protection and survival.

Schmitt (1988a) calls for a juridical definition of sovereignty. The concept of “exception” is the main reference that “reveals most clearly the essence of the state's authority” (Schmitt, 1988a: 13). Definition of the normal situation and normality always requires definition of the exception itself. In exception, the decision departs “from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law” (Schmitt, 1988a: 13). Thus, referring to Schmitt, the authority is competent for law making beyond the existing legal framework.⁸⁹ The exception, which cannot be subsumed by the existing legal framework, still can be defined in the framework of juristic by Schmitt (1988a). Schmitt (1988a) defines this principle which sounds strange as follows: “the exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as decision, remain within the framework of the juristic” (1988a: 12, 13). How could it be? Is it not itself an ambivalent situation, to stay in the realm of juristic, while suspending law by decision? While he says the decision on exception is accessible to jurisprudence, he does not mention that the concerned decision is an outcome of or restricted by a judicial review. “Unlimited authority”, he says, characterizes “an exception” (Schmitt, 1988a). Schmitt defines the “unlimited authority” as “the suspension of the entire existing legal order” (Schmitt, 1988a: 12). “Suspension” does not mean abolition, the existing legal order is not abolished, suspension signifies an intermediate position between actualizing and ending. Unlimited authority, then, arises through setting the existing legal order to this intermediate position. The decision on an exception is in this sense, cannot be defined as an emergency measure or an emergency decree, it is a decision on suspension of the “entire” existing, valid legal order

⁸⁹ Benjamin's (1978) distinction of law making and law preserving violence may be significant for understanding mythic foundation of law, which needs nothing besides itself, no origin at all. Benjamin says that law is relevant as long as

(Schmitt, 1988a: 12). In Schmitt's words:

The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically *juristic element-the decision* in absolute purity. (emphasis is added, 1988a: 13)

How can "the decision in absolute purity" be defined as a juristic element? What does juristic mean? Does Schmitt hyperbolize the meaning of juristic? This statement can be further analyzed, but it is clear that Schmitt accepts an unrestricted decision as a juristic element. He says that legal order can only be valid if the condition of validity be provided. With his words: "the exception appears in this absolute form when a situation in which legal prescriptions can be valid must first be brought about" (Schmitt, 1988a: 13). A regulable situation is necessary for "legal prescriptions can be valid", and Schmitt (1988a) defines the decision taken in this lawless condition as a "juristic element". He distinguishes exception from anarchy and chaos: "because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind" (Schmitt, 1988a: 12).

How does it happen? How the order in the juristic sense prevails? The existence of the state is the guarantee of dominance of "order in the juristic sense", for Schmitt (1988a). However, the concerned order "is not of the ordinary kind". It is different from an ordinary order, but still can be defined as an "order in the juristic sense". How can an order in the juristic sense be defined? Concepts of "chaos" and "order" are main references in definition of the exception. Since "chaotic" situation is "ordered" by the sovereign, the state, in exception order prevails. Exception is subsumed by jurisprudence, since the state "orders" in exception and transforms the chaos into an order imposed by the state. Therefore, "the existence of state is undoubted proof of its superiority over the validity of the legal norm" (Schmitt, 1988a: 12). That's why a condition of exception signifies conversion of a chaos to an order. Decision about an exception "frees itself from

depends on an executive power, which would enforce it.

all normative ties and becomes in the true sense absolute" (Schmitt, 1988a: 12). It is absolute, freed from all restrictions. Schmitt (1988a: 31) says that *decision* bears, must bear something new and alien: "constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien". He puts forward a challenging view: "looked at normatively, the decision emanates from nothingness" (Schmitt, 1988a: 32). He reminds that the norm is not sufficient for making a legal decision; the legal principle must always be interpreted by a certain person.

The legal prescription, as the norm of decision, only designates how decision should be made, not who should decide. ... the question is that of competence, a question that cannot be raised by and much less answered from the content of the legal quality of a maxim (Schmitt, 1988a: 32, 33).

However, pre-set definition regarding who is competent to decide on an exception cannot be relevant, since, "a distinctive determination of which individual person of which concrete body can assume such an authority cannot be derived from the mere legal quality of a maxim" (Schmitt, 1988a: 31). Schmitt (1988a: 30) reminds that the essence of legal decision requires an element of 'personality'. He (Schmitt, 1988a) points out that, it is impossible to define an exception in law, and to draw the limit of it. He reminds that the world is chaotic, it cannot be foreseen and defined properly, gets out of definitions. "A philosophy of concrete life" he asserts, "must not withdraw from the exception and the extreme case, but must be interested with in it to the highest degree" (Schmitt, 1988a: 15). A philosophy of concrete life, then, has to deal more with the exception, rather than the rule, and understanding the concrete life is only possible through understanding the exception (Schmitt, 1988a: 15). Schmitt (1988a: 15) opens this assertion as follows: "the rule proves nothing; the exception proves everything: it confirms not only the rule but also this existence, which derives only from the exception". Thus, according to him, "the decision on the exception is a decision in the true sense of the word" (Schmitt, 1988a: 6).

Schmitt (1988a) opens up the concept of exception by the help of concept of “decision”. The concept of decision is important for understanding Schmitt’s approach. He clarifies the meaning of decision as follows: “because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm” (Schmitt, 1988a). An exception cannot be subsumed by a general norm, since it cannot be defined before the decision. However, the question of if this decision is juristic or not deserves an answer. This decision is not accepted as a juristic decision by jurist of the time, for instance by Robert von Mohl (Schmitt, 1988a: 6). Schmitt (1988a), on the other hand, criticizes Robert von Mohl’s claim of “the test of whether an emergency exists cannot be a juristic one”. He (1988a: 6) says that Mohl “assumed that a decision in the legal sense must be derived entirely from the content of a norm”. This is an interpretation about juristic sphere, say cases about decisions in legal terms for Schmitt. Schmitt opposes definition of ‘juristic’, which is limited with the concept of ‘norm’, and uses adjective of the ‘juristic’ in definition of the ‘decision’. He emphasizes that *decision* is the essential part of jurisprudence. The point is that constituting power, as a decision on exception suspends norm, and re-founds it after regulating the conditions that the norm would be relevant. The main presumption is that, the state would ensure a situation, and norms can only be significant for this situation. If this situation is considered in danger, norms can no longer be relevant.⁹⁰ There is no need of laws for creating new ones, it necessitates “decision”, and decision can be generated from “will”, not from the

⁹⁰ For Schmitt (1988a):

Emergency can be manufactured through an economics that capitalizes on uncertainty by concealing it beneath the polarities of underground and above-ground, friend and foe, figuring an enemy whether there is one or not. The arrival of the event in a state of emergency would thus have been a surprise (and thus not an event). It would, rather, have been the repetition of the violence of a decision against its own possibility – the *perhaps*, uncertainty itself, which must be both betrayed and kept within living memory if the decision to retain its ethical and political basis. (emphasis is original, 102)

“norm”. Therefore, the will of the sovereign, who decides on exception is “juristic”.

How can the *arche* that the state is founded on, then, be described? Schmitt (1988a) answers this question by referring to order and security. He says that “the precise details of an emergency” cannot be expected, and one cannot anticipate “what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated” (Schmitt, 1988a: 12). Therefore, “the state suspends the law in the exception on the basis of its right of self-preservation” (Schmitt, 1988a: 12).

Schmitt (1988a) points out that these abstractions have not any significance, the significant factor springs from who decides the exception in concrete. Sovereign is one, “who decides in a situation of conflict what constitutes the public interest or interests of the state, public safety and order, *le salut public*, and so on” (Schmitt, 1988a: 6). He defines the condition of exception that the state is in danger as follows: “the exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like” (Schmitt, 1988a: 6).⁹¹ Such a condition of exception, “cannot be circumscribed factually and made to conform to a performed life” (Schmitt, 1988a: 6). The statement of “a danger to the existence of the state” presumes that the state is the most important existence mode and must be preserved at any cost, as long as it exists as an entity that rests upon the political decision on who the enemy is. Schmitt refers to Bodin and reminds that Bodin’s answer to the question of “to what extent is the sovereign bound to laws” is “only to the extent of fulfilling his promise in the interest of people; he is not bound under conditions of urgent necessity” (cited in Schmitt, 1988a: 8).⁹² There are many critical and

⁹¹ However, Schmitt says that “the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege” (1988a, 5). Thus, it does not necessarily define a condition of emergency decree.

⁹² Schmitt’s theory is reflexive to different contexts. He emphasizes the importance of context and evaluation, say relativity of the concepts of “public

approving views on Schmitt's theory of political and sovereignty.⁹³ Giorgio Agamben's opinion can be accepted both as critical and complimentary of Schmitt's theory of exception. That's why, it would provide an account of Schmitt's concepts of the political and exception. Agamben's viewpoint is utmost important for further understanding Schmitt's theory. He asserts that it is difficult to distinguish the exception and the rule. He refers Benjamin's comments on continuity of exception and rule, as follows:

The tradition of the oppressed teaches us that the 'state of exception' in which we live is the rule. (Benjamin cited in Agamben, 1998: 55)

This trajectory defined by Benjamin is followed by Agamben. He says that "the intentional creation of a permanent state of emergency has become one of the most important measures of contemporary States, democracies included" (Agamben, 2004). He, additionally, mentions that the states may implement measures of state of emergency even if a state of emergency is not declared in technical sense. The question brought by Agamben is that, if the state of emergency is integrated into the legal order, and if it is the rule, rather than an exception, what are possible outcomes of such a system (2004). He defines two forms of implementing exceptional measures. Accordingly, these measures may either be implemented as an exceptional measure or transforms into a governmental technique (Agamben, 2004). Though he refers these forms as if they can be discerned, he asserts that the juridical system makes this distinction almost

order" and "security". According to Schmitt,

Public order and security manifest themselves very differently in reality, depending on whether a militaristic bureaucracy, a self-governing body controlled by the spirit of commercialism, or a radical party organization decides when there is order and security and when it is threatened or disturbed (1988a: 10).

⁹³ For instance, Dillon says that both Hobbes and Schmitt are figures that express "modernity's foundational politics-of-security" (Dillon, 2002: 78). He asks "Who is the enemy? What is the enemy? Where is the enemy? How does this discourse of security that not only propels the war but foundationally legitimates the political order that is committed to waging it?" (Dillon 2002: 74) Dillon referring to Agamben emphasizes that it is almost impossible to distinguish transgression of law from execution of law in exception (2002: 77).

impossible. Agamben (2004) says that Schmitt intends to articulate this condition of suspension of law to the juridical system. Then, referring to Agamben, “Schmitt needs to show that the suspension of law still derives from the legal domain, and not from simple anarchy” (2004). “In this way”, he adds, “the state of emergency introduces a zone of anomy into the law, which, according to Schmitt, renders possible an effective ordering of reality” (2004). As presented above, Schmitt emphasizes that exception in no way signifies a chaos, it is embedded in the legal order through the sovereign decision. According to Agamben’s (1998) reading of Schmitt’s concept of sovereignty, sovereign is defined as one who is both inside and the outside of the judicial order. The sovereign, he says, “having the legal power to suspend the validity of the law, legally places himself outside the law” (Agamben, 1998: 15). This means, law may be outside of itself (Agamben, 1998: 15). Therefore, the sovereign decides on what the law is, and if certain courses of actions comply with law. Power of sovereign decision is grounded on the sovereign’s power of creating and guaranteeing the “situation” “that law needs for its own validity” (Agamben, 1998: 17). Schmitt’s conception of “exception”, thus, points out an essential problem, say a “paradox” of sovereignty for Agamben (1998).

He formulates this paradox in the framework of relation between law and life. Agamben refers to Deleuze and Guattari’s spatial analysis of sovereignty, and says that “sovereignty only rules over what it is capable of interiorizing” (Deleuze and Guattari, *Mille plateaux*, p. 445 cited in Agamben, 1998: 18). Therefore, state of exception refers inclusion of what cannot be subsumed, by the juridico-political order; and state of exception does not coincide with “the chaos that precede order”, it signifies practices of life that cannot be circumscribed by the authority without suspending law.⁹⁴ Therefore, authority needs to suspend law, for

⁹⁴ Agamben (1998:18) formulates this suspension as follows:

The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, *taken outside {ex-capere}*, and not simply excluded.

integrating these practices to the legal order (Agamben, 1998: 18). The rule is suspended for giving rise to the exception. However, the juridical order is valid, even if law is suspended for the exception (Agamben, 1998: 18). Therefore, “the state of exception itself is thus essentially unlocalizable (even if definite spatiotemporal limits can be assigned to it from time to time)” (Agamben, 1998: 19).

Agamben’s (1998) arguments further Schmitt’s definition of exception. While Schmitt articulates state’s violation of law, to the juridical order, Agamben (2004) points out that the exception has been rule and such an articulation is problematic. He says that today, “the state of exception comes more and more to the foreground as the fundamental political structure and ultimately begins to become the rule” (Agamben, 1998: 20). The reason behind this argument is Agamben’s (1998) analysis of locations of exception, through which human life is transformed into bare life, such as the concentration camp, refugee camps, and other similar spaces. Agamben (1998) opens the concept of exception in regard to semiotics. He says that law is founded on language, and it bears the potentiality of including what is not included, and “language is the sovereign who, in a permanent state of exception, declares that there is nothing outside language and that language is always beyond itself” (Agamben, 1998: 21). Therefore, though law does not coincide with a definite concrete action, it can bear it either as a rule or an exception, even as a transgression. That’s why, law is always more than what it is (Agamben, 1998: 21). The question about definition of “rule” and “exception” arise in the moment of decision: “what emerges in this limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule” (Agamben, 1998: 25). Sovereign decision in Schmitt’s theory signifies a communication between the norm and fact for Agamben (1998: 26). Actual conditions, or the life is referred by the norm, which is interpreted by the sovereign, and transgression of norm, may overflow the norm itself, through sovereign decision. “A zone of indistinction between outside and inside, chaos

and the normal situation—the state of exception” is required for integrating chaos to normal order (Agamben, 1998: 19). “This is why”, Agamben asserts, “sovereignty presents itself in Schmitt in the form of a decision on the exception” (1998: 25). Accordingly, the decision is taken not someone designated for it, but through mediation of the *nomos*, that bestow the actual meaning of the decision (Agamben, 1998: 25, 26). Then, decision conforms with the “*nomos*” for Schmitt. The “rule” Agamben says, refers to real life and makes this reference “regular”. Decision about if an act complies with law always requires a decision on exception (Agamben, 1998: 26). Therefore, exception to the norm is always embedded in the norm. This essence of the law can be formulated as follows: “the ‘sovereign’ structure of the law, its peculiar and original ‘force,’ has the form of a state of exception in which fact and law are indistinguishable (yet must, nevertheless, be decided on)” (Agamben, 1998: 27).

Agamben claims that “the sovereign *nomos* as the constitutive event of law with respect to every positivistic conception of law” is eminent for Schmitt’s conception of law (Agamben, 1998: 36). That’s why, constitution of law is effective beyond the constituted law, in Schmitt’s theory. Accordingly, legal norm always presupposes an exception, it refers to life through defining the exception, for setting the rule. Therefore, “life, which is thus obligated, can in the last instance be implicated in the sphere of law only through the presupposition of its inclusive exclusion, only in an *exceptio*” (Agamben, 1998: 27). Sovereignty rests on this “threshold in which life is both inside and outside the juridical order” (Agamben, 1998: 27). This “threshold of indistinction between outside and inside, exclusion and inclusion, *nomos* and *physis*, in which life is originally excepted in law” is reviewed and renewed by the sovereign decision (Agamben, 1998: 27). Agamben (1998) refuses both Schmittian and Kelsenian definitions of sovereignty. He says that while Schmittian conception is grounded on the political, Kelsenian conception, is grounded on jurisprudence. However, sovereignty is neither a political power beyond law, nor the groundnorm, integrated in juridical order, “it is the originary structure in which law refers to life and includes it in itself by

suspending it” for Agamben (1998: 28). He defines this question of indeterminacy as the paradox of sovereignty (Agamben, 1998: 39). This paradox appears clearly “in the problem of constituting power and its relation to constituted power” (Agamben, 1998: 39).

Agamben (1998) interprets this appearance of paradox as division of constituting power and constituted power. Sovereign power, “divides itself into constituting power and constituted power and maintains itself in relation to both, positioning itself at their point of indistinction” (Agamben, 1998: 41). According to Agamben, the essential problem of Schmittian conceptualization of constituting power is that, it cannot be distinguished from the constituted power, and then, from the sovereign power. Thus, *nomos* can be transferred to the constituted power for Schmitt, whereas such an assertion is impossible for Agamben (1998). Agamben sets the problem as follows: “if constituting power is identified with the constituting will of the people or the nation . . . then the criterion that makes it possible to distinguish constituting power from popular or national sovereignty becomes unclear” (Agamben, 1998: 43). This means “the constituting subject and the sovereign subject begin to become indistinguishable” (Agamben, 1998: 43). The point is that, constituting power is beyond the constituted power, cannot be replaced by the constituted power according to Agamben (1998). He refers to Negri, and emphasizes “irreducibility of constituting power” (Agamben, 1998: 43). He concludes that “until a new and coherent ontology of potentiality . . . has replaced the ontology founded on the primacy of actuality and its relation to potentiality, a political theory freed from the aporias of sovereignty remains unthinkable” (Agamben, 1998: 44). Then, one has to acknowledge the dual character of sovereignty, grounded both on potentiality and actuality (Agamben, 1998: 46, 47).⁹⁵ Agamben asserts that “at the limit”, where sovereignty rests, “pure

⁹⁵ Agamben, thus, defines “sovereignty” as follows:

Sovereignty is always double because Being, as potentiality, suspends itself, maintaining itself in a relation of ban (or abandonment) with itself in order to realize itself as absolute actuality (which thus presupposes nothing other than its own potentiality). (1998: 47)

potentiality and pure actuality are indistinguishable" (1998: 47). He points out the question of indistinction of constituting power and constituted power as follows:

This is why it is so hard to think about both a "constitution of potentiality" entirely freed from the principle of sovereignty and a constituting power that has definitively broken the ban binding it to constituted power. (Agamben, 1998: 47)

Agamben (1998), denying to reduce the constituting power to the constituted power, accepts reducing the question of sovereignty to the question of ontology of potentiality, and departs from the sphere of the political. Still, one has to accept that this departure paves way for a genuine argumentation. As an outcome of this departure, Agamben (1998) reformulated the question of exception set forth by Schmitt, as a question of indistinction between transgression and execution of law. He says that, "in the state of exception, it is impossible to distinguish transgression of the law from execution of the law, such that what violates a rule and what conforms to it coincide without any remainder" (Agamben, 1998: 57). He says that sovereignty for the Western political thought does not presuppose separation, but integration of law and violence. It is defined in "the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence" (Agamben, 1998: 31, 32). The point is that, "the principle according to which sovereignty belongs to law . . . does not at all eliminate the paradox of sovereignty; indeed it even brings it to the most extreme point of its development" for Agamben (1998: 30). Thus, politics lies on the threshold that human life is either defined beyond, or inside the rest of the world.

Agamben follows Benjamin's argument of sacredness of life and resemblance between violence and law. Accordingly, sacredness of life is the essential assumption that the concept of sovereignty is founded on.⁹⁶ He says the

⁹⁶ Agamben explores "intersection between the juridico-institutional and the biopolitical models of power" (1998: 6). He asserts that those analysis must be integrated, "and that the inclusion of bare life in the political realm constitutes the original-if concealed-nucleus of sovereign power" (Agamben, 1998: 6).

biopolitics is founded on regulating of *zoē* according to the *bios*. Western politics, he says, has been occupied with the distinction of *zoē* and the *bios* (Agamben, 1998: 11). Therefore, according to Agamben (1998), figure of *homo sacer* and the idea of “sacred life” arisen as a political element, which is bounded to the sovereign. Thus, “the first foundation of political life is a life that may be killed, which is politicized through its very capacity to be killed” (Agamben, 1998: 89)⁹⁷ Accordingly, “the production of a biopolitical body is the original activity of sovereign power” (emphasis is original, Agamben, 1998: 6). He claims that “biopolitics is at least as old as the sovereign exception”, therefore, one cannot distinguish the modern state from preceding forms of state, in the manner of integration of biopolitics and sovereignty, for Agamben (1998: 6).

Agamben says that “bare life of the citizen” is the key element in this articulation of the biopolitics and sovereignty therefore, bare life “becomes both subject and object of the conflicts of the political order, the one place for both the organization of State power and emancipation from it” (Agamben, 1998: 9). This integration proceeds with two merged processes. While “along with the disciplinary process by which State power makes man as a living being into its own specific object, another process” through “the birth of modern democracy . . . man as a living being presents himself no longer as an *object* but as the *subject* of political power” (Agamben, 1998: 9). Thus, violence and law of nature is integrated into any political system, and political system is established on

⁹⁷ Agamben says that “the originary political relation is marked by this zone of indistinction in which the life of exile or the *aqua et igni interdictus* borders on the life of *homo sacer*, who may be killed but not sacrificed” (1998: 110). Agamben (1998) narrates the process in which human life is politicized as follows:

The tie itself originally has the form of an untying or exception in which what is captured is at the same time excluded, and in which human life is politicized only through an abandonment to an unconditional power of death. The sovereign tie is more originary than the tie of the positive rule or the tie of the social pact, but the sovereign tie is in truth only an untying. And what this untying implies and produces — bare life, which dwells in the no-man’s-land between the home and the city — is, from the point of view of sovereignty, the originary political element. (Agamben, 1998: 90)

conversion of human life to bare life, which can be recognized as an object by sovereign (Agamben, 1998: 36). In brief, Agamben says that Schmitt's conception of exception rests on indeterminacy of sovereign decision regarding value of human life, which is determined in a definite political context for each case. This decision on value of human life, on the other hand, is founded on production of biopolitical body for Agamben (1998). Therefore, according to Schmitt, Agamben asserts, the *nomos* is defined as "the pure immediacy of a juridical power [*Rechtskraft*] not mediated by law": "it is a constitutive historical event, an act of legitimacy that alone renders the legality of the new law meaningful in general" (Schmitt *Das Nomos*, p. 42 referred in Agamben, 25). Thus, Agamben (1998) says sovereign decision regarding biopolitical body is made in accordance with the *nomos*, and cannot be limited by a given legal framework for Schmitt.

4.2.4. A Further Comment on the Concept of the Political and a Partial Conclusion

Schmitt's (1976: 64-65) concept of the "political" presumes that human nature is dangerous and willful. He analyzes the "real" political condition, beyond imagination of an ideal world order, and affirms political grouping of human beings, since it serves maintaining a people's own form of life. Thus, the political is both analyzed as a reality, and affirmed as a necessity for overcoming problems that are engendered by liberal parliamentary democracy in Schmitt's theory (1976). However, Leo Strauss (1976: 102) mentions that indeed, Schmitt wants to affirm the political from moral point of view. In this point, it would be better to refer Leo Strauss's (1976) comments on Schmitt's concept of the political.⁹⁸ Strauss (1976) says that Schmitt conceptualizes the political not as a preference, but as an unavoidable condition of being human. According to Strauss (1976: 103), Schmitt rests on liberal values of neutrality of morality, and

⁹⁸ There are essays that analyze the dialog between Strauss and Schmitt. While certain authors –for instance McCormick (1998)– emphasize similarity of Strauss's and Schmitt's theories, others –for instance Howse (1998)– point out differences.

that's why conceptualizes the political as a necessity, beyond all preferences. Strauss (1976: 101) says that Schmitt's real intention was affirmation of the political as the moral condition that human life derives its meaning from. Thus, grouping humanity as friend-enemy and admittance of human killings according to a principle, can only be justified by the answer that is given to the question of "what is right" for Strauss (1976). Accordingly, when a human being refrains from encountering death in accordance with the answer, which is given to the question of what is right, he-she abandons his-her humanity. Strauss (1976) thinks that Schmitt is aware that maintaining life at any cost is not valuable for humanity. Strauss's comment on Schmitt's conception of politics may be right, as far as Schmitt's (1988) criticism of capitalism, and "economic philosophy" are considered. He says ethical support for convictions is necessary for the rise of politics: "the Idea is inherent in the very essence of politics, because without authority there is no politics, and without an ethical support -for convictions- there is no authority" (Schmitt, 1988: 41). Although he had proposed to derive ethical support from Catholicism for "politics" in *The Idea of Representation* (1988), later he conceptualized "the political" in *The Concept of the Political* (1976) as an empty or neutral concept that would be outlined by the state, which reflects concrete human groups, in the name of the people. However, *The Concept of the Political* definitely rests on analysis of real conditions. Furthermore, Schmitt (1976) conceptualizes political grouping of human beings not as an ideal condition, but as a necessity that concrete struggles lead to. Accordingly, any political antagonism is founded on the friend-enemy grouping. The essential reference in deciding friend and enemy is the possibility of an existential confrontation. Enemy is always enemy of a "people", a public enemy. Thus, definition of an enemy presupposes defining a people, and the state rests on friend-enemy distinction.

Schmitt (1976) admits that the state may declare a domestic enemy, when there is a threat of civil war, but declaring of a domestic enemy does not reinforce the state. Therefore, the state should ensure the integrity of the nation, in order to

be powerful against other political entities, other states. Political decision also includes a deciding the condition of normality in the country. Schmitt (1988a) says that normativist and decisionist theories of jurisdiction fail in approaching the question of sovereignty. Accordingly, after monarchic conception of sovereignty was dethroned by the legal positivism and liberalism, the question of decision was not eliminated, but has been just overseen. Liberal democracy entails expression of fragmented demands, but sovereignty requires a unified expression of demands. Schmitt (1988a) defines "sovereignty" in regard to deciding the condition of normality in the country and the "exception". He says that it is impossible to expel exception from life. Then, a theory of the state and law should have a room for exception. The sovereign, who decides the exception can suspend the existing legal order. Such a suspension is grounded on the definition of the "normal". Norms can only be relevant for a "normal" situation, and sovereign decides if the situation is normal. Since the authority ensures an "order" for "normal" condition, it may make a decision for suspending the existing law that is valid for the "normal" conditions. Norm and decision constitutes the essence of the juristic decision. However, no norm can define and embrace an exception. That's why the exception decisions cannot be derived from a norm for Schmitt (1988a). Schmitt (1988a) says, in exception, decision overflows the norm. Agamben (1998) asserts that constituting power appears in exception decisions in Schmitt's conception of the exception. Agamben points out that Schmittian conceptions of political and exception rest on sovereign ban on human life, which rests on biopolitical definition of human body. As it is presented, Schmitt's theories may be promising for interpreting Susurluk Affair. How could one interpret Schmittian theoretical standpoint in regard to extra-legal activities of the state, in general; and in the Susurluk Affair, as a case of extra-legal activities of the state, in particular?

4.2.5. Extra-Legal Activities of the State from the Viewpoint of Schmitt's Theories of the Political and Sovereignty

As the subsections, which present Schmitt's theoretical standpoint above, show, Schmitt's theories of political and sovereignty offer a theoretical framework for understanding extra-legal activities of the state. The state is a political entity only if it can decide on who the enemy is and on limits of legal and extra-legal spheres dynamically. That's why, it acts according to the *nomos*, which cannot be defined stably, but changes according to political grouping of human beings. Therefore, extra-legal activities of the state can be considered to reflect an unstableness of constituting *nomos*. However, do Schmitt's theories of sovereignty and the political offer a viewpoint that recognize Susurluk Affair as a case of extra-legal activities of the modern states? How could Susurluk Affair be interpreted from this point of view? Could it be interpreted as an outcome of a decision on exception in Schmittian sense?

4.2.6. A Schmittian Reading of Susurluk Affair as a Case of Extra-Legal Activities of the State

The above question can be answered by way of a general interpretation of Susurluk Affair from the Schmittian viewpoint. One may approach to the circumstances that encompass Susurluk Affair with reference to Schmittian conception of democracy. Accordingly, an obstacle before democracy in Turkey can be interpreted as the heterogeneity of the population. Kurdish population speaking a different mother language makes it difficult to establish democracy in Turkey, since Schmittian conception of democracy requires a homogenous population. The Republic of Turkey has pursued elimination of this heterogeneity for long, but fruits of such efforts bore insufficient. Does Schmitt accept different political spheres for different populations of the same territorial integrity, such as a federative political organization, or does he propose to homogenize the population using other instruments such as forced migration? It is difficult to speculate on this issue, but it is known that he welcomes the population exchange between Greece and Turkey after the Turkish War of Independence. However,

these questions are not so relevant to Schmitt's conceptualization, since he constructs a theory of the political, and does not advise a method, but rather discloses political facet of human relations. Thus, both of these results can be understood from Schmittian point of view. However, one should take into consideration that differences and groups are not dangerous for the political entity, until they are translated into a political cleavage for Schmitt. Then, as long as differences of Kurds are not translated into the political sphere, and do not generate a friend-enemy distinction, there is no question of heterogeneity for Schmitt. However, if one focuses on the appearance of the PKK from the Schmittian concept of the political, the differences were translated into politics through the attacks conducted by the PKK either for affirmation of differences, and promotion of cultural rights, or for founding a separate state. Such translation into politics cannot be defined as a case of the Schmittian friend-enemy distinction. The attacks of the PKK were approached as a "security" issue. However, the threat of a civil war, i.e., conversion of the differences into a political distinction was still pending. The state could not provide "security", particularly in the Eastern and South Eastern Anatolia. From 1980 to 1987 the Republic of Turkey was under martial law. In 1987, a state of emergency was declared in 13 provinces in Eastern and Southeastern Anatolia. Thus, a different legal order was valid in the region. According to a decision by the Secretariat of General Staff in 1993, maintenance of the security at home had priority over the international security problems. Although the situation was acknowledged as a problem of domestic security, this decision was a declaration of a domestic enemy. Can Susurluk Affair be understood from a Schmittian point as an indistinction between transgression and implementation of law? Is it possible to interpret Susurluk Affair as an outcome of deciding the exception for overcoming difficulties of an extraordinary situation from Schmitt's theoretical perspective? Prior to answering this question, other issues concerning the Schmittian interpretation of Susurluk Affair would better be clarified.

It is difficult to claim that Susurluk Affair was an outcome of a political

decision made by competent authorities, since no one conceded that such a decision was made. According to the findings of the investigation reports, on the other hand, it is impossible to imagine an extra-legal organization operating within the state, and employing criminals beyond notice of the highest posts of the state. Certain generals, who were members of the NSC, but were not prosecuted, supported Korkut Eken after Korkut Eken objected to the decision of the Supreme Court of Appeals.⁹⁹ Remembering Susurluk Affair, those generals, who defended Korkut Eken, and other members of the NSB might represent the *nomos* in the Schmittian sense. Thus, they can be recognized as guardians of the Constitution, who decided on suspension of it secretly, when necessary. Additionally, both Ağar and Çiller appreciated Çatlı's activities. So, if it is assumed that an exception is decided by the Secretariat of General Staff or the

⁹⁹ Those generals can be considered as pursuers of the "national objectives" defined in a book on "concept" and "content" of the state, published by the General Secretary of the NSC (Milli Güvenlik Kurulu Genel Sekreterliği, 1990). This book can be considered having a *raison d'état* approach in general. It narrates purposes of the states; such ties between the state and citizens as the tax system, elections, political representation and compulsory military service. It also narrates obstacles before maintaining the state as an integrity. The book claims, essential purpose of the existence of the state is maintaining the security of the people (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 10). "National interests" are defined as general values that are supposedly beneficial to and have to be provided for the security and happiness of the nation (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 20). Those national interests, are defined as abstract values, which have to be converted into national objectives (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 23). According to the book, national objectives that serve to the natural interests may be unwritten, also (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 251). Accordingly, even if there is no written objective, one can find it out in tendencies and behaviour specific to the concerned country (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 251). National strategy, is defined as the methods and ways of action carried out for attaining the national objectives (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 38). According to this framework, any state has to decide on and implement a "National Security Policy" against domestic and foreign threats, which jeopardize its continuity and integrity (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 42). It is said that, protection and national security issues are the essential duties of the government, and the deficiency and weakness in maintaining security may result in loss of national values, and cannot be compensated, so these issues should be dealt with in brief ways without a deficiency of secrecy (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 44). The national strategy of a country is supposed to be examined and determined by the National Security Councils or Councils (Milli Güvenlik Kurulu Genel Sekreterliği, 1990: 258).

NSB¹⁰⁰, or the executive body, then Susurluk Affair can be evaluated from a Schmittian point of view.

A decision for initiating a “low intensity conflict” was introduced as a strategy of the fight. The decision regarding to initiate a “low intensity conflict” against the PKK was acknowledged.¹⁰¹ However, the other decision regarding the cases of employment of Çatlı and his companions, forming JİTEM, etc. was not acknowledged. It was difficult to interpret the outcomes of the decision, until certain extra-legal activities of the state were disclosed by an accident, Susurluk accident. Then, the decision to suspend existing legal order was officially introduced through “acknowledged outcomes”, such as the “low intensity conflict”, with the omission of such consequences as extra-judicial killings by unknown assailants that are not acknowledged. One has to ask how Schmitt would approach extra-legal activities of the state in the context of Susurluk Affair in regard to this panorama for evaluating it from Schmittian viewpoint. Indeed, this question calls two other questions. The first one is if extra-legal activities of the state in the context of Susurluk Affair can be accepted from Schmittian viewpoint, the second one is how such a secret decision can be interpreted from Schmittian perspective. These points should be analyzed further, for evaluating Susurluk Affair from Schmittian viewpoint.

Could a fake identity card issued for a criminal with an authentic signature on it be understood from Schmittian viewpoint? Could JİTEM and extra-judicial killings by unknown assailants be understood from Schmittian viewpoint? Are such cases outcomes of an “exception” decision in Schmittian manner? Indeed, the concept of exception impels suspension of law, thus it implies a regulative ordering of chaos. Thus, the difference between exception and chaos has to be examined in the context of Susurluk Affair. One should admit that, though the

¹⁰⁰ According to Article 10 of the Law No. 2945, on National Security Council and General Secretariat of the National Security Council, decisions that are made by the NSC may be published only if NSC decides so (Resmi Gazete, 11.11.1983).

¹⁰¹ Kışlalı (1996) interviewed with generals about this issue.

conditions in the Eastern and South Eastern regions were very similar to chaos and anarchy, policies implemented, which were for fighting against the PKK are organized and planned. For instance, Çatlı was using identity cards and passports that are signed by the Ministry of Internal Affairs. Could Schmitt accept such activities? According to Savaş's report (2000) JİTEM members were using the arms provided by the Ministry of Internal Affairs, and they were authorized for conducting operations. Village guards, who used the authority conferred by the Ministry of Internal Affairs for different purposes, such as for settling conflicts between clans, were not totally outside the juristic order, since they might be brought to court for these crimes, though mostly, this was not the case. Therefore, it was different from chaos: there was an order. For instance, the number of the killed newspaper sellers shows that there was not an arbitrary use of force, though the ordinary laws that bore insufficient were suspended, and replaced by law of an emergency state. However, these practices were different from practices of a "camp", which are absolutely and openly outside of the legal order. For instance, the case of execution of Cantürk, as narrated by Savaş (2000), shows that there was an order in use of force. These extra-legal teams were extra-legal in terms of the Constitution, but they used physical force by the authorization of the state, and were paid by the state. Acts of JİTEM, similarly, cannot be considered independent of the state. JİTEM is a mysterious organization, although it is said that there is no officially established JİTEM, the Report prepared by the TGNA (Meclis Susurluk Araştırma Komisyonu Raporu, 1997) points out that it exists and operates as an official body. Could Schmitt accept an organization such as JİTEM? According to Savaş's (2000) report, law was suspended, and extra-legal forces used force beyond existing laws. What is suspended by these executions is not only the constitutional right to a fair trial, but also the right to life. If one refers to Agamben's perspective, these conditions can be interpreted as the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence. Since Schmittian conception of exception implies suspension of legal order in entirety, extra-legal activities of the

state in the context of Susurluk Affair can be acceptable from Schmittian viewpoint, if they are outcomes of an exception decision. However, can one define such a condition as an exception, in Schmittian viewpoint? For answering this question, one has to evaluate secret decision from Schmittian point of view.

There is no need for secrecy in a democracy for Schmitt. There is no need for restriction of the state power, no need for secret affairs of the state, either, if those who rule and who are ruled are identified. Deciding emergency state is easy for the government in Schmittian condition of democracy. Accordingly, the government representing the constituting power of the people can behave on behalf of the people. In the context of Susurluk Affair, there is either a question of democracy, say identity of those who are ruled and rulers, or a question of sovereignty. There is a question of democracy, since those rulers concealed the decision on exception from the rest of the people. However, is it an entire concealing? As Ağar mentioned, “everyone knows what has been done in the fight against terrorism”, and those who know were not only political leaders, and bureaucrats. When former deputy Prime Minister Çiller said, “we had the list of businessmen, who supported the PKK” it was apparent that those businessmen were treated beyond the legal restrictions. However, the threat was not acknowledged officially. The exception decision was not acknowledged, either. Since the decision is a decision to suspend law, can secrecy be subsumed by the decision?

The need for secrecy can be interpreted as an outcome of deficiency in sovereignty, since authorization to decide exception is limited by international politics and law, too. Therefore, a state is not free in deciding the exception, and has to consider limits of sovereignty, in this manner. Organizations of international politics, such as the UN, may interfere to domestic issues with instruments such as declaring an embargo, or military intervention of a security force, as it is the case in former Yugoslavia. Schmitt (1976: 78, 79) says that “peaceful” methods such as “economic sanctions and severance of the food

supply from the civilian population” are not less political in comparison to warlike methods. These policies are generally presented as means of maintaining human rights, democracy and freedom. Though there are many instances of human rights violations, which one should be interfered with is decided in the framework of international political powers. Concepts of freedom, democracy and humanity have been transformed into instruments of international politics, too. Therefore, the limitation on national sovereignty set by international politics may be interpreted as the essential reason of secrecy of decision made on exception in Susurluk Affair. Additionally, the Republic of Turkey limited its sovereignty by ratifying certain international conventions such as the European Convention of Human Rights. It conferred to citizens the right to apply the European Court of Human Rights, for disputes that cannot be resolved by the courts in Turkey. As Schmitt would say (1976: 51), such kind of restrictions cannot refrain a people from deciding on who the enemy is and behave in accordance with this decision. One may interpret the refrainment from acknowledging extra-legal activities of the state in Susurluk Affair in these ways, but the question if such a decision on secrecy can be accepted as incorporated into the exception decision is not answered yet. Could a secret decision that is not acknowledged by who decides, even after disclosure of Susurluk Affair be admitted as a exception in Schmittian manner?

The crucial question is if the decision made by the TGNA on not to bring Ađar to the Constitutional Court be interpreted as an acknowledgement of Susurluk Affair by the TGNA, as the constituting power. Can Mehmet Ađar’s case be interpreted from a Schmittian viewpoint, particularly if one focuses on the concerned decision? TGNA stripped Ađar’s immunity at first, but in the first session, it is decided that the court was not competent for the case. Legal proceedings concerning competence of the court have taken a long time, meanwhile, Ađar was elected deputy for two times. Then, he had the public support, at least support of a group of people. After Ađar was elected deputy in the general elections held on April 18, 1999, a motion was raised for launching an

investigation by the TGNA against Ađar. However, the Investigation Commission decided that there is no need to bring Ađar before the Constitutional Court. Then, he had the support of the TGNA. Can this decision be interpreted from Schmittian point of view as a practice in which the constituent power is in force? Schmitt criticizes those who “exercise power by way of indirect powers on which it devolves responsibility” (1996: 83), thus, Susurluk Affair cannot be interpreted as a case of exception in the Schmittian sense, as long as the decision on extra-legal activities of the state is not acknowledged by who decided those activities. I think, the concerned decision cannot be interpreted as a decision to bear the responsibility of Susurluk Affair, it is rather a way of devolving the responsibility, from Schmittian viewpoint.

4.3. A General Evaluation of Susurluk Affair as a Case of Extra-legal Activities of the State from the Viewpoint that Understands the State as Political Institution

While the doctrine of *raison d'etat* proposes a statecraft, a way of government for well being of the people of the country, Schmitt's perspective rests on the analysis of politics, in this manner it departs from the doctrine of *raison d'etat*. Since Schmitt's theory of the political is founded on analysis of concrete necessities of the world, it resembles Machiavelli's analysis, rather than proposals of the doctrine of *raison d'etat*. However, Schmitt's theory is different from Machiavelli's analysis, too. While Machiavelli's advises concerning suspension of law are incorporated into a general problem of holding power, Schmitt's concept of the exception does not rest on such a problem. Consequently, Schmitt's theories of the political and sovereignty and doctrine of *raison d'etat* lead different interpretations of Susurluk Affair. Doctrine of *raison d'etat* offers a general view of Susurluk Affair, as a case of extra-legal activities of the state, it does not provide a framework for a legal analysis. Schmitt's theory of the political, on the other hand, provides such a framework, since he focuses on political construction of the distinction between transgression and implementation of law, in accordance with grouping of human beings as friends

and enemies. However, though Schmitt's theory of the political provides a framework for understanding strategies of the fight against the PKK, which are acknowledged, such as the strategies of "low intensity conflict", it does not offer a framework to understand Susurluk Affair as an outcome of a decision on exception. How can the general view this study provides in regard to Susurluk Affair be interpreted, further? Concluding chapter intends to have a general evaluation of Susurluk Affair as a case of extra-legal activities of the state.

CHAPTER 5

CONCLUSION:

A CRITICAL EVALUATION OF SUSURLUK AFFAIR AS A CASE OF EXTRA-LEGAL ACTIVITIES OF THE STATE

The state, from the president and to the police force, faces charges of murder. (Çiller, Milliyet, 14.12.1996)

Distinction between legal and illegal violence can be recognized in the former Prime Minister Çiller's statement cited above. She does not prefer to distinguish the state from those persons creating and enforcing legal norms in the name of the state. She emphasizes that executive officials represent the state. When she uses the phrase "the state, from the president to the police force", she implies a whole hierarchy referring to all those positions in between, such as the Minister of Internal Affairs, governors, security directors, etc. The structure Çiller refers has the authority of treating citizens of the Republic of Turkey in accordance with laws. Thus, their actions aiming at the enforcement of law are themselves sanctioned by law. She refers to a presumption about the modern state: use of physical force by the state forces is authorized legally in a given territory in the modern state. If this was not the case, that is to say the legal order did not authorize the concerning action, how can then such an action be qualified? In other words, how can extra-legal activities of the state be interpreted? This study intended to answer such a crucial question, so that Susurluk Affair, as a case of extra-legal activities of the state, could be located in the legal-political theory. As the study brings to view, different answers are derived from legal-political theory to the concerning question. The answers given to this question differ according to one's theoretical standpoint about the nature of the modern state. These answers are presented in the chart below:

Chart 1. Conceptions of Extra-Legal Activities of the State

	Theories	Concept of the State	Extra-legal Activities
State as a legal institution	Weber	Organization that has the monopoly of legitimate use of violence	Extra-legal activities of the state are illegitimate on the basis of formal-legal legitimacy
	Habermas	Legitimate legal institution: democratic-constitutional state	Extra-legal activities of the state are illegitimate on the basis of democratic legitimacy
	Kelsen	A relatively central legal order	No reflection on extra-legal activities, except certain abuses by persons
State as a political institution	<i>Raison d'etat</i>	A unity to be maintained by a specific language and mentality	Extra-legal activities are necessary if they serve to "public benefit"
	Schmitt	Decisive entity rests upon its political character (Schmitt, 1976: 44-46)	Distinction between legal and extra-legal is made through a political decision

These different conceptions and corresponding diagnoses are explained in the third and fourth chapters. However, different approaches to the extra-legal activities of the state need to be examined further in this conclusion, for the purpose of locating Susurluk Affair into the legal-political theory. Assumptions about the concept of the state would provide a frame of references for evaluating different theoretical standpoints vis-a-vis Susurluk Affair. As presented above, different presumptions about the concept of the state produce different views on extra-legal activities of the state. In this regard, Weber's theory is pertinent for an analysis of the modern state and of the administration. A Weberian view asserts

that extra-legal activities of the state are illegitimate on the basis of the requirements of formal-legal legitimacy. Weber's approach, which rests both on power dynamics in society, and on definition of the modern state as a rationally legitimated legal order, cannot comprehend a case of extra-legal activities of the state. Habermas's conception of democratic constitutional state has no room for extra-legal activities of the state, either. Therefore, these two conceptions of the rule of law do not produce a perspective for an analysis of extra-legal activities of the state. Kelsenian legal positivism, on the other hand, does not refer to any extra-legal activity, since it conceptualizes the state affairs in the sphere of law, without any remnant. However, such kind of activities can be analyzed as far as they are defined as individual offenses, from Kelsenian viewpoint. Weber's, Habermas's and Kelsen's perspectives share a basic premise regarding the state. That is, the state is conceptualized as a legal institution by those theorists. Thus, in brief, extra-legal activities can be understood either as illegitimate, or as personal offenses of those who are involved, from the viewpoint that understands the state as a legal institution. These viewpoints conceptualize the political as converted into the legal sphere. While legal sphere legitimizes political sphere in terms of the Weberian theory of the rule of law, it is established as the constitutional state with an autonomous legal sphere that regulates power circulation in society according to Habermasian theory of the rule of law. For Kelsen, on the other hand, political sphere can only be represented as the expression of the efficacy of the legal order. However, the political sphere may have dynamics that go beyond, and cannot be subsumed by the legal sphere. Susurluk Affair and similar cases show the other facet of the modern state. Such kind of affairs can be understood from the viewpoint that understands the state as a political institution. The doctrine of *raison d'état*, which understands the state as an agent working for "public good", acknowledges and even affirms the extra-legal activities of the state, so long as they are on people's behalf. Maintaining the state, which is supposed to be an organization that works for "public good", justifies and legitimizes the means used for this purpose, according to the doctrine of *raison d'état*. Therefore, from this

point of view, it is possible to understand extra-legal activities of the state. However, this view does not bring a perspective for a detailed analysis. Schmitt's theory of the political, on the other hand, provides a full account for extra-legal activities of the state from political point of view. From the viewpoint of Schmitt's theory of the political, the state is founded on human groupings according to the category of friend and enemy distinction. The state, which is assumed to provide security for people, puts forward the general conditions, and it is impossible to set definite limits in regards to legal sphere. Therefore, extra-legal activities can be incorporated into the legal sphere through an "exception" decision for Schmitt's theory of the political. Thus, Schmittian perspective offers an analysis of extra-legal activities of the state, as incorporated into legal theory. In brief, different perspectives offer different ways of understanding of extra-legal activities of the state. Susurluk Affair is a good example for comparing these perspectives in regard to extra-legal activities of the state. That's how, a more detailed reflection can be brought into the context of Susurluk Affair. The following table presents possible reflections directly on the case of Susurluk Affair.

Chart 2. Interpretations of Susurluk Affair from Theoretical Standpoints

		Susurluk Affair
State as a legal institution	Weber	Deficiency in legitimacy on formal-legal basis
	Habermas	Administrative power becomes independent from communicative power Deficiency in power regulating mechanisms of the constitutional state
	Kelsen	A legal case: offenses of certain persons.
State as a political institution	<i>Raison d'etat</i>	Extra-legal activities of the state for maintaining the state, in terms of territorial unity and homogeneity
	Schmitt	Exercise of power by way of indirect powers on which it devolves responsibility

As shown in the above classification, different theoretical standpoints lead to different readings of Susurluk Affair. Since details of the table stated above is given in the third and fourth chapters, it would be utile to reiterate here these stances briefly, for to be able to compare and asses them. Weber's and Habermas's theories provide two different conceptions of legitimacy of the legal order. While the modern state derives legitimacy on the basis of rational-legal authority for Weber, legitimacy of the legal order is only possible on the basis of democratic principles that rest on communicative power for Habermas. Weber's perspective provides ground for a detailed analysis of modern administration. In the context of the Susurluk Affair, analysis of the modern state from Weberian point of view cannot grasp the use of extra-legal forces, since this would shatter his conception of the rational modern administration. Extra-legal activities of the state are, moreover cannot be recognized as activities of the state that is legitimized on formal-legal basis. Thus, a Weberian analysis would stipulate Susurluk Affair as an illustration of illegitimate activities. From Habermasian point of view, law is the "medium through which communicative power is translated into administrative power" (1996: 150). Then, concerning Susurluk Affair, it seems that there is a problem in regulation of administrative power in terms of its departure and autonomy from communicative power. Therefore, there is a deficiency in regulative mechanisms of the constitutional state. This implies that there is a distance between becoming a subject and an object of politics. Habermasian conception of the rule of law asks for a mechanism through which being an object of a political decision is mediated through the constitutional state.

As an interpretation of the Susurluk Affair either from Weber's or Habermas's perspectives shows, the theory of the rule of law understands Susurluk Affair as a problem of legitimacy. Another point of view, which also conceptualizes the state as a legal institution, ignores the problem of legitimacy. Kelsen's pure theory of law is another theoretical standpoint, radically different from Weber's or Habermas's perspectives. A Kelsenian reading of Susurluk Affair is only possible by seeing it as a legal case, since in his viewpoint there is nothing

beyond the legal sphere for considering the state affairs. Kelsen's probable comment on Çiller's statement cited at the beginning of this conclusion needs to be focused here. According to Kelsen's conception of the state, the state is constituted by the norms and human beings who implement these norms, thus, one cannot charge the state of murder. However, he would not oppose to charge the real persons ranging from the responsible politicians to all public officials of murder, if the legal case requires so. They can be brought to the court, and may be found guilty, individually from the Kelsenian point of view. In brief, the theory of the rule of law and legal positivism do provide grounds to account the Susurluk Affair, as a case of extra-legal activities of the state. Thus, it can be claimed here that the theoretical standpoints which conceptualize the state as a legal institution considers Susurluk Affair either as a deficiency in legitimacy or abuses by certain persons.

All the "activities" referred as the Susurluk Affair is definitely accepted and recognized from the viewpoint of the doctrine of *raison d'état*, since the main criterion for the basis of legitimacy is the "public benefit", which justifies even the suspension of law, and which is concretized as benefit of the state. In other words, if extra-legal activities of the state are not used for individual interests, but used only for the maintenance of the state, they are considered as acceptable for doctrine of *raison d'état*. However, this doctrine does not provide a viewpoint that explains the connection between jurisdiction and politics. Carl Schmitt's theories of the political and sovereignty provide such a viewpoint. Schmitt's concept of "exception" explains the political construction of the distinction between transgression and implementation of law. As presented earlier in this study, extra-legal activities of the state can be approached as an outcome of a decision on exception from Schmittian point of view. However, the Susurluk Affair cannot be interpreted as an outcome of a decision on exception in the Schmittian sense.

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APPENDIX A.

TURKISH SUMMARY

“Susurluk Olayı” 3 Kasım 1996’da Susurluk yakınında bir trafik kazasıyla açığa çıkan devletin yasal alan dışı faaliyetlerine işaret eden bir ilişkiler ve olaylar bütünüdür. Yasal alan dışındaki devlet faaliyetleri kavramı açıkça yasal olarak tanımlanmış devlet faaliyetleri alanının dışında olmalarına karşın yürütme tarafından yönlendirilen ya da izin verilen faaliyetlerdir. Yasal alan dışındaki devlet faaliyetleri ancak yürütme ile yasamanın ayrıştığı ve yargı sürecine tabi olduğu bir anayasal düzende söz konusu olabilir. Aksi halde, otoritenin yasal sınırlar içinde kullanılıp kullanılmadığını değerlendirmek mümkün değildir. Bu yüzden, yasal alan dışındaki devlet faaliyetleri kavramı modern devlete ilişkin bir kavramdır. Bu gibi faaliyetler yasal uygulamanın yasa çiğnemekten ayrılmasının güçleştiği bir eşikte gerçekleşirler ve anayasal düzene ancak yasa çiğneme ya da yasa uygulama olarak dahil edilebilirler. Bu gibi faaliyetler açıkça yasal düzene dahil edilmezler, siyasal kararların sonucudurlar, bu faaliyetler gizlilik içinde yönlendirilir, ortaya çıktıklarında da genellikle belirli kişilerin suçları olarak gösterilirler. Bu nedenle bu gibi eylemlerle ilgili olarak suçlanan devlet adamları ve bürokratlar gizli bilgiler, dokunulmazlık, af, parlamento kararı gibi yasal zırhlarla korunurlar. Bu çalışma yasal bir yapıya dayandığı varsayılan modern devletin işleyişindeki bu tip sapmalara işaret etmek istiyor. Susurluk Olayı Susurluk kazasıyla gündeme taşınan bilgilerle açığa çıkan bir modern devletin yasa dışı faaliyetleri örneği olarak tanımlanabilir. Susurluk Olayı, yasama sürecinde oluşturulan yasaların uygulanmasıyla sorumlu kabul edilen yürütmenin yasaların ötesinde faaliyet göstermesi olarak bir yasal alan dışı devlet faaliyetleri örneği olarak tanımlanabilir. Kaza sonrasında açığa çıkan suçlularla siyasetçiler ve bürokratlar arasındaki ilişkiler kamuoyunda tartışılmış, eleştirilmiş ve yargı konusu olmuştur. Türkiye’de devletin niteliği konusunda tartışmalara kaynaklık eden bu olay pek çok defa sözü edilen ancak yetkili makamlarca reddedilen faaliyetlerin kısmen ortaya çıktığı ve tartışılır hale gelmesini sağladığı

iin nemli bir olaydır. Susurluk Olayı kısmen Meclis Arařtırma Komisyonu Raporu ve Bařbakanlık Teftiř Kurulu Raporu ile, kısmen de dava srecinde incelenmiřtir. Ancak kiřiler zerine yoęunlařan ve iliřkilere odaklanan yaklařımlar Susurluk Olayını karmařıklařtırıp, esas sorunun zerinde dřnmeyi zorlařtırmıřtır. Basındaki tartiřmaların byk blm de Susurluk Olayı erevesinde kimin ne yapmıř olduęu tartiřmasına odaklanmıřtır.

Susurluęun gndeme tařınmasında iki esas hat ortaya ıkmıřtır. Bazı siyasetiler ve kře yazarları Susurluęa karıřanları savundu. Susurluęu savunanlar Susurluęun devletin srdrlmesi abalarının sonucu olduęunu sylediler. Susurluęu eleřtiren dięerleri, Susurluęun hukuk devletinin zaafı sonucu ortaya ıktıęını, bunun nedenin Trkiye Cumhuriyetinin zel kořullarından kaynaklı demokrasi ve sivil toplumun geliřememiřlięi olduęunu sylediler. Bunlar Trk devlet geleneęi ile Trkiye’deki yasal alan dıřındaki devlet faaliyetlerinin iliřkisine dikkat ektiler. Kısacası, Susurluk demokrasi zaafı, sivil toplumun zayıflıęı sorunu olarak ve Trk devlet geleneęi ile baęlantılı olarak tartiřılmıř, ancak hukuk-siyaset kuramı erevesine tařınmamıřtır.

Dnyadaki benzer rnekler Susurluęun Trk devlet geleneęinin tezahr olarak grlmesini zorlařtırmaktadır. Susurluk Olayı yasal alanla yasa dıřı alan arasındaki sınırın ok da belirgin olmadıęını gsterir niteliktedir. Benzer pekok rnek de bu konuda Trkiye’nin yalnız olmadıęını, bu konuda yapısal bir durumdan bahsetmenin daha doęru olduęunu gstermektedir. Trkiye’nin zgnlę zerine yoęunlařan bir bakıřın bu yapısallık zerine dřnmeyi zorlařtırdıęı aıktır. Modern devlet kamu gcnn yasal kullanımı varsayımı zerine kurulmuřsa da, Susurluk Olayı benzeri yasal alan dıřındaki devlet faaliyetlerinin rnekleri var. Gladio, GAL (Amnesty International Report, 1997; Aretxaga, 2000), SAS askerleri tarafından gerekleřtirilen Cebelitarık İnfazları (Rolston, 2000), Kuzey İrlanda’daki lm mangaları (Rolston, 2000; Sluka, 2000), İran-Kontra Olayı (Walsh, 1993; Executive Summary of the Report on Drugs, Law Enforcement and Foreign Policy), Hindistan’daki (Mahmood, 2000; Pettigrew, 2000) yasal alan dıřında faaliyet gsteren zel polis gc gibi bu tip olayların

siyasal literatürde pek çok örneği var. Ayrıca, yasal alanla yasa dışı alandaki devlet faaliyetlerini ayırt etmenin görece güç olduğu Arjantin (Robben, 2000; Chevigny, 1991), ve Guatemala gibi (Afflitto, 2000; Ibarra, 1991; Warren, 2000) örnekler de var.

Bu olaylar devlet faaliyetleri söz konusu olduğunda devlet gücünün yasal ve yasa dışı kullanımı arasındaki ayrımın nasıl birbirine geçtiğini gösteren örneklerdir. Bazı örneklerde bu ayrımı yapmak neredeyse imkansızken diğerlerinde görece olarak mümkündür. Örneğin Arjantin’de 1976’dan 1982’ye kadar süren cunta döneminde sosyal muhalefetin bastırılmasında tanımlı yasal sınırlar ötesinde şiddet kullanılmış, gözaltına alınan muhalifler kaybedilmiştir (Robben, 2000: 97). Kaybetme eylemlerine karışanlar 1986’ya kadar kovuşturmaya uğramamış, 1986’da yargılanıp, 1990’da affedilmişlerdir (Robben, 2000: 110). Devlet faaliyetlerinde yasal ve yasa dışı ayrımının görece olarak belirgin olduğu ve bu gibi faaliyetler açığa çıktığında kovuşturmaya uğradığı örnekler de vardır. Örneğin İspanya’nın Sosyal Demokrat hükümeti 28 ETA üyesini öldürtmek için kiralık katillerden oluşan GAL’i kullanmıştır. Olayın açığa çıkmasından sonra İçişleri Bakanı ve Devlet Güvenlik Sekreteri de dahil, yargılanan on kişi 2 yıla 10 yıl arasında değişen cezalar aldı. Ancak Yargıtay’ın önerisi üzerine cezaları Bakanlar Kurulu ve Anayasa Mahkemesi kararıyla kaldırıldı (Amnesty International Report, 1997). İspanya’da bu tip faaliyetlerle ilgili iddialar GAL açığa çıkmadan önce de ileri sürülüyor, ancak reddediliyordu. Bu nedenle, yasa uygulamakla yasa çiğnemek arasındaki farkların belirli bir ülkenin anayasal düzeni gereğince yasa metinlerinde tanımlı olması yasal alan dışındaki devlet faaliyetleri günyüzüne çıkmadığı sürece yargı sürecine taşınmıyor. Örneğin Hindistan’da devletin Pencap’taki Sihlere ve Keşmir’deki Müslümanlara karşı uyguladığı kontrgerilla faaliyetleri büyük ölçüde bilinmekle birlikte tümüyle ortaya çıkmamıştır (Mahmood, 2000). Pettigrew kırsal Sih yerleşimlerinde “yasa dışı gözaltı, kaybetme, sahte çatışmanın (gözaltına alınan kişinin polis tarafından öldürülmesinin üstünü örtmek için sahte çatışma) günlük olaylar haline geldiğini” söylüyor (2000: 205). Hindistan’da “devlet için yasal alan dışında faaliyet gösteren

güçler olarak” özel polis güçleri oluşturulmuştur (Pettigrew, 2000: 207). Pettigrew’in aktardığına göre, bu özel polis güçlerinin “kendi normal yetki alanlarının dışında faaliyet göstermesine izin verilmekte, ve bu güçle hem askeri hem de paramiliter güçlerle özel operasyonlar düzenleyebilmektedir” (Pettigrew, 2000: 209). Benzer bir biçimde 1969-1994 arasında Kuzey İrlanda’da yasa çiğnemenin yasa uygulamadan ayrılmasının güçleştiği bir dönem yaşandı. Sluka (2000: 141) İngiliz güvenlik güçlerinin Katoliklere karşı yönetime bağlı Protestan güçleri desteklemek için karmaşık metotlar uyguladığını söylüyor. Sluka (2000: 142, 144) İngiliz polis gücünün yönetim yanlısı ölüm mangalarına silah ve Katoliklerle ilgili bilgi sağlama ilişkisinin 1969’dan ateşkes ilan edilen 1994’e kadar sürdüğünü söylüyor. Ayrıca, milliyetçi Katoliklerin eylemleri kovuşturmaya uğrarken, yönetim yanlılarının eylemleri fazla kovuşturmaya uğramaması da olayın bir başka boyutu (Sluka, 2000). Yönetim yanlılarıyla İngiliz güvenlik güçleri arasındaki ilişkiler dışında, Cebelitarık İnfazları gibi İngiliz güçlerinin doğrudan sorumlu olduğu olaylar da var. “Cebelitarık İnfazları” İngiliz SAS komandolarının silahsız üç IRA üyesini Cebelitarık’ta öldürmesi olayıdır (Rolston, 2000: 161). Bu olayla ilgili olarak Avrupa İnsan Hakları Mahkemesi İngiliz hükümetini Sözleşmenin 2. Maddesini ihlal etmekten suçlu buldu (Rolston, 2000: 161). Yasal alan dışı devlet faaliyetleri çoğunlukla ülke içinde yasal alanını ötesinde şiddet kullanılmasıyla gündeme gelirken, İran-Kontra Olayı gibi uluslararası siyasetin bir parçası olarak yasal alan dışında gerçekleştirilen devlet faaliyetlerini de görüyoruz. Bir yandan var olan yasaların uygulanmasındaki sorunlar sözkonusu oluyorken, olağanüstü hal dönemlerinde anayasal çerçevenin bütünlüğünün bozulduğunu görüyoruz. Örneğin, Fin (1991: 206-219; 86-97) Kuzey İrlanda’da IRA ile mücadele döneminde ve Batı Almanya’da Kızıl Ordu Fraksiyonu ile mücadele dönemlerinde anayasa değişiklikleri ve olağanüstü hal yasaları nedeniyle anayasal bütünlüğün bozulduğunu söylüyor.

Modern devletin yasallık temeline dayandığı iddiası Susurluk Olayı tipi olaylarla sarsılmaktadır. Bu yüzden, bu durumun hukuk-siyaset kuramındaki yerine bakmanın ve Susurluk Olayına teorik açıdan nasıl yaklaşılabileceği

üzerinde düşünmenin konuyu açmak için daha yararlı bir yaklaşım olacaktır. Bu çalışma böylesi bir çabadır. Bu nedenle, Susurluk Olayının devlet teorisinde nereye oturduğuna bakmayı, bunu yaparken de devleti hukuksal bir kurum olarak ve siyasal bir kurum olarak kavramsallaştıran iki temel çerçeveye göre konumlandırılmıştır. Böylesi bir çaba hem Susurluğa devlet bağlamında bakmayı sağlayacak, hem de Türk devletine odaklanmanın getireceği sınırlılıklardan kaçınmayı ve doğrudan hukuk-siyaset kuramına yönelmeyi sağlayacaktır. Bu amaçla, devleti bir hukuk kurumu olarak kavramsallaştıran ve devleti siyasal bir kurum olarak kavramsallaştıran iki kuramsal bakış açısından Susurluk Olayı değerlendirilmektedir. Bu çalışma, devleti hukuksal bir kurumu ve siyasal bir kurum olarak gören perspektiflerden bakıldığında Susurluk Olayı ve benzer olayların nasıl görülebileceği; devleti bir hukuk kurumu olarak kavramsallaştıran ve devleti siyasal bir kurum olarak gören çerçevenin devleti anlamada ne ölçüde etkili bir çerçeve sunduğunu sorgulayıp, Susurluk Olayını hukuk-siyaset kuramına oturtmayı deniyor. Bu çaba temel olarak, özelde Susurluk Olayı ile ilgili tartışmalara genelde ise modern devletin yasal alan dışında faaliyetlerine bakışta bir katkı sağlamaktadır.

Bunu yaparken, devleti hukuki bir kurum olarak tanımlayan iki temel yaklaşıma, hukuk devleti kuramına ve pozitif hukuk kuramına bakıldı. Hukuk devleti kuramı bu çalışma için önemli, çünkü Susurluk Olayı bağlamında en çok gündeme getirilen kavram “hukuk devleti” olmuştur. Modern devletin büyük ölçüde hukuksal temelde çalıştığı göz önüne alınırsa böyle olması da normaldir. Hukuk devleti kuramının biçimsel-liberal ve demokratik temelli iki yorumu olarak bu alanın iki önemli isminin yaklaşımlarına bakılmıştır. Max Weber’in pekçok alandaki katkısının yanısıra hukuk teorisine de önemli katkısı olmuştur. Weber modern devleti güç kullanımını biçimsel-hukuksal temelde meşrulaştıran bir yapı olarak tanımlar. Yönetim aygıtı da, bu güç kullanımının akılcı aracı olarak tanımlanmıştır. Weber’in bürokrasi ve yönetim alanında yaptığı katkı da Susurluk Olayını konumlandırmada zengin bir perspektif sunma potansiyeli taşır. Weber’in biçimsel hukuksallık açısından tanımladığı devlette yönetsel sirlara, genel

anlamda sır kavramına ve modern *raison d'etat*'a ilişkin açılımlar da vardır. Weber'in yaklaşımından farklı olarak Habermas biçimsel yasallıkla demokrasiyi birbirini dışlar biçimde değil, tamamlar biçimde kavramsallaştırmıştır. Habermas, uzun yıllar boyunca devletin meşrulukla araçsallığı birlikte sağladığını, modern devletin ortaya çıkmasıyla gündeme gelen devlete ilişkin metafizik meşruluğun ortadan kalkmış olmasının meşruluk sorununun ortadan kalkması anlamına gelmeyeceği ve olumsuz bir gelişme olarak devletin ve hukukun araçsallaştırılabileceğini söyler. Meşruluk sorununu aşmanın ancak yasaya uyan öznelerin kendilerini yasa koyucu olarak görmeleriyle, dolayısıyla Kant'ın everensellik prensibinin yasaların genelliğiyle sınırlanmayıp, yasanın oluştuğu sürece yansıtılmasıyla mümkün olduğunu söyler. Habermas'ın modeli Arendt'in iletişimse iktidar kavramına dayanır. Bu genel çerçeve içinde yönetsel yapının güç kullanımı ve işleyişi iletişimse iktidarın yönetsel alana tercümesi anlamına gelir. Anayasal devletin görevi bu tercümenin doğru yapılmasını gerekli mekanizmalarla sağlamaktır. Aksi durumda meşruluk sorunu doğar.

Hukuk devleti temelli yaklaşımların meşruluk vurgusundan farklı olarak pozitif hukuk meşruluk sorununu gündeme getirmez. Bu çalışmada pozitif hukukun önemli bir ismi olan Hans Kelsen'in "saf hukuk teorisi"ne bakılmıştır. Kelsen'in seçilmesinde dönemin cumhurbaşkanının ve hükümet üyelerinin Susurluk Olayını değerlendirirken, muhtemelen Kelsen okumamış olmalarına rağmen şaşırtıcı biçimde Kelsenci bir çerçeveyi referans almalarıdır. Kelsen'in kuramı hukuk devleti yaklaşımından farklı olarak meşruluk sorunun ve elbette adalet sorununu hukuk alanından tümenden dışlamaktadır. Kelsen demokrasiyi olumladığı halde kuramını hukukun siyasal tarafsızlığı tezi üzerine kurmuştur. Ancak felsefi göreliliğe ve tek mutlak anlayışının reddi varsayımının üzerine inşa ettiği kuramının aslında demokratik bir yönetime hizmet edeceğini varsaydığı söylenebilir. Bu amaçla, devleti tümenden tarafsız bir alan olarak tanımladığı hukuk alanı içinde eritir. Devlet anayasa ile kurulu bir korporasyondur, bu anlamda devlet normlardan ve bu normların uygulayıcısı olan öznelerden ibarettir dediğinde Kelsen'e karşı çıkmak zor görünmektedir. Gerçekten de kişilerin ve

kuralların ötesinde “maddi” bir devlet tanımlamak zordur. Ancak Kelsen’in tasarladığı çerçeve de devletle ilgili farklı boyutları ve bu anlamda da yasal alan dışındaki devlet faaliyetlerini anlamlandırmayı zorlaştırmaktadır.

Susurluk Olayını okumada devletin hukuksal bir kurum olarak görüldüğü perspektif meşruluğa ya da hukuksallığa yaslanırken, devletin siyasal bir kurum olarak görüldüğü perspektif devletin yasal alan dışındaki faaliyetlerini anlamada daha açıklayıcı bir bakış açısı sağlamaktadır. Uzun bir gelenek, Meinecke (1998) tarafından “Machiavellism” olarak tanımlanan gelenek, ya da Botero’ya referansla “*raison d’etat*” olarak tanımlanan gelenek böylesi bir anlamlandırma için çok uygundur. Bu doktrinin temel çizgisini özetlerken Meinecke’nin (1998) metni ve Machiavelli’nin *Discourses*’ı temel alınmıştır. Machiavelli olağanüstü koşullarda yönetimin düzenlenmiş olmasının devletlerin varlığını sürdürmesi için ne kadar önemli olduğunu anlatır. Düşmanlarının varlığının devletlerin büyümesi ve gelişmesi için elzem olduğunu söyleyerek sadece hanedanlar arasındaki üstünlük mücadeleleri için değil, devletin varlığını sürdürme koşulu olarak da iktidara yönelik siyasetin önemini vurgular. Bu düşünce değişen koşullarla ve değişen devlet örgütlenmelerinde farklı biçimlerde yer bulmuştur. Meinecke’nin metni özellikle modern devlette ve uluslararası ilişkilerde *raison d’etat*’ın nasıl kabuk değiştirdiğini ve sürekli savaş durumundan büyük güçlerin dengelediği bir dünyada uzun süreli barış durumunun hangi temelde sağlandığını göstermesi; ve yeni savaşların çıkmasının bu güçler dengesinin bozulmasıyla mümkün olduğunu anlatması açısından önemlidir. Ancak *raison d’etat* perspektifi hukuk temelli bir değerlendirme yapmak için fakirdir. Öte yandan Schmitt’in egemenlik kavramı doğrudan hukukla ilişkili olarak kurgulanmıştır ve Schmitt’in devleti siyasal bir kurum olarak tanımladığı “siyasal kavramı”na yaslanır. Schmitt’in teorik açımları devlet faaliyetlerinde yasal alan ile yasa dışı alan arasındaki geçişkenliğinin nasıl mümkün olduğunu göstermesi açısından önemlidir. Schmitt’in kavramsallaştırmasında yasanın uygulanabilmesi için yasayı kabul edebilecek yaşamsal pratikler olmalıdır. Yasa sözkonusu yaşamsal pratiklere eşit anlamda uygulanamıyorsa egemen güç tarafından askıya alınır ve yasanın

uygulanabileceği bir ortam yaratılır. Schmitt için siyaset insanın doğasıyla ilgili bir durumdur ve bir halkın kendi hayat biçimini sürdürme sorunudur. Bu yüzden de varoluşsal bir sorundur. Schmitt liberalizmin toplumsal bütünlüğü sağlamada karşılaşıcağı açmazların varoluş sorununun reddi, yani siyasetin reddi üzerinden aşamayacağını düşünür. Bu çalışma, özetlenen kuramsal izlek üzerinden Susurluk Olayının farklı okumalarını yapmayı deneyen, Susurluğun farklı perspektiflerden nasıl görüleceği üzerine kapsamlı bir denemedir.

Modern devlet belli bir alanda fiziki güç kullanımı yetkilendirilmesi üzerine inşa edilmiştir. Yasal düzen belirli bir eylemi yetkilendirmiyorsa bu eylem nasıl değerlendirilebilir? Başka bir deyişle, devletin yasal alan dışı faaliyetleri nasıl yorumlanabilir? Bu çalışma Susurluk Olayının hukuk-siyaset kuramında konumlandırmak için böylesi önemli bir soruyu yanıtlamaya çalıştı. Bu amaçla, öncelikle Susurluk Olayı aktarıldı. Daha sonra devleti hukuksal bir kurum olarak ve siyasal bir kurum olarak gören kuramsal yaklaşımlar açısından yasal alan dışındaki devlet faaliyetlerin nasıl görüldüğü incelendi. Son olarak da Susurluk Olayı bu farklı kuramlar açısından yorumlandı.

Devleti hukuksal bir kurum olarak anlayan Weber'in hukuk devleti kuramı, devleti meşru güç kullanımı tekeline sahip örgüt olarak kavramsallaştırır. Bu kuramsal bakış açısına göre yasal alan dışındaki devlet faaliyetleri biçimsel yasal açıdan meşru değildir. Demokratik temelli bir hukuk devleti kuramı geliştiren Habermas'ın devlet kavramsallaştırmasına göre ise demokratik anayasal devlet meşruiyeti mümkün kılar. Habermas'ın kuramından bakıldığında yasal alan dışındaki devlet faaliyetleri demokratik meşruiyet açısından meşru değildir. Devleti hukuksal bir kurum olarak kavramsallaştıran diğer kuram, Kelsen'in saf hukuk kuramı ise devleti göreceli olarak merkezileşmiş bir yasal düzen olarak tanımlar. Bu bakış açısından kişisel suçlar dışında yasal alan dışındaki devlet faaliyetlerine hiçbir gönderme yapılamaz. Devleti siyasal bir kurum olarak gören *raison d'etat* doktrini devleti belirli bir dil ve zihniyetle korunacak bir bütünlük olarak kavramsallaştırır. Bu kavramsallaştırma "kamu yararı"na hizmet ettiği sürece yasal alan dışındaki devlet faaliyetlerini gerekli bulur. Schmitt'in siyasal ve

egemenlik kuramlarına göre ise devlet siyasal karakterine dayanan karar verici kurumdur. Schmitt'e göre yasal alanın içi ve dışı ayrımı siyasaldır. Bu farklı kavramsallaştırmalar üçüncü ve dördüncü bölümlerde incelenmiştir.

Devlet kavramsallaştırması farklı kuramsal duruşların Susurluğa bakışını değerlendirmek için bir çerçeve sunmaktadır. Devlet kavramsallaştırmasındaki farklı varsayımlar devletin yasal alan dışı faaliyetleriyle ilgili farklı sonuçlara ulaşırlar. Çalışmada öncelikle bu farklı bakış açılarının yasal alan dışındaki devlet faaliyetlerine nasıl baktığı incelendi. Weberci görüş devletin yasal alan dışı faaliyetlerini biçimsel-yasal meşruluğun gerekleri açısından gayri meşru bulur. Hem toplumdaki dinamiklere, hem de modern devletin akılcı yoldan meşruluk kazandığı tanımına dayanan Weber'in görüşü devletin yasal alan dışındaki faaliyetlerini bu açıdan gayri meşru görür. Habermas'ın demokratik anayasal devlet kavramsallaştırması da yasal alan dışındaki devlet faaliyetlerini kabul etmez. Bu nedenle bu iki hukuk devleti kavramsallaştırması devletin yasal alan dışı faaliyetlerini inceleme perspektifi sunmazlar. Kelsen'in pozitif hukuk kuramı ise yasal alan dışı devlet faaliyetlerine gönderme yapmaz, çünkü devlet faaliyetlerini tümünden yasal alanda tanımlar. Ancak, Kelsen açısından bu gibi faaliyetler kişisel suçlar olarak tanımlanabilirdikleri kadarıyla incelenebilirler. Sonuç olarak, yasal alan dışı devlet faaliyetleri devleti hukuksal bir kurum olarak tanımlayan bakış açısından ya gayri meşru ya da bu faaliyetlere karışanların kişisel suçlar toplamı olarak anlaşılır. Bu bakış açısından siyaset faktörünü yasal alana tercüme edilmiş olarak kavramsallaştırır. Weberci hukuk devleti kuramına göre yasal alan siyasal alanı meşrulaştırırken, Habermas'a göre anayasal devletle toplumdaki iktidar dolaşımını düzenler. Öte yandan Kelsen'de siyasal alan ancak yasal düzenin işlerliği olarak ifade bulur. Ancak, siyasal alan yasal alanla kapsanmayan dinamiklere sahiptir. Susurluk Olayı ve benzer olaylar modern devletin bir başka yüzünü gösterir. Bu gibi olaylar devleti siyasal bir kurum olarak gören bakış açısından kısmen anlaşılabilirler. Devleti "kamu yararı" amacıyla işleyen bir kurum olarak anlayan *raison d'etat* doktrini devletin yasal alan dışındaki faaliyetlerini bu faaliyetler halkın yararına görüldüğü sürece anlar, hatta

onaylar. *Raison d'etat* doktrinine göre, kamu yararı için çalışan bir örgüt olduğu varsayılan devleti korumak bu amaçla kullanılan araçları haklılaştırır ve meşrulaştırır. Bu yüzden, bu bakış açısıyla devletin yasal alan dışı faaliyetlerini anlamak mümkündür. Ancak *raison d'etat* doktrini ayrıntılı bir hukuksal analiz perspektifi sunmaz. Schmitt'in kuramı ise devletin yasal alan dışı faaliyetlerinin hukuksal değerlendirmesini mümkün kılar. Schmitt'in siyasal kuramının bakış açısından devlet insanların dost-düşman ayrımına göre gruplaşmasına dayanır. Halkın güvenliğini sağlayacağı varsayılan devlet, yasal alana temel olacak koşulları değerlendirir ve bu koşulların sürdürülmesi için hukuk-hukuk dışı ayrımını belirler. Bu yüzden Schmitt'in kuramında yasal alan dışındaki devlet faaliyetleri yasal alana istisnaya dair bir kararla dahil edilmiştir. Yani, Schmittci bakış açısı yasal alan dışındaki devlet faaliyetlerini siyasal faktörüyle hukuk kuramına dahil ederek analiz etmemizi sağlar. Bu bakış açılarının Susurluğa ilişkin olarak nasıl yorumlanacağı önemlidir. Aynı zamanda Susurluk Olayı da bu farklı bakış açılarını devletin yasal alan dışındaki faaliyetlerini karşılaştırmak için iyi bir örnektir.

Weber'in ve Habermas'ın kuramları yasal düzenin meşruiyetine ilişkin iki kavramlaştırma sağlar. Weber'e göre modern devlet meşruiyetini akılcı-yasal otoriteden sağlarken Habermas için yasal düzenin meşruiyeti ancak iletişimsel iktidara dayanan demokratik ilkelerle mümkündür. Weber'in perspektifi yönetsel yapının da detaylı bir analizini sağlar. Susurluk Olayı bağlamında Weberci modern devlet kavramsallaştırması yasal alan dışındaki devlet güçlerini biçimsel-yasal meşruluk temelinde kavrayamaz. Devletin yasal alan dışındaki faaliyetleri devletin biçimsel-yasal temelde meşrulaştırılabilen faaliyetleri değildir. Bu nedenle, Weberci analiz Susurluğu ancak metafizik temelli bir meşrulukla açıklayabilir. Habermascı (1996: 150) bakış açısıyla hukuk iletişimsel iktidarın yönetsel iktidara tercüme edildiği ortamdır. Bu nedenle, Susurluk dikkate alındığında yönetsel iktidarın düzenlenmesiyle ilgili bir sorun ortaya çıkar. Yönetsel iktidar iletişimsel iktidardan bağımsızlaşmıştır. Bu nedenle, anayasal devletin iktidar dolaşımını düzenleyen mekanizmalarında zaaf vardır. Eğer

modern devlet hem siyasetin nesnesi hem de öznesi olan vatandaşın çıplak hayatı üzerine kurulmuşsa siyasetin öznesi ile nesnesi olmak arasındaki mesafeyi nasıl yorumlamak gerekir? Habermas'ın anayasal devlet modeli iktidar dolaşımı için düzenleyici bir mekanizma olarak anlaşılabilir mi? Habermascı hukuk devleti kavramsallaştırması siyasal kararların nesnesi olmanın dolayımlandığı bir siyasal özne olma mekanizmasını gündeme getirir. Susurluk Olayı bu mekanizma için bir meşruluk krizi anlamına gelir. Susurluğun Weberci ve Habermascı yorumlarının gösterdiği gibi, hukuk devleti kuramı Susurluğu bir meşruiyet sorunu olarak anlar. Devleti hukuksal bir kurum olarak kavramsallaştıran diğer bakış açısı, meşruluk sorununu gündeme getirmez. Kelsen'in saf hukuk kuramı Weber'in ve Habermas'ın perspektiflerinden farklıdır. Susurluğun Kelsenci okuması ancak bir dava olarak okunmasıyla mümkündür, zira Kelsen açısından devlet işleri söz konusu olduğunda hiçbir eylem yasal alanın dışında kalmaz. Kelsen'in devlet kavramlaştırmasına göre devlet normlardan ve bu normları uygulayan insanlardan ibarettir. Susurluk da ancak kişisel suçlar olarak yorumlanabilir. Kısacası, hukuk devleti kuramı ve pozitif hukuk Susurluğun yasal alan dışı devlet faaliyetleri olarak bir görünümünü sunmaz, ya biçimci-yasal veya demokratik meşruluk sorunu olarak ya da kişisel suçlar olarak tanımlar.

Susurluk Olayı *raison d'etat* doktrini çerçevesinde kabul edilir ve anlaşılır. Ancak, bu doktrin hukuksal bir analiz olanağı sunmaz. Carl Schmitt'in kuramı ise yasal alana ilişkin bir analiz için zengin bir çerçeve sunar, zira Schmitt'in "istisna" kavramı yasal alan dışındaki devlet faaliyetlerinin siyasal alanla açıklanabileceği bir kavramdır. Schmitt'in kavramsallaştırması Weber ve Habermas'ın hukuk devleti kuramlarından ve Kelsen'in pozitif hukuk kuramından çok farklıdır, çünkü Schmitt devletin insanların dost-düşman ayrımı temelinde gruplaşmasına dayalı siyasal karakterine vurgu yapar. Buna göre, hukuk siyasete açıktır ve yasal olanla olmayanı ayıran hat sabitlenemez. Öte yandan, siyasal alan hayatın dayandığı temeldir. Bir halkın, insan hayatının nesneleşebilirliği, yani yok edilebilen çıplak hayata indirgenebilirliği üzerinden kendi hayat tarzını korumasıdır. Schmitt'in bakış açısı devletin yasal alan dışındaki faaliyetlerini

anlar, ancak Susurluk Olayı Schmittci anlamda bir istisna kararının sonucu olarak da yorumlanamaz.

Buna göre, Weberci bakış Susurluğa baktığında biçimsel-yasal meşruiyet zaafı görür. Habermas'ın hukuk devleti yorumuyla Susurluk Olayında yönetsel iktidarın iletişimsel iktidardan bağımsız kaldığını ve anayasal devletin iktidar dolaşımının düzenleyici gücünde bir zaaf görülür. Kelsen'ci bakış açısıyla sadece belirli kişilerin suçlarının sözkonusu olduğu bir dava görülür. *Raison d'etat* doktrininin bakış açısıyla Susurluk Olayı toprak bütünlüğü ve homojenliği açısından devleti korumak için devletin yasal alan dışındaki faaliyetleridir. Schmittci bakış açısıyla ise, bir istisna kararının sonucu değil, sorumluluğun devredildiği dolaylı yollarla iktidar uygulanmasının sonucudur.

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