Dr. Ildikó Marosi – Dr. Lóránt Csink Ph.D.

guest lecturer – senior assistant
Department of Constitutional Law

Political Questions in the United States and in France

Are there answers for all our questions? Such a philosophical and admittedly rhetorical question could be put in all fields of life. One often finds problems one cannot solve and questions one cannot answer. But this does not necessarily mean the lack of solution to the said problem; it might occur that there exists a possible answer but our knowledge is too little to find it.

It is essential to clarify whether there exists a hypothetical response to the issue that cannot be answered according to the information one already has. In such a case, gathering more pieces of information could help in finding the solution; otherwise such an activity would be in vain. This does not necessarily mean that one has to be reconciled to insolvability but to seek another logical sphere to arrange the matter.

The problem arises both in natural sciences and in philosophy. According to the adherents of *Theory of Everything* (TOE), phenomena are recognisable and, what is even more important, they connect each other. As a result, the emerging questions can be answered in the limits of the logical system. The principle, either the believers of TOE admit it or not, roots in ancient Greek cogitation. As for Aristotle and Plato, with the *divine principle* (the so-called 'nous') of man the world is recognisable.[1] The main difference between Aristotle and Plato was on the question whether this knowledge could be reached *de facto* or it exists only hypothetically. But they agreed that world is recognisable and open questions can be answered.

The strongest rebuttal of TOE arose in the first half of the 20th century. According to the *incompleteness theory* of Kurt Gödel in 1931, no logic system can be complete (i.e. all the questions put in the sphere are answerable) and consistent (i.e. free from contradictions) at the same time. In another way, if a logic system is consistent, there must exist open questions and if there are not any, there must exist discrepancies.[2] Although the thesis was set on mathematics, its importance seems to be in exceeding the borders of natural science and in expanding to all logic systems.

As it was mentioned, the problem is not limited to defined sphere of sciences, it also effects legal sciences. In the jurisdiction of courts, including constitutional ones, there may come up

1 Aristotle meant it both on natural sciences and on philosophy. Concerning the former, it could be found in "Physics" and the latter in "De Anima". The matter arises in "Timaeo" at Plato.

2 The simplified review of the thesis was published by Mérő, László: Új észjárások (New Cogitation). Tercium, 2001. p113.

problems that seem to be unsolvable at first sight. So it is essential to define the attitude the judge should strike, as the one whose task is to deal with the case.

In legal sciences the "sole correct answer" doctrine has great importance. Its basic point is that law, as the complex of all available norms, answers all questions and it gives only one response to the expert. If one does not find this sole correct answer, the "error" can be in the abilities or it is due to lack of information. Law, if it wants to be operable, does not seek the "correct" but the "final" answer. The conviction in rationality, the rule of law and the claim for predictability explain the lawyers' insistence to the possibility of sole correct answer.[3] Without denying the practical importance of the thesis, resulting that all legal questions have to be answered, we reckon that the theoretical existence of the answer for all questions does not come from the thesis. The principle of "sole correct answer" is possibly a fiction, which is necessarily applicable even if it is practically not true.

The situation is paradox because the "sole correct answer" is neither a theoretical nor a practical doctrine. It is not theoretical, because it has not been proven that there really are answers to all the questions, moreover the opposite is more likely. But neither practical, because judges have the tools to avoid some questions they are not willing to deal with, as we present it through the American and the French jurisprudence.

Furthermore, in our point of view, the "finality" of the legal answer is not an end in itself. In ideal cases the adequate answer becomes final. This obviously turns up in the system of legal remedies in which the legislator and the court have to balance the interests of finality and adequacy; how long they are willing to seek the adequate answer and leave the case pending.

Adequacy has two aspects. On the one hand, a legal decision should be acceptable in legal aspects, i.e. it must have a legal basis, it must root in a legal authority. And on the other hand, it should be correct even in non-legal (equitable or economical) aspects.[4] To sum up, judicial decisions should meet the following standards:

1. to make a final decision on the question;
2. the decision should be correct and
3. the decision should be based on legal authority.

As for the first requirement, courts and constitutional courts are supposed to have answers for all questions, otherwise they are not able to make decisions. However, in some cases it is really difficult to fulfil the second and the third standard at the same time. The difficulty seems to be that correct decisions do not always have legal basis; in other words, consequent decisions arising from legal norms do not always result in correct decisions.[5]

In such cases, it is very tempting to the judiciary to doubt the first standard and avoid the decision-making in the case.

Notion of political question

Constitutions contain the most basic legal norms of a political society.[6] The splendid isolation of law and politics seems hardly possible. As a result, the judiciary sometimes face situations in which they are to show political activity.

3 Szabó, Miklós: Ars Iuris. A jogdogmatika alapjai (Bases of pragmatic law). Prudentia Iuris, Miskolc, 2005. p53.

4 Jakab, András: Az alkotmányértelmezés módszerei. (Methods of constitutional interpretation) http://www.szazadveg.hu/kiado/szveg/47jakab.pdf

5 See note 4.

6 See note 4.

In a theoretical aspect, activities shaping society are "political". Such activities point out the direction the society follows among the alternatives. The definition has two important elements; firstly, the choice among different values and secondly, the effect of the decision expands to the whole society or at least to a significant part of it.[7] We found it essential to make a difference between the certification of a decision and its consequence. Just because a decision is important for the society or it has serious economic effect, it is not necessarily a political decision.[8]

On the contrary, in a common sense, decisions in which the judiciary chooses the correct way rather than the one rooting in legal norms are "political". In this sense, labeling a decision as political is a negative evaluation, meaning that the decision is not conform to legal norms. The everyday meaning deems questions as political if they concern the affairs of political *powers* (political parties, lobbies, unions etc.).

We wish to approach the notion of political decisions from another aspect, as we find questions political if they affect political *branches* (and not political parties). In this article we attempt to define the attributes of political questions in the American and French jurisprudence, to examine the way these questions are dealt with and to draw the conclusion from the different approaches.

The political question doctrine in America

The Supreme Court of the United States does not decide political questions. The point of the doctrine is to differentiate judicable and non-judicable questions[9] on the basis of separation of powers; the judiciary does not interfere in the affairs of the legislator and the executive, i.e. in political questions.[10]

However, it is the judiciary itself, which decides whether a question is political or not and the Supreme Court dropped the general attributes if it found a case better not to concern.[11] Indeed, there are different interpretations of political questions and the Court can freely decide which one to choose and as a result the court may influence its own scope of authority.

Premonitory signs of the doctrine came up in the early years of the history of the United States. In 1793 the Supreme Court pointed out that it did not give advisory decisions to other branches. In the very case *Thomas Jefferson*, George Washington's minister for foreign affairs asked the Court's opinion to learn the attitude America should show on the war between England and France. In its answer the Court stated that in the system of separation of powers there were clinching arguments against arbitrary deciding a matter being referred to the executive.[12]

However, in the early years the Court accepted the classical interpretation on political question. In its famous decision, *Marbury v. Madison*,[13] the Court felt that regard to cases meeting

7 Győrfi, Tamás: Az Alkotmánybíróság politikai szerepe. Gondolatok a bírói aktivizmus fogalmának hasznosságáról. (The political role of the Constitutional Court. Thoughts on the usefulness of judicial activism) Politikatudományi Szemle 1996/4. p64.

8 See note 7. pp. 64–65.

9 Paczolay, Péter: Könyörtelen bírói hatalom? A bírói alkotmányértelmezés politikai szerepe. (Cruel judiciary? The political role of judicial interpretation of the constitution) Jogállam 1993/2. 32. p.

10 Antal, Attila: Politikai kérdések doktrínája. (Political questions doctrine) http://www.meltanyossag.hu/files/meltany/imce/kp-politikaikerdesekdoktrinaja-080422.pdf

11 Sólyom, László: Az alkotmány őrei. (Guards of constitution) http://www.mindentudas.hu/solyomlaszlo/20050523solyom1.html?pIdx=14

12 See note 9. p31.

13 5 U.S. 137 (1803)

jurisdictional standards, it was obligated to take and decide them.[14] This interpretation was explicitly written by chief justice Marshall in *Cohens v. Virginia*. "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution".[15]

However, this rigid conception was often broken but the doctrine of political questions explicitly came up only in the middle of the 19th century. In *Luther v. Borden* the Court came to the conclusion that it is the president and the Congress who are entitled to decide whether the form of government of a state is "republican" in the sense of sec. 4. Art. 4. of the Constitution. Therefore the Court, as the question is political, has no right to take a stand on it.[16]

The doctrine of political question has never meant that the judiciary is completely out of the affairs of the executive, not even in the early days of its application. In the *Pocket-Veto Case* the Court stated: the fact that a question linked to another branch did not mean that the Court could not interpret the constitution.[17] This directive was carried on in *Coleman v. Miller* in which the Court denied to define the length of "reasonable time" in a constitutional amendment.[18]

In these decisions the Court followed the prudential theory of political questions. This interpretation focuses on the distinctive element of political questions; it seeks the attributes upon which a question deems to be political. And as a result of the interpretation, the Court decides only matters concerning other branches if it is nothing else but the interpretation of the constitution.[19]

---

14 CRS Annotated Constitution. Electronic publication of Congressional Research Service p706. http://www.law.cornell.edu/anncon/html/art3frag30_user.html

15 19 U.S. 264, 404. (1821). In the case the Congress allowed to operate lottery in the District of Columbia. The Cohen brothers sold the coupons in Virginia, confronting state law. State authorities tried the Cohens and fined them. The substance of the case was whether the Supreme Court could review the decisions of state courts.

16 48 U.S. 1 (1849). The background of the case was that *Martin Luther* took part in the Dorr-revolution, aiming to change the government. The main purpose of the revolution was to broaden the suffrage. Borden, as a state official, searched Luther's house and arrested him. According to Luther's petition, Borden was not a representative of the republic because no state deem to be republic if it grants only suffrage to the wealthiest. In his point of view, the Dorr-government was legitimate.

17 279 U.S. 655. (1929) In 1926 the Congress adopted a law granting judicial action for Indians in Washington to compensate for their lands being taken. On 24 June, 1926 the Act was sent to president *Calvin Coolidge* who had not signed it until 6 July, the deadline for signature. But the Congress had begun its summer vacation on 3 July, so sec. 7 Art. 1. of the constitution (pocket veto) came into effect. Some Indian tribes tried to launch petitions but they were refused due to lack of legal basis.

18 307 U.S. 433. (1939) The Congress drafted a constitutional amendment in order to prohibit child labour. Upon Art. 5 of the constitution, the three-quarters of the member states should ratify the amendment. In the Senate of Kansas, 20 senators voted in favour and 20 against it but finally the proposal was accepted with the vote of the deputy governor being the chairman of the session. Some senators launched a petition stating that the procedure was out of reasonable time.

19 On prudential theory see BICKEL, Alexander: The Least Dangerous Branch: The Supreme Court at the Bar of Politics. Bobbs-Merill, Indianapolis, 1962.

A totally different interpretation became accepted in *Baker v. Carr*.[20] In this case the Court decided so that the connection with separation of powers did not make the question non-judicable. The Court allocated its former praxis and drew to the conclusion that political question might arise in the following cases:

- textually demonstrable constitutional commitment of the issue to a coordinate political department;
- a lack of judicially discoverable and manageable standards for resolving it;
- the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
- the impossibility of a Court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;
- an unusual need for unquestioning adherence to a political decision already made;
- the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[21]

The Court stated that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question" so it decided that the extent of constituencies is not one of political questions. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine".[22]

In Baker v. Carr the Court turned back to the classical interpretation of political questions according to which political cases can also be decided by interpreting the constitution, so they are nearly always judicable. With this statement the Court gave very narrow interpretation of political questions.

However, the Court moved further from Baker v. Carr during its later praxis. To set an example, in *Nixon v. United States* the Court found the question of the Senate's process in impeachment cases political[23] or in *Goldwater v. Carter* the Court stated that the termination of an international treaty was a political question.[24]

Nowadays the sphere of political question narrows again. It is noteworthy that during the presidential elections in 2000 with respect to the recounting of votes in Florida[25] the Court did not mention the doctrine although the constitution expressively assigned the Congress to

---

20 369 U.S. 186. (1962) The constitution of Tennessee declared that borders of constituencies should be supervised in every ten year in order to promote equal suffrage. Despites, no supervision had taken place since 1901 and there had become tenfold difference among the constituencies because of urbanisation. Therefore *Baker* launched a petition against *Carr* who was responsible for state elections.

21 369 U.S. 186, 217 and following

22 369 U.S. 186, 211.

23 506 U.S. 224. (1993) Walter NIXON, judge of the Supreme Court was charged with giving false testimony but he did not resign even when he was imprisoned. The House of Representatives proposed his deprivation and the Senate set up a committee to inquire the case. Upon the Committee's proposal the Senate approved the deprivation. NIXON claimed that the inquiry of the committee was unlawful as it formally was not the "procedure of the Senate".

24 444 U.S. 996. (1979) President CARTER denounced the common defence treaty with China without the approval of the Senate.

25 *Bush v. Palm Beach County Canvassing Bd.* 531 U.S. 70. (2000)

count the electoral votes and the House of Representatives to choose the president if no candidate gained the majority of the votes.[26]

Summing up the cases of the jurisprudence of the Supreme Court, one could categorise political questions into two groups.

As for one, questions relating to separation of powers are political; those questions that are explicitly tasks of other branches according to the constitution itself. To determine whether a case links to separation of powers the Court accepted the functional interpretation which bases in the limits of judicial competence; questions are political if the Court has no competence to deal with them. We find the main difference between prudential theory and functional interpretation in the different approach. The former is a positive one; it attempts to find the attributes that characterise political questions, while the latter is negative; questions are political if they are out of judicial competence.

Secondly, questions of foreign affairs and wars are typically political (see Goldwater v. Carter). However, it is noteworthy that just because a question relates to foreign policy it is not necessarily political.[27]

The political question in France (Acte de gouvernement)

French law does not distinguish between the activity of the administrative body and that of the government. As far as the possibility of the judicial review of administrative law is concerned, all the acts of an authority may be reviewed, when they have a character of belonging either to the governmental or to the administrative sphere. At the same time, there is an important scope of governmental acts, which can still avoid the control of the administrative court: the so-called "acte de gouvernement", a category which still does not have a generally accepted definition.

The category of the acte de gouvernement is a remnant of that concept of sovereignty, which was founded more than 200 years ago, and according to which the sovereign is free to act, as the idea of sovereignty is characterised by its unbounded nature. In *Rousseau*'s concept the sovereign was the people themselves. But soon it turned out that the controlling role of the people in whom sovereignty resides is not sufficient as far as the actual functioning of the different branches of power is concerned. Exercising real control over them and securing the legality of the authorities in every possible way required organised and institutionalised forms.

The control of the governmental-administrative activity made it necessary to introduce – beside the traditional judicial power and within the framework of the executive – a separately prevailing control-organisation. The Conceil d'État, which functioned primarily as the counsellor of the government, became – paradoxically in the 19th century in its ever widening sphere of competence – the censure of the government, the "guardian" of the legality of the governmental-administrative resolutions. Through the growing number of cases considered by the Conceil d'État the need to take French governmental-administrative activity under the jurisdiction of the law became more and more manifest.

---

26 Onecle – Legal Research: Political Questions. http://law.onecle.com/constitution/article-3/20-political-questions.html

27 Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579. (1952) During the Korean war president Harry Truman decided on the mission of troops without asking Congress to enact state of war. To avoid inflation, he introduced economic measures and kept prices and salaries low. Due to the measures, some steel workers were on strike but the president expropriated the factories. The Court stated that the president had no right to do so and acting without proper authorisation seems to be no political question.

French legal practice and legal dogmatics arrived through this case law from the idea that the acts of government refer to what was called "political interest" and therefore considered as uncontrollable to the present day requirement of the constitutional state, which, according to Favoreau, essentially excludes the possibility of an unreviewable governmental act, because the executive has to operate in accordance with the laws, but at least under the scope of the constitution.[28]

If one looks for the sphere and the conceptual definition of those governmental-administrative acts which still avoid legal control, one has to focus on the practice of the judiciary. Although jurisprudence applies the concept of the acte de gouvernement, its generally accepted definition has not been provided yet either by jurisprudence or by legal practice. It is more than telling that the Conceil d'État (or the Tribunal des conflits) does not even use the concept very often.[29] But one can clearly claim that even after the full perfection of the constitutional state there remain certain types of governmental-administrative acts which can be reviewed neither by the ordinary jurisdiction nor by administrative courts. In their decisions these courts explicitly articulate their lack of competence in these matters. The development and transformation of legal practice offers different kinds of arguments to substantiate this lack of competence, which historically determines the definition of the unreviewable governmental acts.

In the first period of the pertinent practice of the Conceil d'État it used to state its lack of competence in reference to those acts, in the background of which direct political motives (le mobile politique) were suspected.

But as it turned out, the urge to complete the rule of law over all kinds of governmental acts proved stronger than the revolutionary thesis of the sovereign, acting in the interest of the people, and for that reason regarded as uncontrollable. Therefore, in the second half of the 19th century the "political motif", as the reason why a governmental decision should avoid judicial review and the foundation stone of the acte de gouvernement suffered a final defeat in a case before the Conseil d'État. Prince *Napoleon Bonaparte* was discontented with a decision of the minister of defence, which effectively deprived him of his title of general which he had received in the ancien regime, and he turned to the Conceil d'État for legal remedy. The Conceil d'État, in its function as the judge of the executive, in its decision on 19 February, 1875 made it clear that in a legal process of examining the legality of a governmental act the political motif of the act itself cannot lead to the establishment of a lack of competence. By claiming its own competence it dismissed the case of the prince, because it found the contested decision in accordance with a legal regulation dating back to 1852. This judgement did not only end the period when political motives could exempt an act from judicial review, but lead to a contrary result: acts without an adequate legal basis and explained only politically were to be annulled by the Conceil d'État, regarding it as either illegal, or as leading to the abusive exercise of power.[30]

When the practice of the court has expanded its competence so as to cover another significant part of governmental decisions, it had to decide new criteria for those acts which still remained unreviewable. The new standard was found in the nature of the resolution. A new practice was introduced, shifting from argument based criteria to activity based examination. The French literature which likes classifications, groups the acts of the executive which were

28 Favoreu, Louis: Du déni de justice en droit public (Denial of justice in public law) L. G. D. J., 1964. p. 169.

29 The Conceil d'État has hardly any decisions which have called the particular governmental acts as acte de gouvernement, which by its very nature escapes juridical review before the administrative or the ordinary court. Such are for example: l'arret Héritier d'Orléans, CE 18 juin 1852, l'arret Duc d'Aumale, CE 20 mai 1887, l'arret Duchesse de Saint Leu, 5 décembre 1938, l'arret Rubin de Servens, CE 2 mars 1962, avagy l'arret Barban, TC 24 juin 1954.)

30 l'arret Barel, C.E. 2 mai 1954.

questioned before the Conceil d'État – and other judicial forums – but were left without its merits being reviewed, in different ways. Some think that judicial practice distinguishes between the particular decisions of the administrative and other governmental activities, securing total immunity for this second group. There are others who think that the distinction depends on whether the governmental act refers to the internal affairs (les actes de gouvernement dans l'ordre intern) or to foreign relations (les actes de gouvernement dans l'ordre international).[31] From this perspective the Conceil d'État considers unreviewable those acts of the executive that refer partly to the relationship between the government and other branches, and partly to the relationship between the French state and other public law entities.

The Conceil d'État established its own lack of competence in those cases, when the act to be reviewed concerned the relationship between the relationship of the executive and other branches.

Due to its lack of competence the supreme judicial forum in administrative law did not examine those resolutions of the government which concerned the refusal to initiate the legislative procedure, the declaration of the beginning and the end of the given session of the parliament, the dissolution of the National Assembly, the promulgation of the law, or the reopening of the debate of a particular bill.[32] According to the decision of the Conceil d'État there is no chance for legal control in the above parliamentary resolutions.

Similarly, certain decisions of the president are also unreviewable. The presidential resolution based on Art. 16. of the constitution is an example of that type.[33]

It is worth referring to the fact that this resolution is one of the few in which the Conceil d'État labelled the particular resolution under scrutiny to be an acte de gouvernement.[34] Therefore, the court can review neither the legality, nor the temporal effect of it. The Supreme Administrative Court takes the view that the president exercises executive power, and therefore the measures brought by him in this position are outside the governmental-administrative function, and therefore cannot be brought under the supervision of the court. (However, a special court with a special procedural order can examine the legality of these measures and the presidential responsibility as well.)

The administrative court cannot challenge the presidential decision on the nomination of the three members of the Conceil d'État either.[35]

Two other decisions in 2005 touched upon the exercise of presidential powers.[36] In one of them the action questioned the legality of a resolution of the president, with which he wanted to introduce a Bill on two constitutional amendments before the two Houses of the Parliament. According to the petition, this was an illegal resolution contradicting Art. 19 of the constitution. In the other case the action aimed at annulling a presidential resolution, which was to order a referendum about the ratification of the European Constitutional Treaty. In both cases the Conceil d'État established its lack of competence, referring to the fact that the actions questioned the relationship of constitutional branches (i.e. that of the common session of the

31 Chapus, Roland: Droit administratif general (General administrative law) 1993, p. 754-755. in Auvret – Finck, Josiane: Les actes de gouvernement, irréductible peau de chagrin? Revue du Droit Public 1–1995, p132.

32 See the detailed reference to these cases in Auvret-Finck, infra p. 132.

33 Art. 16 of the French Constitution invests the president of the republic with special prerogatives in a state of emergency, based on the experience of the total capacity of the French public law institutions during the German occupation of June 1940.

34 l'arret Rubin de Servens, CE 2 mars 1962.

35 CE Ass., 9 avril 1999, Mme Ba, AJDA, p. 401. Peiser, Gustave: Contentieux administrative (Administrative procedure) Dalloz 2004, p39.

36 l'arret Hoffer, 22 févr. 2005, l'arret Hoffer, 23 févr. 2005.

two Houses of the Parliament versus the president, and that of the president of the republic and the Conceil d'État). Reviewing the legality of these relationships is outside of the scope of the Conceil d'État.

The acts concerning "foreign relations" have become more significant. They include the governmental-administrative resolutions in connection with international agreements, the steps of the French authorities to foster diplomatic relations, as well as the decisions relating to situations of warfare.

According to the coherent practice of the Conceil d'État until 1998, decisions concerning negotiation talks determining the content of international treaties or concerning their adoptions had also been outside the realm of the administrative jurisdiction. In 1998 it expanded its competence to include the revision of the legality of the ratification[37] (except for the particular case, when the acceptance and ratification of an international treaty is regulated in a law.) The judicial review can touch upon a resolution which neglects an international agreement when it has already become part of French law.

Unlike international agreements, other acts – also including acts adopted after an international treaty – can be put under administrative judicial review in order to see if they conflict with an international agreement.

The administrative jurisdiction covers the interpretation of the resolutions of international treaties as well – and the opinion of the minister for foreign affairs is no longer necessary for this review.[38] But the minister for foreign affairs – without an administrative review – has the right to give opinion on whether an international agreement was, and how far it was implemented by the other party to the contract.[39]

The Conceil d'État practically regards as unreviewable any resolutions, acts, decisions, which might come from an institution of the executive, or from an authority under its supervision, or from an organ belonging to its diplomatic body, if its content is an articulation of the Republic of France, as an international entity.

The Conceil d'État established its lack of competence, when in a case before them a French citizen claimed that during her/his foreign detention she/he had not received the adequate consular defence.[40] In another case a governmental-administrative step - claimed to be dissatisfactory for a French citizen to win a position in an international organisation - was regarded as unreviewable.[41] A famous and interesting case of French administrative law concerns a governmental circular letter, which excluded Iranian students to enrol to French universities during the Gulf War.[42] The supreme administrative judicial forum cannot review the point of view taken by the minister of the French government in the Council of the European Union.[43] The resolution of the president, which made it possible to continue the nuclear experiments once more also qualified as an "acte de gouvernment".[44] But neither is it reviewable whether the government satisfies its international obligations laid down in bilateral international agreements.[45]

37 http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007990344&dateTexte=#

38 http://archiv.jura.uni-saarland.de/france/saja/ja/1990_06_29_ce.htm, The Conceil d'État regarded it as outside its jurisdiction to interpret the debatable resolutions of the international treaties. In these cases, the judge suspended the procedure and called for the opinion of the minister for foreign affairs.

39 The European Court of Human Rights decided that the limited admission of the Minister of Foreign Affairs into the case contradicted the treaty in Chavrol v. France.

40 l'arret Bastide, CE 31 mai 1918.

41 l'arret Weiss, CE 20 février 1953.

42 l'arret Gisti et Mrap, CE 23 sept. 1992.

43 l'arret Association les Vers, CE 23 nov. 1984.

44 http://www.conseil-etat.fr/ce/jurispa/index_ju_aj9501.shtml

45 l'arret Sté Eiffage, CE 20 déc. 2003.

The practice of administrative jurisdiction also regards as unreviewable all the governmental actions concerning armed conflicts. Due to a lack of competence one could not debate the legality of the French mission in the Kosovo War.[46] But neither is it possible to make a judgment about the damages caused by the armed conflict, as the immunity of the state in this respect excludes its responsibility for causing damages.

Although the majority of the acts which can still avoid legal control is connected with the international activity of the French state, the constraint to fulfil constitutionality, as it was conceptualised by Favoreu, requires that all governmental acts be put under the scrutiny of legal control, and this principle had its influence on the whole field of administrative law as well. Legal practice tried to reach out for the constitutional review of international resolutions. As a result of this occupation of the field a new term was introduced in legal practice and in the relevant literature: the concept of the "acte détachable", or "detachable acts".

Judges of administrative court can establish their own competence in all acts, which can be separated from a resolution brought by a French authority in connection with foreign relations, and which can be reviewed by the internal legal regime without an examination touching upon the foreign relations concerned. The reason for this is that the executive has no absolute discretion in the choice of the means by which it satisfies its international legal obligations.

In this respect the most typical case concerns extradition. The Conceil d'État established its own competence in connection with the supervision of governmental resolutions concerning the execution of an agreement of extradition,[47] in which the French government puts forward a request to another state.[48] No resolution can be claimed to be an acte de gouvernement, in which the government rejects a request of extradition on the part of a foreign state,[49] or withdraws a request of extradition.[50] These resolutions can by now be made the object of legal supervision.

As a summary one can state that the earlier existence of unreviewable acts were seen by many as infringing on the principle of the rule of law. Legal practice – and following it jurisprudence – makes efforts to fold up this gap.[51]

On the other hand the Conceil d'État does not attempt to define the concept of the acte de gouvernement. Rather – with a negative approach – it points out in its case-law those characteristics, which result in the lack of its competence, and which therefore lead to the immunity of the given decision from judicial review. This negative approach has brought, however, concrete results, as one can list the resolutions which were regarded as acte de gouvernement and therefore not reviewed legally.[52]

But it is still a question how these resolutions should be taken after all? Are they lacunas of law-making or special examples of the application of law? Are they imperfections of the constitutional state, which are seen as necessary by some authors,[53] and as disappearing by

46 l'arret Mégret et Meghantar, CE 5 juillet 2000.

47 l'arret Dame Kirkwood, CE 30 mai 1952.

48 l'arret Legros, CE 21 juillet 1972.

49 l'arret Royaume-Uni, CE 15 oct. 1993.

50 l'arret gouvernement suisse, CE 14 déc. 1994.

51 See for example Melleray, Fabrice: L'immunité juridictionnelle des actes de gouvernement en question (Unreviewable acts of government), Revue Francaise de Droit Administratif, N 5. 2001. The author of this study sums up the conclusions one can draw of the Spanish recodification of 1998, which aimed at making reviewable acts which were earlier considered as unreviewable governmental acts. According to the newly codified law on Spanish administrative jurisdiction, the judge is entitled to examine the legality of particular normative elements of „political acts", in a context of basic rights, in order to find recompensation for the damages caused by these acts.

52 See note 35. pp. 38–43.

53 See note 32.

others?[54] Is the doctrine of the „acte de gouvernement" the monster of the constitutional state, or rather is it its victim?[55] After almost two hundred years of struggle within the practice of administrative law and its theory is it preferable to approach these resolutions from the point of view of constitutional law with an eye on the possibility to open them up to constitutional jurisdiction[56] or is it not? A line of questions can be raised, which might perhaps be answered, but to which no one has found the satisfactory answers yet.

Conclusions

Telling the difference between the American and the French legal system hardly seems necessary. Despite the different ways of legal cogitation and the differing judicial systems, they both unanimously consider that not all the disputes can be transferred to judicial questions. Consequently, both legal systems have (legally) open questions.

It is necessary to set measures that divide judicial questions from non-judicial ones. These measures are different in the United States and in France; they are drawn from the separation of powers in the former and from the rule of law (l'état de droit) in the latter. But they both have the same end; to separate judicial issues and political questions.

Despite the different measurement, the jurisdictions of the two countries come to a very similar conclusion. Lately both states have chosen a negative approach, they do not seek the attributes that characterise political questions, instead they find a question political if it is out of the competence of the judiciary. As a consequence, no clear definition for a political question is given.

The adjudication of political questions is constinuously changing in the two countries. In France, their scope reduces but in the United States no clear tendency reveals. The issue – one of the unresolved theoretical dilemmas of constitutuional jurisdiction – emerges and fades away in the relevant jurisprudences following the dynamics and needs of legal practice.

Résumé

L'»acte de gouvernement« aux États-Unis et en France

Ce n'est pas nécessaire de présenter en détail les différences profonds entre les systemes juridiques american et francais. Néanmoins malgré les différences entre le mode du pensée juridique et clui de l'ordre justice judiciaire on peut reconnaitre dans tous les deux systemes la considération philosophique de l'incapacité de canaliser les débats et les problemes sur sa voie juridique. Par conséquent dans les deux systemes il reste des problemes insaisissables au niveau du droit.

54 See note 35. p. 44.

55 Chapus, Roland: L'acte de gouvernement monstre ou victime? (Is "actes de gouvernement" a monster or a victim?) Dalloz, 1958. in: Carpentier, Elise: L'acte de gouvernement n'est pas insaisissable, Revue Francaise de Droit Administratif N 4. 2006. p. 662.

56 See note 55.

C'est la raison pour laquelle on a besoin de définir dans le cadre du droit comme l'ordre logique les criteres qui distinguent les questions a caractere juridique de celles qui échappent au controlle juridique. Aux États-Unis et en France, la base des criteres de cette distinction differente, c'est le principe de la sépartition du pouvoir en Amérique du Nord, tandis qu'en France c'est celle de l'État de droit.

En dépit de ces différences, la jurisprudence développée dans ces deux pays aboutit presque á la meme conséquence. Ces derniers temps les deux États appliquent une approche négative : ils ne cherchent plus l'élément isolant ces cas des autres, en revanche, ils considerent ces questions comme questions politiques qui tombent en dehors du cadre de la justice judiciaire et justice administrative. Pour la conséquence directe de cette situation la jurisprudence ne formule pas la définition précise de l'acte de gouvernement.

ZUSAMMENFASSUNG

Politische Fragen in den Vereinigten Staaten und in Frankreich

Die ausführliche Darlegung der Unterschiede der amerikanischen und französischen Rechtssysteme ist kaum notwendig. Trotz der anderen rechtlichen Denkweise und des differenten Gerichtspflegesystems sind sie darin einheitlich, dass alle Streite in Rechtsstreite nicht umgestaltet werden können.

Daraus folgt, dass in beiden Rechtssystemen rechtlich unbeantwortete Fragen existieren. Deswegen ist es wichtig solche Gesichtspunkte zu bestimmen mit deren Hilfe die rechtlichen beurteilbaren Fragen und die rechtlichen unbeurteilbaren Fragen eindeutig differenziert werden können.

Der Maßstab ist andersgestaltet in den Vereinigten Staaten und in Frankreich; im vorigen ist der Maßstab die Gewaltenteilung (separation of powers), im nachherigen ist es der Rechtsstaat (l'état de droit). Aber das Ziel gibt es in beiden Ländern gleichförmig: die Trennung der rechtlichen und politischen Fragen.

Trotz des anderen Maßstabes werden von den Rechtssystemen dieser Länder ähnliche Folgerungen gezogen.

In der letzten Zeit wurden von diesen Ländern negative Annäherungen gewählt. Sie suchen keine solche Merkmale, die die politischen Fragen charakterisieren. Eine Frage kann erst dann als politische Frage betrachtet werden, wenn sie außerhalb des Wirkungskreises der Gerichtspflege ist. Daraus folgt, dass die politische Frage keinen klare Begriff hat.

Die Beurteilung der politischen Frage ändert sich ständig in beiden Ländern. In Frankreich vermindert sich eindeutig der Bereich der politischen Fragen. In den Vereinigten Staaten gibt es keine klare Tendenz; diese Frage wird einmal stärker, andermal weniger in den Vordergrund getreten.