The Constitutional Court of Turkey

Between Legal and Political Reasoning
„Politik und Recht“

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The Constitutional Court of Turkey
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Editorial

There can be no doubt that politics and law are closely related. The realisation that law is ‘coagulated’ politics is also not new. What is new, however, is the change in statehood, which is accompanied by a change in the opportunities for control and regulation through law. This is where the series Politik und Recht (Politics and Law) comes in by focusing on the following five aspects:

– Law as an institutional context which guides action
– Law as a normative basis for the actions of political actors
– Law as an object of action for political actors
– Conditions and effects of legal control
– Acceptance and willingness of norm addressees to follow the law.

Under the conditions of modern statehood and complex governance, the relationship between politics and law becomes a decisive interface. From this, approaches for the analytical recording of actors’ actions, acceptance by addressees and the effectiveness of the law can be derived. It is obvious that courts at all political levels play a significant role in this respect. However, the political sciences and law, which have operated separately up to now, must be brought together for this purpose, and new methodological approaches must be developed.

The Politik und Recht series is intended as a forum for the development and testing of such interdisciplinary approaches. It is therefore open to contributions that analyse the relationship between politics and law in an empirically sound as well as theoretically ambitious manner. Explicitly normative contributions are also welcome.

Through the series, the editors aim to further promote the interest of political science in law, which has increased significantly in recent years, and at the same time enrich it analytically. Conversely, they are also interested in understanding jurisprudence for the political preconditions for and the effects of the law, plus the conditions for its implementation.

Roland Lhotta, Christoph Möllers, Rüdiger Voigt
PREFACE

Constitutional courts have become a preferred subject in the booming discipline of comparative constitutional law. However, one of the oldest constitutional courts in the world, that of Turkey, established in 1961, has garnered little attention in legal and political research. One reason may be that the Turkish Court falls into a gap between two dominant research interests: the role of constitutional courts in consolidated democracies and their compatibility with democratic principles, and the role of those courts in the transitional process toward democracy. Recently, due to the backlash against democracy (which happens mostly, but not exclusively, in new liberal democracies), a third group of cases has come into the focus of political science and constitutional law scholars: established constitutional courts experiencing growing political pressure.

The Turkish Constitutional Court does not seem to fit into these categories. It is a court established by a military regime in the aftermath of a coup d’état, designed to stabilise the political system against a supposedly oppositional popular majority. It has been operating under frequently changing systems and conditions, oscillating between an unconsolidated democracy and more-or-less authoritarian regimes. However, it would seem that this background alone might make the Turkish court an interesting object for the study of constitutional adjudication in times of regime transformations, as well as for the repercussions constitutional courts may face under such circumstances. This comprehensive investigation of the Court’s role and performance, is therefore both timely and overdue. Commendably written in English, it makes the institutional setting and the case law of the Constitutional Court of Turkey accessible to a broad audience of legal and social science scholars beyond country specialists.

The only way for constitutional courts to operate consists in rendering decisions on constitutional controversies. It is therefore remarkable that the output of constitutional courts, their judgments and the reasons given for them, play a small role in comparative constitutional research, be it legal or political. Questions regarding the impact courts have on political systems as well as their institutional arrangements are in the foreground. This may be understandable for
political scientists who deal with constitutional adjudication; they are
mainly interested in the governmental and institutional aspects of
constitutional courts while their legal work remains alien to them, or
is simply regarded as politics in the disguise of law. Yet, even legal
scholars of comparative constitutionalism tend to avoid the case law
produced by the courts.

It is therefore a merit of this book, written by an interdisciplinary
team of scholars from Germany and Turkey, that it presents a synopsis
of the constitutional court’s political impact, institutional setting and
the related constraints, and the decisions it renders, as well as their
reasoning and effect. This analysis is valuable far beyond the Turkish
case, because legal scholar Ece Göztepe and political scientists Silvia
von Steinsdorff, Maria Abad Andrade, and Felix Petersen bridge the
gap between legal and political science research to direct attention to
the specific contribution of constitutional courts to the political and
social order of any country, namely their judgments. For them, legal
reasoning is not a negligible part of constitutional adjudication; rather,
it is to be taken seriously, without excluding that it may be influenced
by political considerations or expectations.

Since a thorough exploration of the Turkish Court’s jurisprudence
over a time span of sixty years is missing, even in Turkish legal
writing, the book does groundbreaking work. It makes this collection of
jurisprudence available for comparative research for the first time. This
study is all the more important, as tools to address the methodological
challenge that this task presents are not easily at hand, and the task
becomes still more difficult if the research is not limited to the
doctrinal aspects of the Court’s jurisprudence but aims at integrating its
political and social context. The authors’ innovative approach therefore
significantly contributes to the comparative research on constitutional
courts in general. In addition, their work is decidedly non-positivistic,
which considerably increases its merit; comparative constitutional
research that limits itself to the “black letter” of norms and cases tells
us little about the way constitutional law is practiced and takes effect.

After the seminal changes in 1989 and 1990, constitutionalism
and constitutional adjudication seemed to have become universally
established. For many countries, constitutions became relevant for the
first time through the work of their newly established constitutional
courts. Thirty years later, the constitutional map looks different. The
tremendous rise of constitutional adjudication is followed by an
opposing rise against it. What will come next? Turkey’s history may
portend what other countries are just now facing; the alternation of ups and downs that characterizes its past. Turkey’s history of constitutional adjudication thus has something to teach other countries as well, and this book makes these valuable experiences accessible.

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Former Justice, Federal Constitutional Court of Germany
ACKNOWLEDGEMENTS

This book project has been a long-time companion of the authors’ academic and, sometimes, their personal lives. Nearly ten years ago, everything started with a rather naïve question: why is the Constitutional Court of Turkey (AYM), despite having been very visible and influential in Turkish politics for many decades, almost invisible in comparative research on apex courts? The more we tried to solve this initial puzzle, the better we understood how necessary a productive, comprehensive analysis of both this institution and its role at the intersection of constitutional law and politics in Turkey might prove to be on multiple levels. It seemed essential to close substantial knowledge gaps and to correct the resulting misperceptions concerning this particular case. Equally important, the AYM is a crucial case study for comparative research on constitutional courts in political regimes oscillating between phases of democratisation and (re-)autocratisation – a topic currently gaining relevance by the day.

We therefore decided to finally write the missing book on the Constitutional Court of Turkey. From the start, we were determined to do it from a genuinely interdisciplinary perspective, making sure that our findings would be relevant for lawyers and political scientists alike. What followed was a very enriching, but at times exhausting, intellectual expedition because we had to do pioneering work in two regards. First and foremost, research on the AYM came with many challenges. We learned that the institution knows astonishingly little about itself, and even less reliable information was available from Turkish academic literature and other public sources. Second, we found very limited guidance regarding the analysis of case law beyond the narrow doctrinal interpretation usually applied in legal work. Consequently, we developed an innovative approach which combines legal tools of interpretation with social sciences methods of qualitative content analysis.

Our ambitious endeavour to provide an in-depth understanding of the AYM’s function and its impact on the political context within which it operates was further complicated (and delayed) by the extremely fast-moving target of study: since we began our research, the Court’s institutional setting as well as its decision-making were decisively affected by repeated constitutional reforms, and even more drastically by the dramatic changes of the political regime in the aftermath of the 2016 coup attempt.
Hopefuly, the research results presented in this book are valid and valuable beyond these volatile realities of Turkish politics.

Over the years, the authors accrued so many debts of gratitude for support and contributions to the work on the book that it is difficult to fully enumerate them. First of all, we do most sincerely thank Rosa Öktem, Aydın Atılgan, and Dr. Mert Alpbaz, who so competently and patiently translated many key decisions and helped with their editing. We also owe many thanks to consecutive generations of student assistants and PhD students for their invaluable help in putting this book together: Gözde Böçü, Özcan Candemir, Judith Engelke, Lennard Gottmann, Jassin Irscheid, Iva Kuljaca, Felix Ochtrop, Gizem Özbek, and Bianka Plüschke (in alphabetical order). Ayşe Sarıoğlu provided valuable help with the translation of Turkish parliamentary terminology, and Dr. Ertuğ Tombuş provided insightful comments on parts of the manuscript.

The authors further want to thank AYM Court Presidents Haşim Kılıç and Prof. Dr. Zühtü Arslan for their genuine interest in our research and their hospitality. Special thanks go to several rapporteurs at the Court who patiently answered our innumerable questions about all sorts of technicalities and provided inside information whenever possible.

We are very grateful to our extremely competent and meticulous proof-readers Maggie Russell, Mina Leigh Reinckens (Parts I and II), and Andrew Dumbrill (Part III). Their task was particularly challenging because the English version of the manuscript resulted from an intensive, interdisciplinary, and multilingual cooperation between German and Turkish lawyers and social scientists. In addition, substantial parts of it are direct translations from the often-opaque language of Turkish constitutional justices.

The authors would also like to thank Beate Bernstein, editor at Nomos, for her incredibly patient support throughout the long and sometimes arduous process of writing, editing, and producing this book. Last but not least, a most sincere note of thanks goes to Stiftung Mercator for generously funding the work on this book from start to finish.
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ABBREVIATIONS

AKP\(^1\) Adalet ve Kalkınma Partisi (Justice and Development Party)
ANAP Anavatan Partisi (Motherland Party)
A.Ş. Anonim Şirket (Incorporated Company)
AÜHFD Ankara Üniversitesi Hukuk Fakültesi Dergisi (Journal of the Faculty of Law of Ankara University)
AYMKD Anayasa Mahkemesi Kararlar Dergisi (Journal of Decisions of the Turkish Constitutional Court)
AYM Anayasa Mahkemesi\(^2\) (Constitutional Court)
BVerfG Bundesverfassungsgericht (Federal Constitutional Court of Germany)
CCFR Code Civil Français (French Civil Code)
CO Concurring Opinion
CEDAW Convention on the Elimination of All Forms of Discrimination against Women
CHP Cumhuriyet Halk Partisi (Republican People's Party)
CMK Ceza Muhakemesi Kanunu (Criminal Procedure Law)
DEP Demokrasi Partisi (Democracy Party)
DİE Devlet İstatistik Enstitüsü (State Institute of Statistics)\(^3\)
DO Dissenting Opinion
DP Demokrat Parti (Democratic Party)
DSP Demokratik Sol Parti (Democratic Left Party)
DYP Doğru Yol Partisi (True Path Party)
E. Esas sayısı (Application number)
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
FETÖ/PDY Fethullahçı Terör Örgütü/Paralel Devlet Yapılanması (Gülen-Movement)

\(^1\) Another official abbreviation for the AKP is “AK Parti”.
\(^2\) The official name is T.C. Anayasa Mahkemesi (Türkiye Cumhuriyeti Anayasa Mahkemesi), Constitutional Court of the Turkish Republic.
\(^3\) The Devlet İstatistik Enstitüsü (State Institute of Statistics) was replaced in 2005 by the Türkiye İstatistik Kurumu (TÜİK) (Turkish Statistical Institute) (see E. 2008/105; K. 2010/123 in this volume).
ABBREVIATIONS

FP
Fazilet Partisi (Virtue Party)

HSYK
Hâkimler ve Savcılardan Yüksek Kurulu (High Council of Judges and Prosecutors)

ICCPR
International Covenant on Civil and Political Rights

ICESCR
International Covenant on Economic, Social and Cultural Rights

ILO
International Labour Organisation

K.
Karar sayısı (Decision number)

KHK
Kanun Hükümünde Kararnamesi (Statutory decree)

MHP
Milliyetçi Hareket Partisi (Nationalist Movement Party)

MIT
Millî İstihbarat Teşkilatı (National Intelligence Organisation)

MM
Millet Meclisi (National Assembly)

MP
Member of Parliament

PKK
Partiya Karkerên Kurdistan / Kürdistan İşçi Partisi (Kurdistan Workers’ Party)

R.G.
Resmi Gazete (Official Gazette)

SHP
Sosyaldemokrat Halkçı Parti (Social Democratic Populist Party)\textsuperscript{4}

SPK
Siyasi Partiler Kanunu (Political Parties Law)\textsuperscript{5}

SUBPARA.
Subparagraph

TA
Türk Anayasası (Turkish Constitution)

1961 TA
1961 Türk Anayasası (Turkish Constitution of 1961)

1982 TA
1982 Türk Anayasası (Turkish Constitution of 1982)

TBMM
Türkiye Büyük Millet Meclisi (Turkish Grand National Assembly)

T.C.
Türkiye Cumhuriyeti (Republic of Turkey)

TCK
Türk Ceza Kanunu (Turkish Criminal Code)

TCY
Türk Ceza Yasası (Turkish Criminal Code)\textsuperscript{6}

THKO
Türkiye Halk Kurtuluş Ordusu (People’s Liberation Army of Turkey)

TIP
Türkiye İşçi Partisi (Workers’ Party of Turkey)

\textsuperscript{4} Not to be confused with the Sosyaldemokrat Halk Partisi (Social Democratic People’s Party), established in 2002, which is also abbreviated with SHP.

\textsuperscript{5} Not to be confused with the Sermaye Piyasası Kurulu (Capital Markets Board of Turkey), also abbreviated as SPK.

\textsuperscript{6} The usual abbreviation for the Turkish Criminal Code is TCK (Türk Ceza Kanunu). However the Court has also used the abbreviation TCY (e.g. E. 1991/18; K. 1992/20).
The official abbreviation for the Turkish Civil Code is TMK. However, the Court has also used the abbreviation MK or even both abbreviations in one decision (e.g. E. 1990/03; K. 1990/31).

The English abbreviation is TURKSTAT.

The High Council of Judges (Yüksek Hakimler Kurulu) was established with the 1961 Constitution (Articles 143 and 144). The High Council of Prosecutors (Yüksek Savcılar Kurulu) was established in 1971. Both of them were abolished in the course of the military coup in 1980. The 1982 Constitution merged the two councils and established the High Council of Judges and Prosecutors (Hakimler ve Savcılar Yüksek Kurulu, HSYK).
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INTRODUCTION

The political system of Turkey has changed dramatically since the failed coup attempt of July 15, 2016. Earlier tendencies towards de-valorisation of the rule of law mechanisms and democratic standards have since resulted in open autocratisation. During the two years of state of emergency that followed the attempted military coup, repeated mass purges among judges, teachers, academics, and other professional groups created an atmosphere of arbitrariness and fear. This has barely changed since the state of emergency was lifted in July 2018: the constitutional referendum of 2017 abolished basic institutional checks and balances of the parliamentary system, and most of the administrative emergency measures have been converted into regular law.

Currently, the Turkish regime can be best characterised as an unconsolidated autocracy. This assessment, however, has to be put into perspective, as Turkey’s political system could never be characterised as a fully-fledged, consolidated liberal democracy. Instead, for over half a century, phases of democratisation were followed by partial setbacks or even serious authoritarian intermezzi, including open (1960, 1971, 1980), indirect (1997), and failed (2016) military coups. Violent internal conflicts and prolonged phases of states of emergency in the Kurdish part of the country heavily impacted the political, social, and economic systems. Whereas the political regime gradually liberalised over the years, Turkey never developed into a consolidated constitutional democracy. Instead, phases of democratisation and de-democratisation alternate; the current drastic re-autocratisation after some years of liberal opening seems to affirm this pattern once again. While the military’s once dominating role has gradually eroded since the 2000s, the functional logic of other state institutions stayed tutelary, and the political culture never completely outgrew its paternalistic, and even authoritarian, character.

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10 Cf. Çalışkan 2018.
11 See Chapter I.1.2 for details.
12 For an overview of the political history of the Turkish Republic see Altunışık / Tür 2005; Öktem 2011; Kalaycıoğlu 2012; 2019; Taşkın 2013; Turan 2019.
The Constitutional Court of Turkey (Anayasa Mahkemesi, AYM), one of the oldest constitutional courts in Europe, has been a crucial institutional element in this particular political setting for six decades. Established in the aftermath of the first military intervention in Turkey in 1960, it has strongly impacted the Turkish rule of law system as well as politics and society at large under changing political conditions. By and large, it developed a reputation of reasonable judicial autonomy. Whereas its image was never that of an unbending protector of individual rights and liberties against state infringement, the Court usually kept its autonomy vis-à-vis government institutions. Hence, scholars have repeatedly attested the AYM to be “both independent and powerful”.

This is no longer the case since the dramatic events of July 2016: immediately after the failed coup attempt, two justices were arrested under the suspicion of collaboration with the Gülen movement (FETÖ/PDY), which was held responsible for the coup by the Turkish Government. Only two weeks later, the remaining fifteen justices legitimised this action by unanimously dismissing their colleagues. They justified the decision in a highly questionable ruling: in the absence of any hard facts or judicial norms to build on, they argued solely on the basis of “information from the social circle” (sosyal çevre bilgisi) and “common conviction”. This unmasked demonstration of stalwart loyalty to the Government was followed by a massive act of self-censorship concerning the Court’s right of constitutional review. Without any convincing judicial reasoning, the AYM abandoned its long-standing case law, according to which it was entitled to determine the constitutionality of executive decrees under emergency rule. Zühtü Arslan, the President of the AYM, justified this submissive attitude in June 2017 during a meeting with the heads of other European constitutional courts. According to him, the executive branch should be given free rein in times of intense political crisis, such as the aftermath of the attempted coup.

More than five years later, it seems still not finally decided whether or not these acts of “self-abandonment” are irreversible. In any case,
the AYM has lost much of its reputation as a fairly independent constitutional institution within the Turkish political system. The very institution in charge of defending the constitutional order against attacks by other branches of government seems to have – at least temporarily – given up any such claim. One aim of this book is to provide an explanation for this development and to reflect on the Court’s chances of ‘recovery’.

1. The AYM – an Influential but Under-Researched Institution

In order to understand the recent setbacks, a comprehensive analysis of the AYM’s development over the almost sixty years of its existence is necessary. We still know surprisingly little about the institution and its case law. While it has always been perceived as an influential political player by the Turkish public, the reasons for and the sources of this importance have rarely been systematically analysed and discussed among Turkish scholars, let alone within the broader academic community.\(^\text{19}\)

In this context it is particularly revealing that Artun Ünsal’s book *Politics and the Constitutional Court*,\(^\text{20}\) published in Turkish in 1980, is still regarded as a classic, despite the fact that since its publication a new Constitution has been established and repeatedly amended. Political scientist Ünsal approached the Court’s political role from a system-theoretical perspective, analysing its case law between 1961 and 1977 as well as the individual socio-economic background of all justices on the bench in 1976. Against this backdrop, he painted a rather positive picture of the Court, successfully mediating the tensions within the constitutional system of Turkey in the 1970s. Two further Turkish monographs on the AYM, published by constitutional law scholar Ozan Ergül in 2007 and 2016 respectively, also tried to assess the political role of the AYM by analysing (part of) its adjudication. In his judicial dissertation under the title *The Turkish Constitutional Court and Democracy from a Neo-Institutionalist Perspective*,\(^\text{21}\) Ergül mainly focused on the historical trajectory of the Court in order to explain its state-protecting rather than rights-promoting attitude. In his second book on the topic, he further developed this (neo-)institutional

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19 Cf. also Varol et al. 2017, p. 190.
20 Ünsal 1980; English translation of the Turkish title provided by the authors.
21 Ergül 2007; English translation of the Turkish title provided by the authors.

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explanation for what he sees as a path-dependent lack of consistency in the Court’s decision-making.\(^\text{22}\)

Apart from these either outdated or rather limited attempts at analysing the Court’s political role via its adjudication, the AYM’s case law has so far received only sporadic and often biased academic attention. First and foremost, there is a lack of systematic judicial analyses of the decisions. The prevailing indifference of most Turkish law scholars towards the AYM\(^\text{23}\) also (partially) explains the missing doctrinal consistency of the Court to be discussed in the second part of this book.

The interest of Turkish social scientists in the Court’s output has thus far also been rather episodic. The AYM has at most come to their attention when it decided politically contested questions like the prohibition of parties, the annulment of electoral laws, or the headscarf ban.\(^\text{24}\) Besides, many of the publications are mainly descriptive and lack an analytical perspective. In the absence of a well-established discourse within Turkish academia, the AYM has been almost completely neglected in the respective international literature for most of its existence. This has started to change over the last two decades, as the interest of comparativists in ‘the Turkish case’ has been gradually increasing.\(^\text{25}\) From a comparative perspective, it is a particularly intriguing object of research, as there is little analytical knowledge about the possible judicial and political impact of constitutional courts in non-consolidated, highly volatile regimes. This is also due to limited empirical evidence, because – at least until recently – not many autonomous constitutional courts persisted in regimes oscillating between autocracy and democracy over time; hence the empirical and conceptual relevance of this book.

\(^\text{22}\) Cf. Ergül 2016.

\(^\text{23}\) Exceptions to this general observation are Fazıl Sağlam and Ergun Özbudun. Former AYM justice Sağlam’s comprehensive work – mostly published in Turkish and partly in German – gives detailed insights into the functioning of the institution and its adjudication (cf. Sağlam 1982; 2005; 2006; 2008; 2012; 2013; 2018; 2020). Ergun Özbudun’s analyses of the AYM are similarly important. The professor of public law has contributed a lot to expand knowledge of the AYM far beyond Turkish academia, particularly because of his many publications in English (cf. Özbudun 1997; 2000; 2006; 2010).

\(^\text{24}\) Cf., for example, Örücü 2009, p. 209.

2. Non-Legal Explanations of Judicial Behaviour and the AYM

Until the 1990s, political scientists mostly studied constitutional courts in consolidated democracies, if they were interested in the subject at all. Since the ‘judicial turn’ in the social sciences at the end of the 20th century, a considerable amount of literature also discusses the crucial role these non-majoritarian institutions may play during democratisation processes. Likewise, the (de)stabilising effect of (constitutional) courts in consolidated authoritarian regimes has been analysed in some detail. There is, however, almost no theoretically substantiated knowledge about the possible impact of judicial review in a regime continuously oscillating between autocratic and democratic features. Will the constitutional court defend the legal status quo, opposing any changes, even if these changes would enhance the democratic quality of the political system? Or will it act per definition as a promoter of constitutional checks and balances, fundamental rights, and democratic liberties? And, moreover, how does a constitutional court react if democratic achievements are jeopardised by tendencies of re-autocratisation time and again?

When assessing the role of constitutional courts within a political system, social scientists usually focus on non-legal explanations, no matter what the particular political context may be. They pick up on the established ‘judicial behaviour’-research inspired by over sixty years of literature on the US Supreme Court. According to this theoretical approach, constitutional justices are perceived as political players or, more precisely, policy seekers who act strategically. The classic ‘attitudinal model’, deducted from empirical studies on the individual votes of US Supreme Court justices, stipulates a direct causal link between their individual policy preferences and the collective court decisions. While more sophisticated versions of this model developed over time, they still conceptualise constitutional courts as ‘ordinary’ political actors among others, such as governments or parliamentary opposition.

28 Cf., among others, Dahl 1957; Epstein / Knight 1997; Tsebelis 2002; Segal / Spaeth 2002; Bailey / Maltzman 2011.
31 For a good overview of this research tradition cf. Dyevre 2010 or Wrase / Boulanger 2013.
model is no longer seen as a sufficient explanation by most scholars, other non-legal factors, such as public expectations or external pressure group influence, are taken into consideration.

More recently, a concurring non-legal attempt at explaining constitutional courts’ varying roles within political systems emphasises the institutional determinants of judicial behaviour. This (neo-)institutionalist perspective may focus either on a constitutional court’s institutional status within the respective political systems, or on its internal organisation and the institutional design of its competences. Scholars have analysed – among other aspects – the effects of internal decision-making structures on the argumentation of individual justices in politically sensitive cases or tried to measure whether the political positioning of the court varies according to different judicial proceedings.

Regarding political science explanations of constitutional courts’ decision-making, this book mainly builds on Arthur Dyevre’s comprehensive model “reconciling the various attitudinal and institutionalist approaches”. He introduces three levels of analysis: the individual attitudes of the judges are located on the micro level, while internal institutional conditions like the discretion over case selection and assignment, term limits and renewability, or the possibility of publishing dissenting opinions, form the meso level of analysis. Finally, on the macro level, external institutional variables, such as power fragmentation, constitutional checks and balances, or public support for the court, should be taken into consideration. Dyevre rightly stresses that explanations on all three levels are not mutually exclusive, but have to be assessed in varying combinations, depending on the particular situation of each respective court.

The few and tentative conceptional explanations of the possible role constitutional courts play in volatile regimes like Turkey mainly focus on the macro-level of judicial behaviour. They usually start by asking why constitutional courts come into being in the first place. Many scholars argue that a broad societal consensus, declaring the protection of funda-

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33 Cf. Epstein / Knight 1997; Collins 2008.
37 Dyevre 2010, p. 297.
38 Cf. ibid., p. 318.
39 Cf. ibid., p. 314.
mental rights and an effective system of checks and balances normative aims in itself, are an indispensable precondition for any successful institutionalisation of judicial review. Other academics assume that it is mainly the uncertainty about future outcomes and power relations during a transition period that encourages politicians to delegate some of their power to a group of ‘neutral’ justices. Following this ‘assurance theory’, a once-established autonomous constitutional court gives opposition parties and minority groups the chance to appeal against majoritarian decisions and thus inevitably promotes fundamental rights and other democratic principles. It is obvious that these approaches do not fully apply in the case of the AYM.

Ran Hirschl developed a concurring explanation, which is more sceptical about the automatic link between judicial review and democracy promotion and thus seems to fit the Turkish experience much better. Following his ‘hegemonic preservation’ thesis, judicial review may just as well be established by dominant political elites as a tool to protect their threatened power and privileges in times of transition against hostile elected majorities. In this case, the constitutional justices are not supposed to protect or even promote democratic principles, but to preserve as much of the status quo ante as constitutionally possible in order to serve the interests of the old elites. Regarding the AYM’s founding after the military coup of 1960, this ‘hegemonic preservation’ theory seems most convincing. Rather than promoting democratic government or human rights protection, the military in charge of the constitution-making process shaped the Constitutional Court as one counter-majoritarian institution among others so as to preserve the hegemony of the so-called Kemalist elite over a presumably leftist and pro-Islamic parliamentary majority. The institutional development and the extensive case law of the Court since its founding, though, cannot be evaluated exclusively through the lens of Hirschl’s thesis: in a system of particularly high political and institutional volatility and social mobility like the Turkish Republic, it seems unlikely that any ‘old elite’ should have been able to preserve its

status and political influence over decades via a – supposedly – similarly homogeneous group of justices.

The most elaborate attempt to explain constitutional adjudication in Turkey beyond the initial phase along the lines of 'hegemonic preservation' was presented by Ceren Belge in 2006. In essence, she argued that "the court's narrow take on civil liberties cannot be explained by a lack of judicial independence" but instead by its loyalty to the so-called 'Republican alliance', comprised of the military, civil bureaucrats, "the intelligentsia (universities, professions, the press), and university students" as well as Kemalist political parties.⁴⁶ According to Belge, the protection of this alliance’s privileges against a more egalitarian concept of democracy remained the main rationale behind AYM rulings for several decades. To prove her point, she summarily checked the Court’s rulings from 1962 to 1982 and calculated annulment / rejection rates, distinguishing between cases dealing with "republican autonomy", "civil rights and liberties", and "other issues".⁴⁷ She extended her findings to the period until 1999 by including some unsystematically selected cases into her analysis.

While the basic outcome of Belge’s study, i.e. the “selective activism”⁴⁸ of the AYM and its often “conservative and restrictive stance”⁴⁹ regarding political and religious rights is certainly plausible, it is less convincing to explain this attitude exclusively through its unbending loyalty to the alleged 'Republican alliance'. Whereas Kemalist ideology definitively functioned as a unifying social force for decades, government coalitions in Turkey were much more fragmented and ideologically diverse over the years than the term 'Republican alliance' suggests. The existence and, even more, the long-term stability of this broad and internally-heterogeneous amalgam of different social groups and professions, stretching from the military to the press, from state bureaucrats to university teachers and students, must be questioned.⁵⁰

Even in Belge’s understanding, the alleged ‘Republican alliance’ vanished in the late 1990s due to the growing influence of Europeisation.⁵¹ Nevertheless, other scholars continue to explain AYM adjudication by

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⁴⁶ Belge 2006, p. 656.
⁴⁷ Ibid., p. 666.
⁴⁸ Ibid., p. 687.
⁴⁹ Ibid., p. 671.
⁵⁰ Belge (2006, pp. 676 ff.) concedes that the ‘Republican alliance’ experienced two phases of instability (after 1971 and in the early 1990s), resulting in a temporary shift to more progressive human rights rulings by the AYM.
similar patterns beyond this epoch. Asli Bâli, for example, identified a “paralysing model of judicial guardianship” in favour of Kemalist “elite preferences” as the Court’s main rationale in her influential 2012 article on “The Perils of Judicial Independence”. Following this assessment, the AYM should have turned into a fundamental opponent against the political take-over by the “non-elite party” AKP and its main representatives. While some publicly contested rulings during the 2000s seemed to point in this direction, many others did not, as will be shown in this book.

The idea of a purely ideology-driven, homogeneous Constitutional Court unyieldingly defending the interests of a hegemonic elite within the political regime is also put into question by the rare attempts to statistically analyse AYM case law over time. Yasushi Hazama, for example, scanned 175 abstract norm control decisions issued by the AYM between 1984 and 2007 and compared the success rates of the proceedings according to the referring authority and referral reasons, very roughly distinguishing between issues of “state principles” and claims of “horizontal accountability”. In a nutshell, he found that so-called “state-elite parties” – a category very similar to that of the ‘Republican alliance’ – were by no means more successful when applying to the AYM than “non-state-elite parties”. Instead, the Court was generally more inclined to “accept unconstitutionality claims of executive transgressions than those of state-principles violations.”

A recent study by Aylin Aydın-Çakır analysing the impact of “the court’s political preferences” in relation to the political composition of respective Governments on AYM rulings comes to similar conclusions. According to her quantitative analysis of all decisions published between 1984 and 2010, several variables “attenuate” the effect of ideological distance (or proximity) between the Court’s decisions and “state-elite preferences”. In this context, one finding concerning the “legal preferences” of the Court is particularly telling: regardless of the political context, there is a signifi-

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52 Bâli 2012, p. 310.
53 Even Hazama, without giving any explanation, bluntly stated in his article: “(…) Constitutional Court judges are also considered part of the state-elite” (2011, p. 427).
54 For details on the right to initiate abstract norm control proceedings cf. Chapter I.3.1.
55 Hazama 2011, pp. 429-430.
56 Ibid., p. 421.
57 Aydın-Çakir 2018, p. 1101.
58 Ibid., p. 1119.
cantly higher probability of the AYM overturning laws that are claimed to violate state principles than those supposed to violate individual rights.\textsuperscript{59}

Whereas these quantitative analyses do not provide in-depths explanations of possible legal or non-legal rationales behind the adjudication, they do support the main argument elaborated in this book: The AYM’s widespread perception as a “guardian of the regime”\textsuperscript{60}, “protector of the system”\textsuperscript{61} or “defender of the raison d’etat”\textsuperscript{62} cannot be sufficiently explained by its supposedly collective and uniform ideological alliance with one particular political group. Instead, this questionable macro-level explanation needs to be complemented by micro- and meso-level approaches. In addition, all non-legal explanations should be put into perspective by taking into account the constitutional reasoning developed in the Court’s rulings.

Regarding the micro-level of AYM justices’ individual voting behaviour, we also have very little reliable knowledge. This is all the more astonishing, as – contrary to the practice of many other European apex courts – the individual votes of Turkish constitutional justices have been documented in the published decisions from the beginning. Besides, since the establishment of the Court, dissenting and concurring votes were always permitted, and all generations of Turkish justices extensively exercised this right.\textsuperscript{63} Among the very few studies that have taken the micro-level perspective into account at all, two recent publications stand out. Building on the ‘attitudinal model’ and strategic judicial behaviour theories, Mert Moral and Efe Tokdemir analysed the “ideological stances of individual justices”\textsuperscript{64} in political party closure cases and found considerable variation. This result is even more striking, because the Court’s activism concerning party dissolutions is often considered as best proof of its homogeneity and the unanimity on the bench.\textsuperscript{65}

Ozan Varol et al. also discovered a relatively high rate of individual dissent within AYM’s rulings when looking for “systematic ideological changes” in the decisions following the AKP-induced Constitutional

\begin{flushleft}
\textsuperscript{59} Cf. ibid.
\textsuperscript{60} Shambayari 2008, p. 99.
\textsuperscript{61} Örücü 2009.
\textsuperscript{62} Can 2012.
\textsuperscript{63} Cf. Abad Andrade 2020, pp. 24-25.; pp. 197 ff.
\textsuperscript{64} Moral / Tokdemir 2017, p. 276.
\textsuperscript{65} The AYM adjudication on political party dissolutions is discussed in detail in Chapter II.4.1.
\end{flushleft}
Court reform in 2010. While their quantitative analysis of 200 randomly selected rulings between 2007 and 2014 did prove a “conservative ideological shift” among the sitting justices, this did not (yet) translate into any statistically significant effect on the outcome of the case law. This finding supports the assumption that there is no directly proportional relation between justices’ individual political attitudes and their voting behaviour. Hence, it is misleading to conceptualise the AYM as a monolithic institution and/or a completely homogenous group of justices at any phase of its existence, as is often implied in the literature.

There is plenty of room for further micro-level explanations of the AYM’s political role. Empirical research is needed to better understand the impact of Court Presidents, to trace the influence of the ‘great dissenters’, or to explain the importance of individual votes during different phases of collective decision-making. As Maria Abad Andrade has impressively shown in her recent book on the decision-making process of the AYM, the many inconsistencies within this process heavily contribute to the lack of doctrinal clarity and to its, at times, even contradictory case law. Whereas our study does not particularly focus on individual voting behaviour, some of the key rulings analysed in Part II also cover numerous dissenting opinions, revealing rich information about individual justices’ agendas.

3. Interdisciplinary Analysis of AYM Rulings and its Politico-Legal Reasoning

The most important shortcoming in the analytical literature on the AYM concerns meso-level approaches, putting institutionalist explanations at the centre of attention. Our study aims to fill this gap by retracing the Court’s competences and composition as well as its internal decision-making. And, above all, we will assess the outcome of this institutionally shaped process as it is mirrored in the AYM’s case law. This requires pioneering work in three regards: first, we provide for the first comprehensive, long-term study of the AYM’s role as a crucial constitutional institution within the rapidly changing Turkish regime through the analytical lens of comparative political science. Second, we systematically combine legal and non-

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66 Varol et al. 2017, p. 201.
67 Ibid., p. 187.
68 Cf. ibid., p. 214.
69 Cf., for example, Shambayati 2008, p. 106.
legal perspectives of interpreting constitutional court adjudication. Third, we introduce elements of qualitative content analysis to the interpretation of court rulings, which can be productive far beyond the Turkish case.

Our analysis is based on an interdisciplinary socio-legal understanding of judicial power: in order to assess the political role of any constitutional court, a comprehensive analysis of its rulings is indispensable.\footnote{For a comprehensive overview of the state of the art and the gaps in interdisciplinary socio-legal research on constitutional court decision-making cf. Steinsdorff 2019.} While the interpretation and annotation of case law has always played an essential part in jurisprudential research, most social scientists still neglect the importance of the specific argumentation explicated in (constitutional) court decisions. If they engage with adjudication at all, they usually content themselves with merely stating whether or not the unconstitutionality of a norm was stipulated. They overlook that – whatever personal, political, or other non-legal motives might be involved – rulings ultimately are legal texts which cannot be deciphered without referring to legal frames of argumentation and interpretation.\footnote{Cf. Steinsdorff 2019, p. 208.} In this regard, legal scholars have a “clear and uncontested advantage” over social scientists, as Ran Hirsch, one of the most prominent scholars working in this field, rightly put it.\footnote{Hirsch 2018, p. 21.}

First and foremost, apex courts are institutions that function on the basis of legal procedures very similar to those applicable in any common court. Additionally, constitutional justices are mostly trained lawyers, many of whom were socialised as professional judges.\footnote{While in most countries only trained lawyers are eligible as constitutional justices, there are exceptions, like in France or the US. But even in these cases, \textit{de facto} most justices have a legal professional background. This also applies to Turkey, where the justices have always come from different professional backgrounds, and not all of them have worked as professional judges before. The eligibility criteria to the AYM are described in more detail in Chapter I.2 of the book.} It is naïve to neglect the influence of these particular rules and mindsets on the outcome of the decision-making process. And, even more importantly, the legal framing contributes significantly to the legitimisation of the decisions as well as of the constitutional court’s role within the political system in general.\footnote{Cf. Landfried 2019, p. 3.} A constitutional court, exercising its power in a judicial form and operating under constraints that are typical of collegiate judicial bodies, clearly
distinguishes itself from ‘ordinary’ political institutions: Instead of public vote-seeking and political majority building, it is supposed to decide on the basis of “rational deliberation” and convincing legal argumentation. The earnestness and transparency of the consensus-oriented deliberation not only legitimise the counter-majoritarian character of constitutional courts’ decision-making, they also foster the public acceptance of the decision’s outcome.

As the decision-making usually takes place behind closed doors and therefore cannot be entirely reconstructed, the ex-post rationalisation of this process in form of the published ruling is crucial. While it is obvious “that the making and the presentation of a decision can fall apart”, the judicial deliberation displayed in the published text is an important element of its credibility. David Robertson, one of the very few non-lawyers advocating the significance of legal reasoning in constitutional court rulings, aptly characterises this restraint: “Of course judges bargain with each other to get majorities on multimember courts – but the currency they trade in is itself argument.” Hence, a close reading of the justices’ argumentation can reveal much about the ‘real reasons’ of a decision, be they legal, non-legal, or a mixture of both. To put it in a nutshell, justices “determine themselves whether something is constitutional or not, but are only free to make this determination inside a complex web of legal and political restrictions”.

One particular restriction constitutional justices have to keep in mind concerns their dependence on public acceptance of the rulings: constitutional courts are reactive institutions, i.e. cases have to be brought to court and rulings have to be implemented by other actors. Hence, the

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77 Da Silva 2013, p. 559.
79 There are very few apex courts in the world which deliberate in public. One exception is the Brazilian Supreme Court, which holds its sessions with an audience and even allows its public deliberations to be recorded and broadcasted on TV. The Supreme Court justices don’t meet (secretly or officially) beforehand (cf. Da Silva 2013, p. 568).
80 On the difference between the process of decision-making and its representation cf., among others, Röhl / Röhl 2008, p. 610.
81 Grimm 2019, p. 311.
83 Robertson 2010, p. 21.
84 Ibid., p. 34.
court depends on the cooperation of possible applicants as well as on the political and societal compliance with its decisions. It must convince the addressed audience(s) that the ruling in question is consistent with the court’s doctrine, as bound by and referring to the constitution, previous decisions (precedent), or binding international law. Only if this is the case, can the constitutional court legitimately build a substantial and sustainable “power of interpretation” (Deutungsmacht). As will be shown in Parts II and III of this book, the rulings of the AYM were (and are) not always consistent in this regard, which might explain why the Court never acquired an uncontested, legitimate authority as defender of the constitutional order in Turkey.

In order to identify recurring patterns of argumentation and various characteristics of judicial and/or political reasoning, a systematic, comparative reading of the rulings is necessary. As specific empirical tools for the in-depth analysis of judicial texts are still missing, our study of selected AYM case law does pioneering work in this regard. The innovative design is partly inspired by the book on “Comparative Constitutional Reasoning”, edited by Arthur Dyevre, Giulio Itzcovich and András Jakab in 2017. This remarkable study assembles text analyses of the 40 “leading cases” in 18 apex courts across Europe and beyond. The case selection as well as the analyses have been executed by interdisciplinary groups of country experts. They all applied a common questionnaire, consisting of 37 “opinion characteristics”. These categories are comprised of the language and form of the texts, the institutional setting of the decision-making, recurring argumentative patterns, and the political context of the decisions. The adaptation of this approach to the purpose of our study, including selection criteria for the AYM rulings and the categories of analysis, will be discussed in detail in Chapter II.1.

Analysing the AYM’s constitutional reasoning is a challenging undertaking in more than one regard. We did not find any guidance in the literature, as even Turkish constitutional lawyers have at best sporadically investigated the Court’s rulings in search of doctrinal logic. In the absence of a continuous exchange between the justices and Turkish academia or other legal professionals about the case law, it is difficult to identify leading

87 Vorländer 2006, p. 15.
88 Cf. Steinsdorff 2019, pp. 218 ff; Jakab et al. 2017a, pp. 4-5.
89 Cf. Jakab et al. 2017a, p. 27.
90 Cf. ibid., pp. 31 ff.
decisions, let alone long-standing doctrinal principles. Besides, whenever the argumentation of AYM decisions has been discussed in the (mostly political science) literature at all, it usually refers to a very narrow range of particularly politicised issues, like the prohibition of political parties\textsuperscript{91} or the headscarf decisions.\textsuperscript{92} As a result, the perception of the Court’s reasoning is so far very vague and lopsided.

We also have to keep in mind that constitutional reasoning is always a dynamic and multifaceted process, i.e. it takes time and continuous discourse to build a consolidated dogmatic understanding of “generic constitutional concepts and doctrines such as the ‘rule of law’ and ‘proportionality’”.\textsuperscript{93} This is particularly true for the AYM, operating in an unstable, conflictive, and at times even disruptive political environment. Moreover, the Court had to render its decisions not only in a rapidly changing political context, but also under two consecutive Constitutions. To make things even more difficult, the current Constitution, whose “political acceptability and legitimacy was always in question”,\textsuperscript{94} has been repeatedly and extensively amended: between 1987 and 2021, 20 substantial revisions were adopted,\textsuperscript{95} including several major amendment packages (1995, 2001, 2004, 2010, 2017).

Hence, it is the main concern of this book to transcend the episodic, deficient, and often erroneous perception of sixty years of AYM case law. In order to identify recurrent argumentative patterns within a corpus of over 15,000 rulings issued between 1962 and 2021,\textsuperscript{96} a systematic selection process was necessary. This approach required extensive research and data collection. Besides the mentioned shortcomings in the literature, this is mainly due to the lack of valid information by the Court itself. Until 2015, no systematic documentation of its internal functioning, let alone any robust statistical material on the outcome, was available. While all decisions have to be published in the Official Gazette of Turkey (\textit{Resmi
INTRODUCTION

Gazete, R.G.) in order to take effect, even in this respect we found considerable inconsistencies, particularly until the 1980s. Until the re-launch of its website in 2015, the Court also never published English translations of its rulings or even English summaries of key cases.97

4. Plan of the Book

The book proceeds in three major steps: the first part portrays the AYM as an institution, documenting its competences and illuminating the external and internal context of its decision-making. The outcome of this decision-making process is at the centre of the second part of the book, which analyses the Court’s contribution to the ups and downs of the political development of the Turkish Republic via its case law. For the sake of maximum transparency of this text-based analysis, the third part of the book comprises the English translations of fifty important judicial review decisions dating from 1962 to 2012. The annotated, commented, and partially abbreviated texts represent our main data corpus.98 Taking into consideration how difficult it still is (for anyone outside the small community of Turkish-speaking lawyers) to access AYM case law issued before 2015, we are sure that the thoroughly edited translation of key decisions has an intrinsic value even beyond the immediate scope of this study.

97 Cf. Chapter I.5.1 for details on the Analytical Service and the intensified attempts of the AYM at creating a more transparent and approachable self-image since 2015.
98 For sampling criteria, the content analytical approach and further information about the rulings included into the analysis, cf. Chapters II.3 and III.1.
The Constitutional Court of Turkey is one of the oldest exemplars of the ‘concentrated’ model of judicial review, introduced to the political systems of many civil law countries in Europe and beyond during the last half century. Since its establishment in 1961, the Court’s main task has been to review the constitutionality of parliamentary laws and – since the constitutional amendments in 1971 – executive decrees. In addition, the AYM has several special competences, most importantly the discretion over the dissolution of political parties. For most of its existence, Turkish citizens were not allowed to individually access the Court in order to claim a violation of their fundamental rights and freedoms. This changed in September 2012, when the comprehensive constitutional reform of 2010 took effect and resulted in a skyrocketing number of individual complaint proceedings at the AYM. The enormously increased workload induced fundamental changes to the institutional functioning of the Court in general and to the organisation of its internal decision-making process in particular. These reforms are only the latest episode in a series of transformations the AYM underwent over the years, causing inconsistencies in and partial disruptions of its institutionalisation.

The lack of publicly available information about the internal procedures as well as about the output of collegial decision-making may be interpreted as one symptom of the Court’s weak institutional self-conception. Compared to other long-standing constitutional courts, such as the Federal Constitutional Court of Germany (BVerfG) for example, the AYM did not document – let alone publish – important facts about its functioning in a systematic way. Hence, the detailed reconstruction of the dynamic evolution of the AYM’s competences, appointment procedures, and internal decision-making mechanisms over time required in-depth enquiries, including the consultation of consecutive versions of the respective Constitutional provisions, the Law on the Constitutional Court (CCA), and the Rules of Procedure (RoP).

The following institutional portrait of the AYM synthesises and interprets a huge amount of thus far often unrelated facts and legal informa-

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99 For an overview of the consecutive “waves” of judicial review development cf. Lustig / Weiler 2018.
PART I: THE INSTITUTION

tion. It paints the detailed picture of a complex, rapidly evolving, and not always completely consistent constitutional institution acting in a complicated and unstable political environment. This innovative institutional analysis of the AYM is an indispensable prerequisite to decipher its legal and political reasoning.

After a short introduction to the constitutional history of the AYM, the complex appointment procedures of the justices are described and evaluated. Chapter I.3 details the competences of the AYM, followed by an explanation of the scope and the effects of different forms of decisions. In the last Chapter of Part I, the internal process of collective decision-making is revealed to the extent to which this ‘black box’ has been opened by previous research conducted by academics, some of whom authored this book.

1. Constitutional History of Turkey and the AYM

1.1 The 1961 Constitution and the AYM

The first Constitution of the Republic of Turkey (1924), like the subsequent Constitutions of 1961 and 1982, set a rigid framework for the political process, since they all included one or more unamendable constitutional clauses. In Art. 102 TA 1924 the form of government of the Republic was laid down as an unamendable provision (para 4), and a particular constitutional amendment procedure100 was stipulated (para 2 and 3). Art. 103 expressly banned the enactment of unconstitutional legal provisions. Yet, as no institutionalised and independent supervisory body for these protective provisions existed, parliamentary sovereignty was unlimited. This situation of judicially unchecked parliamentary majority decisions created little opposition during the one-party government of the Republican People’s Party (Cumhuriyet Halk Partisi / CHP). But after the transition to a multi-party system in 1946 and the victory of the right-conservative Democratic Party (Demokrat Parti / DP) in the 1950 elections, the political tension could no longer be restrained.

The political rivalry in Parliament between the CHP and DP in the 1950s arose, amongst other things, due to unconstitutional laws that

100 Constitutional amendments required an application quorum of one third of the total number and an acceptance quorum of two thirds of the total number of Members of Parliament.
served to repress the parliamentary opposition and restricted individual freedoms in general. With respect to these circumstances, Members of Parliament (MPs) repeatedly proposed laws that authorised ordinary courts to refuse to apply unconstitutional laws. But these proposals to monitor the constitutionality of laws by ordinary courts in different branches of jurisdiction were not accepted by the parliamentary majority.\footnote{101} There were also individual attempts, similar to the US Federal Supreme Court in the case \textit{Marbury v. Madison}, to introduce a check on constitutionality by ordinary courts and to disregard the legislation, if unconstitutionality was found. Yet, both the Court of Cassation (\textit{Yargıtay}) and the State Council (\textit{Danıştay}) rejected such a competence for the ordinary courts on each occasion as there was no explicit authorisation in the Constitution.\footnote{102}

The political tension ultimately resulted in the first coup d’état on 27 May 1960. The military committee that took over intended to re-install civilian rule, once a new Constitution had been drafted. First, a group of law professors was charged with the task of writing a Constitution. As the draft met serious criticism by the military committee for its being too authoritarian,\footnote{103} the committee decided to convene a Constituent Assembly instead. The Assembly consisted of two chambers, with the military committee itself forming one of them. The other chamber was partly elected by indirect vote and partly co-optated with representatives of different professional organisations. As a result, the Constituent Assembly was dominated by CHP representatives, while DP representatives were explicitly excluded.\footnote{104}

When drafting the new Constitution, the idea of an institutionalised and independent judicial control mechanism was a guiding concept, aimed at forcing any parliamentary majority to respect the Constitution in the future. Among the main reasons cited for introducing a constitutional court were the continuous practice of passing unconstitutional laws prior to 1960, and the urgent need for judicial review.\footnote{105} In hindsight, the Constitution of 1961 can be characterised by a “basic distrust in political

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\footnote{101}{For details of the proposed laws, cf. Onar 2003, pp. 188-195.}
\footnote{102}{For a detailed explanation of the circumstances of these decisions, cf. Feyzioğlu 1951, pp. 255-264; Onar 2003, pp. 166-187.}
\footnote{103}{Surprisingly, the military envisioned a more liberal Constitution than the leading Turkish law professors of the era.}
\footnote{104}{Cf. Gençkaya / Özbudun 2009, pp. 14-15.}
\footnote{105}{Cf. the Justification of the Constitutional Commission of the Constituent Assembly (\textit{Kurucu Meclis}), p. 3706; for further opinions supporting these basic
structures popularly elected”.\(^\text{106}\) It introduced a powerful constitutional court as one of the mechanisms by which the then ruling elites intended to prevent the consequences of unchecked majoritarian democracy.\(^\text{107}\) Unsurprisingly, the articles concerning the AYM led to animated discussions during the parliamentary sessions debating the draft of the 1961 Constitution.\(^\text{108}\)

According to Art. 148 (1) of the 1961 Constitution, “the organisation and trial procedures of the Constitutional Court should be determined by law”. The temporary Article 7 of the 1961 Constitution stated that laws concerning the establishment of new institutions should be enacted within six months at the latest, beginning from the first session of the Grand National Assembly of Turkey. Accordingly, after the adoption of the 1961 Constitution as a result of the referendum on 9 July 1961, general elections were held on 15 October 1961 and the first session of Parliament took place on 25 October 1961. Therefore, the deadline for the entry into force of the Constitutional Court Act (CCA) was 25 April 1962. The National Assembly (\textit{Millet Meclisi}) and the Senate of the Republic (\textit{Cumhuriyet Senatosu}) adopted the Act No 44 on 22 April 1962 in a rapid legislative procedure. It was published on 25 April 1962 in the Official Gazette and immediately entered into force. The first twelve regular (\textit{asıl}) and four alternate (\textit{yedek}) justices\(^\text{109}\) were appointed by the President of the Republic and they took office on 24 May 1962 upon the publication of the list of names in the Official Gazette.\(^\text{110}\)

Since its initial establishment in 1962, the AYM was repeatedly subjected to substantial constitutional amendments. After the military intervention of 12 March 1971, the Parliament was forced to introduce constitutional amendments that primarily strengthened the executive branch and weakened judicial review. One important reason for the mili-

\(^{106}\) Heper 1985, p. 88.
\(^{109}\) The difference between regular and alternate justices is explained in detail in Chapter I.2.
\(^{110}\) In order to reach the number of 15 regular and five alternate justices (stipulated by Art. 145 TA 1961), four more AYM members were appointed in the following months: regular members Celâlettin Korelman and Ismail Hakki Ketenöglu (2.06.1962); alternate member Fazıl Ulusocak (9.06.1962); regular member Yekta Aytan (19.06.1962). (The appointments were published in the Official Gazette).
tary’s interference with the AYM’s competences was the decision of the Court of 16 June 1970. In this ruling, the AYM had not only formally reviewed the constitution-amending law No. 1188 (06/11/1969), but had also examined the substance of the law and declared it unconstitutional.\textsuperscript{111} The law amending the Constitution was interpreted in the light of the unchangeable Art. 9 TA 1961, which protected the republican form of government, and the procedure for constitutional amendments as prescribed in Art. 155 TA1961. Even if the Court ultimately declared the law unconstitutional with regard to its form, the decision was accompanied by a long \textit{obiter dictum}. Accordingly, the AYM had the duty to interpret and protect the concept of the Republic not only as a term, but as a comprehensive concept, with all the characteristics enumerated in Art. 2 TA. Thus, the AYM had made it very clear that it considered parliamentary majorities not only bound by the formal requirements, but also by the ‘spirit’ of the Constitution.

According to the constitutional amendments of 20 September 1971 which followed this decision, the AYM was explicitly limited to review laws “by form”, in order to restrict the Court’s ability to control the parliamentarian majority in case of constitutional amendments. However, this amendment did not really affect the AYM’s adjudication. Even after this change, it maintained its original interpretation of Art. 9 TA and continued to consider the protection of the Republic together with the characteristics enumerated in Art. 2 as an inseparable whole.\textsuperscript{112}

Another amendment restricted the range of applicants. According to the original version of the 1961 Constitution, all political parties represented in the Turkish Grand National Assembly were authorised to submit cases. The amended Art. 85(2) TA 1961 stipulated that only a parliamentary group consisting of at least ten MPs was authorised to submit applications (cf. also Chapter I.3.1). It is plausible to assume that this constitutional amendment was mainly motivated by the activism of the Workers’ Party of Turkey (\textit{Türkiye İşçi Partisi / TİP}): between 1963 and 1971, the party had submitted 40 abstract judicial review proceedings.\textsuperscript{113} This number is all the more remarkable, as from 1963 to 1965, the TİP was comprised

\begin{itemize}
\item \textsuperscript{111} Cf. E. 1970/01, K. 1970/31 (07/06/1971); this decision is not documented in Part III of the book.
\item \textsuperscript{113} Own calculations. Cf. also Öngel 2017.
\end{itemize}
of only one MP (Niyazi Ağırnaslı). After the general elections of 1965, the party group temporarily increased to 15 members, but dropped again to only two representatives in 1969. Obviously, the parliamentary majority was not pleased at all about the huge impact even this very small parliamentary minority could exert by applying to the AYM.\textsuperscript{114} As a result, the constitutional amendments of 1971 excluded active individual MPs and small parties without a parliamentary group from the range of applicants.

1.2 The 1982 Constitution and the AYM

The 1970s were marked by political instability, violence, boycotts, and a deteriorating economic situation. 11 Governments were formed and disbanded during these years. The acceleration of repeated elections and changing Governments was accompanied by increasing political polarisation among different political forces. As a result, “Turkey in the summer of 1980 was a country at war with itself”.\textsuperscript{115} Consequently, the military took over once again on 12 September 1980. During this coup, it presented itself as the ‘saviour of the nation’. Yet, as the historian Kerem Öktem has shown, the main reason behind this coup was the leading military’s realisation that their “behind-the-scenes-politics of the last three decades had not produced the desired results”\textsuperscript{116} The cautious political liberalisation initiated by the 1961 Constitution had led to an extensive appropriation of individual and political freedoms by the population and political groups. A side-effect of this process was increasing polarisation and even violent conflict within society. Consequently, the Generals considered a military takeover and a complete overhaul of the system as the only way out.

The putschists’ intent to conduct a major restructuring of Turkish democracy to prevent a recurrence of the political polarisation of the 1970s was clearly reflected in the constitution-making process following the coup. The National Security Council once again created a bicameral Constituent Assembly and declared itself to be one of these chambers. The other chamber was, compared to the civilian chamber of 1960/1961, even less representative. All members were appointed by the Council, and none of them represented the existing political parties.\textsuperscript{117}

\textsuperscript{114} For details on the constitutional review activities of the TİP cf. Chapter II.4.
\textsuperscript{115} Cf. Öktem 2011, p. 56.
\textsuperscript{116} Ibid.
\textsuperscript{117} Cf. Gençkaya / Özbudun 2009, p. 19.
While the constitutional referendum of 1961 had taken place in a rather free atmosphere, the referendum on 7 November 1982 was held in a very repressive political context. It was prohibited to express any views that might have influenced the voters’ decision negatively, and all criticism of the new Constitution was banned. Additionally, the provisional Art. 1 TA coupled the acceptance of the Constitution by referendum with the automatic appointment of General Kenan Evren, the leader of the putschists, as President of the Republic. As the military made it implicitly clear that a rejection of the draft Constitution would result in the continuation of the military regime, the high approval rate of 91.37 percent did not come as a surprise.\footnote{Cf. Gençkaya / Özbudun 2009, p. 20.}

The 1982 Constitution reflected the military’s mistrust of the ‘people’s will’ even more openly than its predecessor: elected assemblies, political parties, and all civil society institutions, such as trade unions or professional and voluntary associations, were weakened. Also, the competences and areas of action of the Constitutional Court as well as the range of possible applicants (Art. 150 TA) were further restricted. Most importantly, a very rigid definition of “formal review” was introduced in Art. 148 (2 TA), explicitly prohibiting any judicial review of the substance of constitutional amendment laws.\footnote{Art. 148 (2) second clause: “(…) the verification of constitutional amendments shall be restricted to consideration of whether the requisite of majorities was obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed”. The crucial importance this provision plays in the political reasoning and self-empowerment of the AYM is discussed in detail in Chapters II.4.3.1 (Headscarf Decision II, documented in Chapter III.3.4 and II.5.4.) At some point, the very existence of a judicial body that protects the Constitution seemed to be at stake in the Constituent Assembly, but in the end, the AYM as an institution survived. In retrospect, one can state that the Court stood its ground within the new constitutional system despite the introduced restrictions. In particular, it succeeded in partly reining in the executive branch by regaining judicial control over emergency decrees. In a series of decisions since the 1990s, the AYM also defined the standards and the implementation framework of basic rule of law principles. This process of growing institutional self-assurance and a gradual promotion of the fundamental values of liberal constitutional democracy will be retraced in Parts II and III of the book via the documentation and analysis of crucial rulings pointing in this direction.}
When the Justice and Development Party (Adalet ve Kalkınma Partisi / AKP) won the elections in 2002, for the first time in Turkish history a right-wing Islamic party formed a single party government. In the following years, social and political tensions between the established elites and the new force in power became more and more intense. The AYM got involved in these conflicts very early on. In 2007, a constitutional crisis erupted over the election of the President of the Republic, in which the Court played a controversial role. In the end, the direct election of the head of state was introduced by a constitutional amendment via referendum. In 2008, the AKP Government initiated a constitutional reform aimed at dissolving the headscarf ban because ordinary laws to this end had been repeatedly declared unconstitutional by the AYM. In the same year, a party prohibition case against the AKP was filed, in which the party only very narrowly escaped a ban before the Constitutional Court.

In 2010, the AKP introduced another major constitutional reform, which many saw as the party’s response to the ongoing constitutional crisis. The amendment affected different aspects of state organisation, but the changes to the High Council of Judges and Prosecutors (Hâkimler ve Savcılar Yüksek Kurulu / HSYK and to the Constitutional Court were particularly controversial. While the Government praised all constitutional reforms as steps towards a further democratisation of the judiciary, some of them de facto fostered its dependence on political majority decisions. For example, members of the ordinary courts were given the opportunity to participate in the composition of the HSYK, the highest self-governing body of the Turkish judiciary. What reads like an inclusive, deliberative provision turned out to have the opposite effect in practice: Since the new law contained a ban on advertising, possible candidates had no opportunity to make themselves known to the electoral body of prosecutors and judges. Hence, the list of candidates drawn up by the Ministry

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120 Cf., for example, Brown / Waller 2016, p. 829. The most crucial AYM decisions in this regard are discussed in detail in Part II of the book, and the translated rulings are documented in Part III.
122 Cf. the in-depth analyses of the Headscarf Decisions E. 1989/01, K. 1989/12 (05/07/1989), III.4.3.3 and E. 2008/16, K.2008/116 (22/10/2008), III.4.3.4. in Chapter II.4.3.1.
123 This ruling is discussed in detail in Chapter II.4.1.
124 Cf., for example, Varol et al. 2017, p. 197.
125 Cf., for example, Göztepe 2010, pp. 685–686; Bâli 2010.
of Justice was in the end accepted as it stood, thus indirectly reinforcing political leverage over this important institution of judicial autonomy.

A similar effect resulted from the partial reform of the appointment procedure to the AYM. The exclusion of the Turkish Parliament from the selection of constitutional justices was revoked, thus – at first glance – strengthening the (indirect) democratic legitimation of the Court. As had already been the case between 1961 and 1982, three AYM members are again elected by Parliament. However, due to the decreasing quorum in three consecutive ballots, there is no need for inter-party agreement on the candidates. Instead, a relative legislative majority can directly determine three out of 15 constitutional justices and thus contribute to the politicisation of this counter-majoritarian institution.126

In the case of the most important constitutional amendment concerning the AYM, the political motivation and the de facto consequences are much more complex: without any doubt, the introduction of the right to constitutional complaint significantly enlarged the Court’s competences. This reform made the AYM directly accessible for all citizens who claim a violation of their basic rights. Hence, the AKP-led government granted the Court a crucial new opportunity to enforce the implementation of fundamental rights and to control the behaviour of state authorities vis-à-vis the citizens.

Whereas the Turkish public had, from the very moment of the Court’s foundation, expected it to protect the entire constitutional order and therefore to be at the disposal of the citizens, the AYM did not fulfil this function for decades. Instead, early attempts at interpreting the Court’s role in this way were destroyed by a series of self-constraining decisions made by the founding generation of AYM justices. In September 1962, they rejected the first individual application claiming the unconstitutionality of Art. 104 of the Code of Criminal Procedure in the form of an actio popularis.127 The justices based their argumentation on the enumeration of eligible applicants in Art. 21 of the Constitutional Court Act of 1962, listing “people, boards and authorities (kişi, kurul ve makamlar)”. They repeatedly upheld a restrictive interpretation of these categories and turned down all individual complaints or collective actions submitted in

126 The changing appointment rules and their implications for the Court’s autonomy are discussed in detail in Chapter I.2.
127 Cf. E. 1962/02, K. 1962/01 [03/10/1962]; not included in the panel of key decisions analysed in Part II and documented in Part III.
1962 (109 cases) and 1963 (168 cases). Consequently, similar applications came to an end in the subsequent years due to the established case law. Four decades later, it was the AYM justices themselves who proposed to open their institution to individual applications, but the bill they submitted in 2004 did not find a parliamentary majority. When the major change was finally realised by the constitutional amendment of 7 May 2010, it primarily aimed at lowering the high number of Turkish applications to the European Court of Human Rights (ECtHR) by introducing a national filter for complaints of fundamental rights violations. The main rationale behind the amendment was to avoid “the massive compensations to be paid by the Turkish state due to frequent ECtHR judgments to its disadvantage”. The far-reaching consequences for the AYM in terms of its political importance as well as the effectivity of its internal decision-making process were more or less unintended side effects.

Most strikingly, the number of AYM decisions increased dramatically: while the Court had rendered less than 4,000 rulings, including all proceedings, between 1962 and 2011, a total of over 15,000 decisions were issued between 2012 and 2019, 10,000 of them concerning individual complaint proceedings. This enormous increase of case load not only forced the Court to adapt its internal work organisation, but it also impacted on the decision-making process and, even more important, on the adjudication of fundamental rights problems. These effects will be discussed in more detail in the following Chapters (particularly I.5, II.2 and II.4.3).

Whereas counter-factual reasoning is always problematic, it is intriguing to imagine how the AYM as an institution might have evolved under the changed circumstances without the dramatic political and legal ruptures that have taken place since 2015/2016.

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128 Göztepe 2018c, p. 68; Sağlam 2020.
129 The Constitutional Amendment Act no. 5982 was passed by the Parliament on 7 May 2010. Since the President submitted the law to a referendum pursuant to Art. 175 TA, the amendments did not enter into force until 23 September 2010 after publication of the official results of the referendum of 12 September 2010. Cf. the Official Gazette of 23 September 2010, No. 27708. For an in-depth analysis of this constitutional amendment process, cf. Göztepe 2010.
130 Göztepe 2018c, p. 69.
It goes without saying that the failed coup attempt of 15 July 2016, the following state of emergency, as well as the massive constitutional amendments of 2017 had far-reaching consequences for the role of the AYM within the Turkish political regime. While the direct legal effect on the Court was marginal, the political context within which it operates changed dramatically. As described in the Introduction, the arrest and dismissal of two AYM justices in the aftermath of the attempted coup have seriously undermined the authority of the Court. Moreover, the massive erosion of fundamental rule of law standards during the two years under the state of emergency (July 2016 – July 2018) and the weakening of essential separation of power principles by the introduction of the so-called “state presidentialism” in the 2017 constitutional reform heavily impacted on the Court’s adjudication.

The fundamental revision of the Constitution in 2017 abolished the dualist structure of the executive branch (monarch/president and the council of ministers), which had been a core feature of the Turkish parliamentary regime since the introduction of the constitutional monarchy in 1876 and in all republican constitutions (1924, 1961, and 1982), in favour of an extremely powerful monist executive: since 2017, the President of the Republic is the sole Head of Government, and the Members of Government act as his deputies which are politically responsible only to (and dependent on) him. The competences of the Grand National Assembly were significantly curtailed, and any parliamentary checks on the President were weakened or even completely eliminated. From the perspective of the AYM, the constitutional change of the presidential decree power is particularly important. According to the new Art. 104 (17) TA, the Head of State no longer needs an enabling parliamentary act to exercise his regulative competence. More than five years after this constitutional reform,

132 The only constitutional change affecting the AYM concerned the number of justices which was reduced from 17 to 15 (Art. 146 (1) TA). Cf. also Chapter I.2 for details.
133 For a detailed analysis cf. Göztepe 2018b.
134 Cf. Haime 2017b; Petersen / Yanaşmayan 2017; Steinsdorff 2017; Göztepe 2018a.
135 Until the constitutional reform of 2017, executive decrees (KHKs) had the force of law, i.e. the executive branch exercised genuine legislative power (within the constraints of the respective parliamentary enabling law). This is no longer the case with the newly established presidential decrees; while they have immediate and binding legal effect, they cannot change or abolish laws enacted by Parliament. Therefore, we use the term `regulative` instead of `legislative` when referring to presidential decree power.
the AYM still hesitates to principally define, let alone to limit, the newly introduced presidential decree power. While the Court has handed down several decisions – including numerous dissenting votes – discussing some aspects of the President’s regulative competence, it deliberately refrained from giving a comprehensive and final view on the matter.\footnote{For a detailed discussion of this problem cf. Barın 2020.}

An equally important change of the politico-legal framework within which the AYM is operating concerns the long-term consequences of the state of emergency regime from July 2016 until July 2018. On the one hand, several emergency decrees were transformed into ‘regular’ laws immediately after the state of emergency was lifted in July 2018. For example, many restrictions to criminal procedure rights and fair trial, such as the limitation of the number of defence lawyers or the extension of the competences of the prosecution,\footnote{Cf. emergency decrees No. 674, 676, 680, 694 and 696.} have since been enacted by Parliament. On the other hand, some measures justified as necessary under the state of emergency were immediately passed as ordinary laws instead of as emergency decrees.\footnote{Cf., for example, laws No. 6723, 6763, 6754, 7035 and 7145.} Hence, the state of emergency was obviously not only used to bestow the executive branch with extraordinary powers for a clearly limited amount of time, but it was perceived as an appropriate opportunity to restrict fundamental rights and freedoms on a permanent basis, somehow ‘normalising’ this situation. The long-term implications of these recent constitutional and political changes for the AYM adjudication are controversially debated in the literature.\footnote{Cf. Göztepe 2018b; Haimerl 2017a; Haimerl 2017b; Yılmaz 2019.}

We will argue in this book, that any well-founded assessment of the current situation and, even more, reflections on possible future scenarios, require an in-depth analysis of the Court’s institutional development and its case law over the last decades. As this brief historical summary shows, the AYM repeatedly adapted to substantial alterations of the constitutional and legal basis of its work, as well as to fundamental changes of the political context. Not only did the Court render its fundamental judicial review decisions in a highly unstable constitutional and political context, but the repeated changes in the legal framework also resulted in a volatile procedural basis for the AYM’s work. Each time a new Constitution or extensive constitutional amendments took effect, the according law on the AYM (CCA) was also substantially altered: Act No. 44 in 1962,\footnote{Published in Official Gazette 25/04/1962, No. 11091.} No. 2949
2. Selection of the Justices

The appointment of justices belongs to the most disputed issues of any constitutional court law. Regardless of the chosen institutional arrangement, politically motivated court packing-strategies always seem to play a role. As the Canadian political scientist Peter H. Russell aptly put it, the only “choice is between a process in which the politics is open, acknowledged, and possesses some degree of balance or a system in which political power and influence is masked, unacknowledged, and unilateral.” Roughly speaking, four basic selection modes can be distinguished, i.e. split, collaborative, and legislative models, as well as a system which transfers the appointment power mainly to (co-opted) judicial councils. While very different in form and logic, all these systems are designed to avoid conferring unqualified appointment power to a single institutional body or person. They enshrine the separation of powers as a design principle, e.g. by allowing different political actors to negotiate appointments, or by allocating appointments to different institutions. They also account for professional legitimation, i.e. merit-based selection criteria.

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141 Published in Official Gazette 13/11/1983, No. 18220.
144 Russell 2006, pp. 420.
146 Cf. Harding / Leyland (eds.) 2009, p. 15.
PART I: THE INSTITUTION

In the light of these general options, the Turkish appointment system seems rather well-balanced, as it includes many different stakeholders in the selection process, and even partly relies on co-optation by peers. The rules of this ‘game’, however, are very complex and tend to hide the political bargaining behind an opaque screen of procedural details. It also comes as no surprise that the selection rules count among the constitutional provisions which have been discussed and amended most frequently. Particularly in times when the decisions of the AYM on critical political issues were not in line with the interests of the ruling party and/or (coalition) Government, the electoral procedure as well as the qualifications of the justices were called into question time and again. On the following pages, the meandering institutional development of judicial appointment rules in Turkey is sketched out in some detail. To provide some guidance, the main features are synthesised in Table 1.

The number of justices sitting on the bench changed several times since the establishment of the Court. Originally, the AYM was composed of 15 regular and five alternate members (Art. 145, 1961 TA). When the new Constitution entered into force in 1982, this number changed to 11 regular and four alternate members (Art. 146, 1982 TA). After the constitutional amendment of 12 September 2010, the difference between the two categories of members was abandoned, and the number of justices was increased to 17. In accordance with Art. 146 (1) TA, the Constitutional Court currently has 15 members. After the constitutional amendments of 16 April 2017, which, inter alia, abolished the High Military Administrative Court and the High Military Court of Appeals, a transitional period had to be implemented for the acting AYM justices who had been elected from these – no longer existing – military courts. As a result, the AYM continued to sit with sixteen justices until the departure of Justice Serdar Özgüldür of the High Military Administrative Court in December 2020. Under the 1961 Constitution and 1982 Constitution (until 2010) alike, the justices were not appointed for a specific term of office. From the time of their appointment, they could work until their retirement at the age of 65. With the constitutional amendment of 12 September 2010, 147

147 Cf., for an historical overview, Kurnaz 2006.
148 The role of alternate justices is explained in more detail in Chapter I.5.
149 Provisional Article 21 d): “The members of the High Military Court of Appeals and the High Military Administrative Court who have been elected to the membership of the Constitutional Court shall continue their membership until their office terminates for any reason”.
150 Art. 146 (1) 1961 TA / Art. 147 (1) 1982 TA.
the term of office was limited to twelve years, and a member cannot be re-elected (Art. 147 (1) TA). Notwithstanding this reform, the members of the Constitutional Court still have to retire when they reach the age of 65.

The 1961 Constitution introduced a mixed selection system, according to which the constitutional justices were appointed from three sources (Art. 145):
1. Through the Grand National Assembly of Turkey (National Assembly: 2 regular members, 1 alternate member; Senate of the Republic: 2 regular members, 1 alternate member);  
2. From the judges of the supreme courts (the so-called co-optation system) (Court of Cassation: 4 regular members, 2 alternate members; Council of State: 3 regular members, 1 alternate member; Court of Accounts: 1 regular member);  
3. By the President of the Republic (2 regular members).

Regarding the three justices to be selected by the Grand National Assembly, the quorum for the first two ballots used to be a two-thirds majority, and if this could not be achieved, the absolute majority of the total number of members was necessary in subsequent ballots. After the 1971 constitutional amendments, this quorum was lowered to an absolute majority of the total number of members from the first ballot. Hence, the necessity of political compromise and an inclusion of opposition parties diminished, as a stable Government, displaying of an absolute majority in Parliament, did not need any consent from the minority parties.

The 1982 Constitution further strengthened the role of the President of the Republic in the appointment process: "(...) the 1982 Constitution transformed the presidency from a largely symbolic and ceremonial office, as it was under the 1961 Constitution, into an active and powerful one, with important political and appointive functions." One of these important appointive functions relates to the President’s role in the selection of AYM justices. The 1982 Constitution abandoned the mixed system of the 1961 Constitution and concentrated the power of appointment on the President of the Republic (Art. 146 TA), even though they had the combined right to select and to appoint only four (three regular members, one alternate member) out of a total of 15 justices. Most importantly, the original version of the 1982 Constitution ensured that Parliament would no longer appoint any constitutional justices. Instead, the plenaries of the supreme courts had to nominate from their ranks three candidates for each vacant position which was not directly filled by the President, i.e. eight justices.

151 Özbudun 2012, p. 198.
regular and three alternate justices. The High Military Court of Appeals (Askeri Yargıtay), the High Military Administrative Court (Askeri Yüksek İdare Mahkemesi), and the Council of Higher Education (İlköğretim Kurulu) were added as new proposing institutions for justices, each proposing one regular member. As the President could freely choose one out of the three proposed candidates from each list, this granted them additional influence on the selection process.

After the constitutional amendment of 12 September 2010, the Parliament was once again entitled to appoint a number of the constitutional justices. According to Art. 146 (2) TA, Parliament elects three justices from lists of three candidates each. Two lists are proposed by the plenary of the Court of Accounts from among its members, and one by the heads of the bar associations of self-employed lawyers. The required quorum for the election is a two-thirds majority of the total number of MPs for the first ballot, and an absolute majority for the second ballot. If an absolute majority cannot be obtained in the second ballot, a third ballot should be held between the two candidates who received the highest number of votes in the second ballot, in which a relative majority of MP votes is sufficient.

This complicated procedure becomes even more problematic in light of the massive imbalance among the 83 suggesting bar associations: while the chair of each bar has one vote, the number of the bars’ members differs significantly: the Istanbul, Ankara, and Izmir Bars have between 12,000 and 56,000 members each, but most others consist of only 100 to 500 members. As these small associations are more easily controlled by the majority party than the much more heterogeneous associations in bigger cities, this offers one more opportunity for indirect political influence on the AYM appointment procedure. A much fairer representation could be guaranteed if the Plenary of the Turkish Bar Associations (Türkiye Barolar Birliği), in which the 83 bar associations are proportionally represented, were to suggest possible future AYM justices.

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152 Cf. https://www.barobirlik.org.tr/Haberler/2021-avukat-sayilari-31122021-82273 (based on information from 31/12/2021) (last accessed: 26/06/2022). For example, in 2021 there were 139 registered lawyers at the Çankiri Bar Association, 144 in Bartın, and 533 at the Batman Bar Association.
Table 1: Selection Procedure of the AYM Justices

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<tbody>
<tr>
<td>Court of Cassation <em>(Yargıtay)</em></td>
<td>4 rm* / 2 am*</td>
<td>2 rm / 2 am</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Council of State <em>(Danıştay)</em></td>
<td>3 rm / 1 am</td>
<td>2 rm / 1 am</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>High Military Court of Appeals <em>(Askeri Yargıtay)</em></td>
<td>1 rm** (not nominated by the court but appointed directly by the President)</td>
<td>1 rm</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>High Military Administrative Court <em>(Askeri Yüksek İdare Mahkemesi)</em></td>
<td>1 rm</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Court of Accounts <em>(Sayıstay)</em></td>
<td>1 rm</td>
<td></td>
<td>1</td>
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</tr>
<tr>
<td>Council of Higher Education <em>(Yükseköğretim Kurulu)</em></td>
<td>1 rm</td>
<td></td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>President of the Republic <em>(Cumbhurbaşkanı)</em></td>
<td></td>
<td>2 rm (one of the two to be appointed from among members of the High Military Court of Appeals)</td>
<td>3 rm / 1 am</td>
<td>4</td>
</tr>
<tr>
<td>Grand National Assembly of Turkey <em>(Türkiye Büyük Millet Meclisi)</em></td>
<td>3 rm / 1 am</td>
<td></td>
<td>3 (2 from the Court of Accounts; 1 self-employed lawyer)</td>
<td>3 (2 from the Court of Accounts; 1 self-employed lawyer)</td>
</tr>
<tr>
<td>Senate of the Republic *** <em>(Cumbhuriet Senatosu)</em></td>
<td>2 rm / 1 am</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of justices</td>
<td>15 rm/4 am</td>
<td>11 rm/4 am</td>
<td>17</td>
<td>15</td>
</tr>
</tbody>
</table>

Source: 1961 and 1982 Constitutions and its amendments; *rm = regular member; am = alternate member; since 2010 all members are regular members, i.e. no specification needed; **not added to the total number of justices, because this member is already counted within the two members directly appointed by the President. ***The Senate has existed only under the 1961 Constitution.

Since the amendment of 2010, there is no mechanism to force a compromise on the parliamentary majority – as was the case under the 1961 Constitution. Instead, the relative majority required in the third ballot paves the way to direct political influence on the Constitutional Court, because the governing party/coalition may then easily enforce its choice. This mechanism dismantles the official justification of the according con-
institutional amendment, arguing that the aim was “to achieve a compromise in the first ballots”.

Since the foundation of the AYM, the professional education as well as the occupation of the justices prior to their appointment has been very diverse. Whereas the majority of AYM members have usually served as ordinary judges before they joined the Constitutional Court, non-lawyers from the Council of State or the Court of Accounts can sit on the bench as well. According to the current constitutional provisions, only six out of fifteen justices have to have completed legal training: the three constitutional justices appointed by the Court of Cassation, two members chosen by the Council of Higher Education, and one solicitor elected by Parliament have to be lawyers. The remaining nine justices may well come from other professions, i.e. four justices directly selected by the President of the Republic and one appointed by him from the candidates of the Council of Higher Education, two justices nominated by the Council of State, and two elected by Parliament from the candidates presented by the Court of Accounts. Hence, theoretically the majority of the fifteen constitutional justices could be non-lawyers. With regard to the complex legal basis of judicial review procedures, and even more so with constitutional complaint procedure, this could be seen as problematic. The explanation put forward in the literature, according to which “the constituent power wanted to provide the Court with a structure that was suitable for finding fair solutions to constitutional problems with social and economic backgrounds”, is not fully convincing. Ultimately, all constitutional questions have a socioeconomic background, and legal training may well provide the knowledge and methods for dealing with them.

The Constitution of 1961 stipulated a minimum age of 40 years for the justices, regardless of their previous service (Article 145(5)). The Constitution of 1982 also stated a minimum age of 40 years in its original version, but only for members who had worked before in academia at universities, high level executives, or practicing lawyers (Article 146(5) TA). This minimum age has been increased to 45 years in the amendment of 2010 for this group of candidates. The problem behind this regulation became obvious with the election of Justice Hicabı Dursun by the Grand National Assembly of Turkey on 6 October 2010. Justice Dursun had been proposed by the Court of Accounts and at the time was not yet 45 years

153 Justification of Art. 17 in the proposal for the constitutional amendment of 05/04/2010.
154 Azrak 2007, p. 220.
old. Hence, Parliament limited the scope of Article 146(5) to the effect that it should be only applied to the group of possible candidates listed explicitly in the article. It remained an open question whether there is any minimum age requirement for any other candidates.

Analysing the composition of the Court in terms of its gender-balance, it is more than obvious that the AYM has been an almost entirely male-dominated institution until today. The first female (alternate) justice appointed in 1990 was Samia Akbulut. In the following years, four more female justices were elected: Fulya Kantarcıoğlu (19 December 1995), Aysel Pekiner (alternate; 20 December 1995), Tülay Tuğcu (22 December 1999), and Zehra Ayla Perktas (27 June 2007). Tülay Tuğcu even became the first ever female president of the Court in 2005. Since 2007 no more women have been appointed, and, as of 2022, the Court exclusively consists of male justices.

The constitutional justices are supreme judges and enjoy the protection of constitutional regulations and the corresponding legal regulations. In this sense, they are not subject to Art. 140 (5) TA, which stipulates that judges and public prosecutors shall be attached to the Ministry of Justice with respect to their administrative functions. The constitutional justices may not assume any official or private duties other than their functions. They must obtain permission from the Court President in order to attend national and international congresses, conferences, and similar scientific meetings (Art. 15 (1e) CCA). This even includes university teaching positions.

All other judges (i.e. other than the Constitutional Court justices) are subject to the Act regarding Judges and Public Prosecutors and the regulations of the Council of Judges and Prosecutors. Only in the event of a final conviction for an offence that requires dismissal from the profession of a judge or prosecutor does the Constitutional Court Act refer to the Act 24/02/1983 No. 2802 regarding Judges and Public Prosecutors (Art. 11 (3) CCA). For decades, this provision proved to be an effective shield against any prosecution of Turkish constitutional justices. Even in times of political turmoil and military coups, their immunity was not put into question.

Against this backdrop, the arrest and following dismissal of the two constitutional justices Erdal Tercan and Alparslan Altan immediately after the attempted military coup of 15 July 2016 proves to be an even bigger violation of core rule of law principles. Without respecting the procedures

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set out in the Constitution and the Code of Criminal Procedure, on 4 August 2016 the remaining 15 members of the Constitutional Court ruled unanimously that the two justices should be dismissed. The Court solely based its decision on “knowledge gained in social circles” and justified this approach by referring to the statutory decree No. 667, arguing that no proof was needed like in criminal or disciplinary procedure, but merely “an impression of whether there was a connection to the terrorist organisation FETÖ / PDY”\textsuperscript{156} was sufficient to uphold the violation of the Constitution and to confirm the arrest.

3. Status and Competences of the AYM

In both the 1961 and 1982 Constitutions, the regulations for the Constitutional Court are laid down in the chapter entitled “Jurisdiction”. Yet in 1961, the AYM was not subsumed under the heading “Supreme Courts”, but was positioned under a separate title. Since 1982, the AYM is listed in the first place under the subtitle “Supreme Courts”. Even though its position within the state organisation differs slightly in the two Constitutions, this does not change its qualification as a constitutional institution.\textsuperscript{157} This is because the competences of the Court are enumerated in great detail in the Constitution and can only be changed by constitutional amendment, not by ordinary laws (Art. 148 (6) TA). A simple statutory restriction of the competencies and duties of the Court is thus excluded. All further regulations, such as the Rules of Procedure of the General Assembly, the sections and the commissions as well as the disciplinary proceedings of the President, the deputy presidents and the members, are left to ordinary law. In accordance with Art. 4 CCA, the AYM disposes of its own budget within the framework of the overall national budget. The attendance of the Secretary General of the Court during the budget negotiations in Parliament is guaranteed by law.

Besides, the AYM has the competence of legal self-management, i.e. it is not assigned to any Ministry. In accordance with Art. 149 (5) TA, the court can determine the principles of its internal working procedures and per-

\textsuperscript{156} Cf. the AYM decision E. 2016/6, K. 2016/12, especially paragraphs 84-98. This ruling was not published in the Official Gazette, but it is accessible on the Court’s website (electronic archive).

sonnel management, including the composition and division of work of sections and commissions (bölüm ve komisyon) within its own RoPs. Since the reform of 2010, the competence of self-management has clearly been concentrated in the person of the President of the Court. Accordingly, the President may appoint and remove the Secretary General and deputies of the Secretary General, ratify Court Rules of Procedures, ensure that the audited expenditure complies with the Court budget, appoint court staff, ensure efficient and smooth operation of the Court, take relevant measures to that effect (Art. 13 CCA), or grant annual leave and excused leave (Art. 70 (2) CCA).

Even though it is generally accepted in Turkish legal literature that the “position and competences [of the Constitutional Court] are protected against intervention by any State authority”, the position and competences of the Court are questioned time and again in politics. To give only one example of this sort of criticism, the outburst of then President of Parliament Bülent Arınç (AKP) may be recalled. Referring to the controversial Headscarf Decisions of the AYM he said in 2005 that this issue should be decided by Parliament instead of the Court, and that in the last instance Parliament could even abolish the AYM by constitutional amendment. According to Arınç, many EU countries do not know such powerful judicial review as Turkey does.

While this whole statement is highly questionable, it is true that the AYM’s scope of action is certainly significant in comparison to that of several other European constitutional courts. As described in the historical overview in Chapter I.1, the range of competences as well as their interpretation by the Court changed repeatedly over the years. Some main features, however, remained more or less stable – and the constitutional reform of 2010 even substantially increased the importance of the AYM by giving it the right to decide individual complaints of constitutional rights violations. As of today, Art. 3 CCA lists the following competences:

1. Abstract and concrete judicial review, which includes the judicial review of laws, presidential decrees, and Rules of Procedures of the Grand National Assembly of Turkey;

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158 Azrak 2007, p. 221.
159 Cf. E. 1989/01, K. 1989/12 (05/07/1989), III.4.3.3 and E. 2008/16, K.2008/116 (22/10/2008), III.4.3.4, analysed in Chapter II.4.3.1.
2. Criminal proceedings, in the capacity as a Supreme Criminal Tribunal, against the President of the Republic, the Speaker of the Grand National Assembly of Turkey, the deputies of the President of the Republic, the Ministers, the Presidents of the Constitutional Court and its members, High Court of Appeal and Council of State, the Chief Public Prosecutors of the High Court of Appeal and the Council of State, the Deputy Chief Public Prosecutor, the President and the members of the Council of Judges and Prosecutors as well as of the Court of Accounts. Also, the Chief of General Staff, the Commanders of the Land, Naval and Air Forces shall be tried in the Supreme Criminal Tribunal for offences regarding their duties;

3. Judicial review of parliamentary decisions: in case the Grand National Assembly of Turkey resolves to remove parliamentary immunity or revoke membership of the MPs, to submit annulment requests for those concerned or other deputies alleging repugnance to the provisions of the Constitution, laws, or the regulation regarding the Grand National Assembly of Turkey (RoP);

4. Control over political parties: to conclude cases concerning dissolution of political parties and deprivation of state aid to political parties, warning applications and demands for determination of the status of dissolution or to review or have reviewed the legality of property acquisitions by the political parties and their revenue and expenditure;

5. Decision of individual applications.

3.1 Abstract Judicial Review

*Art. 150-151 TA; Art. 3 (1a), 35-39 CCA*

Abstract judicial review can refer to:

- Laws amending the Constitution,
- All laws in the formal sense (also the Budget Law, Enabling Laws for decrees having the force of law issued by the Cabinet of Minister etc. until 2017),
- Presidential decrees,
- Parliamentary Rules of Procedure.

The criteria for review are first and foremost positive constitutional provisions. These may be supplemented and/or supported by references to general constitutional principles such as the 'unity of the constitutional
order"\textsuperscript{161} or ‘a minimum living standard appropriate to human dignity’\textsuperscript{162}. Also, general principles of law accepted as an integral part of the constitutional state,\textsuperscript{163} prepositive provisions and/or supra-constitutional law provisions\textsuperscript{164} as well as international treaties/agreements may serve as criteria for constitutional review. Table 8 (cf. Chapter II.5.2) gives a detailed overview of all references to international sources used in the AYM key decisions analysed in this book. International provisions or principles can only be applied as independent criteria of constitutionality, though, if the Constitution directly refers to international law or international agreements. In this sense, Articles 15, 16 and 42 TA should be mentioned as international sources in addition to the constitutional provisions.\textsuperscript{165} The specific way in which the AYM refers to these general constitutional principles and international norms in its constitutional reasoning will be comprehensively discussed in the case law analyses presented in Part II of the book.\textsuperscript{166}

According to Art. 151 TA, “the right to apply for annulment directly to the Constitutional Court shall lapse sixty days after publication in the Official Gazette of the contested law, the presidential decree, or the Rules of Procedure”. With regard to the increasing number of laws and the fact that, aside from the President of the Republic, only the two political party groups having the largest number of members in the Grand National Assembly of Turkey, and at least one-fifth of the total number of members of the Grand National Assembly of Turkey still have the right to raise a legal challenge, the expectation of ambitious and legally well-argued applications is hardly realistic within this short time period.

\textsuperscript{161} In addition to some of the AYM key decisions analysed in Part II, the following rulings are important in this regard: E. 2013/84, K. 2014/183 (13/03/2015); E. 2011/48, K. 2012/88 (22/11/2013); E. 2010/92, K. 2012/86 (22/11/2013); E. 2011/47, K. 2012/87 (22/11/2013).

\textsuperscript{162} Cf., for example, E. 1988/19, K. 1988/33 (11/12/1988); E. 2008/56, K. 2011/58 (28/12/2011); not documented in Part III.

\textsuperscript{163} Cf., among others, E. 2002/112, K. 2003/33 (04/11/2003); E. 2014/164, K. 2015/12 (22/05/2015); not documented in Part III. In this regard, the Turkish legal literature refers to Art. 38 c) of the Status of the International Court of Justice, in accordance with which only “the legal principles generally recognised by civilised peoples” are to be used.

\textsuperscript{164} Cf., for example, the key decision \textit{Rights of Children Born out of Wedlock II} (E. 1990/15, K. 1991/5 (27/03/1992), III.3.26). As highlighted in the content analysis of the ruling in Chapter II.4.3.5, even some international agreements relating to children’s rights are designated as supra-constitutional provisions in this case.

\textsuperscript{165} Cf. also Özbudun 2014, p. 424.

\textsuperscript{166} Cf. in particular Chapters II.5.2 and II.5.3.
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During the first years of the AYM’s existence, a wide range of actors were authorised to initiate abstract judicial review: According to Art. 149 TA 1961, it comprised the President of the Republic, all political parties which had obtained at least ten per cent of the vote in the last elections or were represented in Parliament, one sixth of all the members of one legislative body, and - in cases concerning their entity and duties - the High Council of Judges, the Court of Cassation, the Council of State, the High Military Court of Appeals, and even all universities. As mentioned before, Art. 149 was amended in 1971, excluding political parties represented in the Grand National Assembly of Turkey without having a parliamentary group from the list of possible applicants. Since 1982, Art. 150 of the (then new) Constitution further limited the range of possible applicants to the President of the Republic, the two political party groups having the largest number of members in the Grand National Assembly of Turkey, and a minimum of one fifth of the total number of members of the Grand National Assembly of Turkey.

3.2 Concrete Judicial Review

Art. 152 TA; Art. 3(1b), 40-41 CCA

If a regular court considers a law or presidential decree it has to apply to be unconstitutional, or is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it suspends the proceedings and refers the matter to the Constitutional Court of Turkey for decision. This wording explicitly excludes other statutes, such as the Rules of Procedure of the Grand National Assembly of Turkey, from concrete judicial review procedure, as they have no legal effect for third parties outside Parliament and thus cannot be the object of an ordinary legal dispute.

It is interesting to note that the maximal decision-making period accorded to the AYM in concrete review cases was altered repeatedly. In 1961, Art. 150 TA originally stipulated a time span of only three months, which was extended to six months after the constitutional amendment of 22 September 1971. Since 1982, the AYM has to decide within five months (Art. 152 (2) TA). If it does so, the submitting court is obliged to comply with the ruling. In cases where the AYM is not able to decide, the submitting court has to decide the case under the legal provisions in force.

Apart from these variations in the maximal time span for decision-making, the main difference lies in the consequences of the
AYM’s non-compliance. According to Art. 150 (4) of TA 1961, the court submitting the question of unconstitutionality is supposed to “settle the claim of unconstitutionality according to its own conviction, and shall thus decide on the case under consideration”. In contrast, Art. 152 (2) of the TA 1982 does not leave the court any margin of discretion and obliges the court to conclude the case “under the legal provisions in force”. The fundamental decision of the constitutional legislator to locate the exclusive competence to decide on constitutionality issues with the Constitutional Court appears to be in accordance with this regulation. The decision of the AYM is binding beyond the parties involved in the original court case and thus has an erga omnes effect (Art. 153 (6) 1982 TA). In the 1982 Constitution, the option of inter partes effect, which had existed according to Art. 152 (3) Constitution of 1961, was no longer provided.

Formal unconstitutionality claims of laws in accordance with 148 (2) TA can only be brought before the AYM with a legal challenge by a specific group of people and within ten days. Even though there are no restrictions in the Constitution, it is stipulated in Art. 36 (4) CCA that “courts may not file a claim of unconstitutionality on the basis of formal unsuitability”.

3.3 The AYM as the Supreme Criminal Tribunal

Art. 148 (6 and 7) TA; Art. 3 (c), 57-58 CCA

According to Art. 148 (6 and 7) TA the AYM functions as Supreme Criminal Tribunal for offences relating to the functions of high state officials and high court judges as well as the Chief of General Staff and the commanders of the Land, Naval and Air Force. Under disciplinary law, the Supreme Judges and Public Prosecutors are subject to the area of competence of the Council of Judges and Public Prosecutors. The details of the preliminary proceedings are governed in the laws of the individual supreme courts.

For most of the AYM’s history, these provisions were exclusively applied to Prime Ministers and other cabinet members. In 2011, the first-ever

168 The Constitutional Court has used this option on only one occasion. Cf. E. 1972/26, K. 1972/38 (07/01/1973); not included in the panel of key cases.
169 Law on the Court of Cassation, no. 2797 (Yargıtay Kanunu) Art. 19, 43 ff.; Law on the State Council, no. 2575 (Danıştay Kanunu), Art. 20-21; 53-54; 67 ff.; Law on the High Military Court of Appeals, no. 1600 (Askeri Yargıtay), Art. 9; 34 ff.
criminal procedure against a Supreme Court judge was conducted. The former chair of the 6th Civil Law Chamber of the Court of Cassation, Judge Hasan Erdoğan, was indicted before the AYM on suspicion of corruption. He was cleared on 19 December 2012, as the evidence submitted by the Public Prosecutor’s Office had been obtained by unlawful means and, in accordance with Art. 38 (6) TA, could not be used in the criminal proceedings.\textsuperscript{170}

Prior to the amendment of 12 September 2010, the Speaker of the Grand National Assembly of Turkey and the military chiefs mentioned in Art. 146 (7) TA had not fallen under any jurisdiction in case of offences relating to their functions, as the legal literature rightly pointed out. With the 2010 amendment of the Constitution, this loophole has been \textit{de jure} closed, which was praised by the executive branch as strengthening civilian control over the military. The first opportunity to apply it, however, was met with some difficulties.\textsuperscript{171}

When the AYM is sitting as Supreme Criminal Tribunal, the Chief Public Prosecutor of the Court of Cassation or their deputy acts as a prosecutor for the cases (Art. 57 (5) CCA). Per the constitutional amendment of 2010, the initial judgement of the Supreme Criminal Tribunal is contestable, although before the same court (Art. 58 CCA).

\textsuperscript{170} Cf. E. 2011/1, K. 2012/1 (19/12/2012). For further amalgamated proceedings, in which a Government member was accused, cf. E. 1981/1, K. 1982/2 (13/04/1982) (against Hilmi İşgüzar, former Minister for Social Security, and further 53 individuals); E. 1981/2, K. 1982/1 (16/03/1982) (against Tuncay Mataracı, former Minister for Customs and Monopolies, and further 21 individuals); E. 1982/1, K. 1983/2 (12/04/1983) (against Şerafettin Elçi, former Minister for Public Works, and further 7 individuals); E. 1982/2, K. 1983/1 (09/03/1982) (against Selahattin Kılıç, former Minister for Public Works, and further 9 individuals); E. 1985/1, K. 1986/1 (14/02/1986) (against Ismail Özdağlar, former Minister of State, and further 2 individuals). These decisions are not published in the Official Gazette, but in \textit{Yüce Divan Kararları}, a separate register of the Constitutional Court.

\textsuperscript{171} The former Chief of General Staff İlker Başbuğ (2008-2010) was arrested on 6 January 2012 and charged of attempts to violently overthrow the constitutional Government of Turkey and to establish a terrorist organisation. Başbuğ’s complaint was that the prosecution of the initial charges denied him the right to a judge as guaranteed by Article 148 (7) TA. He demanded to be tried by the AYM, acting as Supreme Criminal Tribunal. After a lengthy procedure through all criminal court levels, the case finally reached the AYM, but – as of July 2022 – was not yet scheduled for decision. For further details on the case and İlker Başbuğ’s successful constitutional complaint procedure cf. 2014/912, 6/3/2014.
Prior to the 2017 amendment, the indictment procedure concerning the members of the Council of Ministers and the consequences of an indictment were stipulated in Art. 100 and 113 (3) TA. It stated that “a minister who is brought before the Supreme Court by decision of the Grand National Assembly of Turkey shall lose his/her ministerial status. If the Prime Minister is brought before the Supreme Court, the Government shall be considered to have resigned”. Following the constitutional amendment of 16 April 2017, the consequences of this criminal procedure before the Constitutional Court were largely mitigated. According to the new version of Art. 106 (9), “(t)he deputies of the President of the Republic or ministers who are convicted of a crime by the Supreme Criminal Tribunal for a crime that prevents them from being elected shall lose their mandate”. This means that during the criminal proceedings before the AYM, the President of the Republic and the ministers can stay in office and can take political decisions until a final judgment. Consequently, the President of the Republic could theoretically appoint new constitutional justices and thus change the bench during the course of the criminal proceedings. The only restriction to the President’s action regards the prohibition of snap elections in case they are under investigation.

3.4 Immunity and Loss of Membership Cases

Art. 83-85 TA; Art. 3 (f) CCA

Members of Parliament and cabinet members are granted protection from criminal prosecution during their time in office according to Art. 83 TA (Art. 106 (10) TA). However, this immunity is not absolute: it can be removed by a decision of Parliament and it does not apply when a member is caught in flagrante delicto, requiring a heavy penalty, or in cases subject to Article 14 TA, as long as an investigation has been initiated before the election. The reasons for a loss of mandate are listed in Art. 84 TA.\(^7\) If the decision of lifting the immunity or of revoking membership of one of its members was taken by the Grand National Assembly itself

\(^7\) Art. 84 (I) Resignation of the deputy; (II) Through a final judicial sentence which precludes the election to the Turkish Grand National Assembly or deprivation of legal capacity; (III) Insistence of a deputy to hold a position or carry out a service incompatible with membership according to Article 82 (IV) Failing to attend Parliamentary proceedings without excuse or leave of absence for five sessions, in a period of one month.
and not by a court (according to Art. 84 (1,3,4), it can be contested before the AYM within seven days. The Court has to decide within fifteen days whether the parliamentary act was in accordance with the provisions of the Constitution, the laws and the RoP of the Grand National Assembly (Art. 3 f CCA; Art. 85 TA). Art. 85 TA grants the right to file an action against the decision of the Parliament before the AYM not only to the deputy or to the ministers in question, but also to all other MPs, as there is a general interest in the protection of the public function of the political mandate.\textsuperscript{173} It is important to note that the AYM does not act as a criminal court in these cases, but simply verifies whether the accusations are serious enough for a criminal action and thus justify the removal of immunity.\textsuperscript{174}

The crucial political significance of these provisions became obvious in 2016, when the AKP-majority initiated a constitutional amendment in Parliament which temporarily changed the immunity rules. On 20 May 2016, Act No. 6718 was passed with the consent of the main opposition party, CHP, even though its party leader had earlier denounced the unconstitutionality of this amendment.\textsuperscript{175} The law was mainly directed against the deputies of the pro-Kurdish HDP, who had been charged with supporting terrorism after the abrupt end of the temporary Kurdish peace process.\textsuperscript{176} The constitutional amendment stipulated that “the deputies against whom a file concerning the lifting of parliamentary immunity has been submitted, by the date of adoption of this article (…) shall be exempt

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\textsuperscript{173} One paradigmatic case in this regard is analysed in Chapter II.4.2.5 and documented in Chapter III.2.20. Similar actions against the annulment of immunity by members of the pro-Kurdish party HEP (Halkın Emek Partisi) in 1994 can be found in: E. 1994/5, K. 1994/24 (21/03/1994); E. 1994/16, K. 1994/35 (21/03/1994); E. 1994/7, K. 1994/26 (21/03/1994); E. 1994/19, K. 1994/38 (21/03/1994).


\textsuperscript{176} After its electoral victory of June 2011, the AKP initiated peace talks in order to end the politico-military Kurdish conflict lasting since 1984. Among other measures, a Reconciliation Commission was established, in which all parliamentary party groups were proportionally represented. The commission’s task was to prepare a new Constitution, but this process failed after two years, and the peace talks were finally cancelled in the summer of 2015 (for details cf. Petersen / Yanaşmayan 2019).
(...), from the first sentence of the second paragraph of the Article 83 of the Constitution”. Hence, the parliamentary majority did not de jure waive the immunity of the deputies, but de facto abstained from exercising this right by temporarily changing the Constitution instead. This resulted in a massive breach of a core rule of law principle, because it not only automatically lifted the immunity of more than one hundred deputies without an explicit parliamentary decision, but it also deprived them collectively of any legal remedy against this act.

70 members of the HDP appealed to the AYM, claiming the unconstitutionality of this constitutional amendment. The Court rejected this application on the grounds that, under Article 85 TA, MPs could only apply in the event of a parliamentary decision. Since Parliament had voted on a constitutional amendment law instead, the MPs were not entitled to ask for judicial review (according to Art. 148 TA). In its ruling, the AYM did not touch upon the matter that the constitutional amendment law de facto did prevent any legal action against the immunity waiver. It only stated in the abstract that MPs and cabinet members are de jure granted protection from criminal prosecution during their time in office according to Art. 83 TA (Art. 106 (10) TA).

3.5 Procedures for the Prohibition of Parties

**Art. 68-69 TA; Art. 3 (d) CCA**

The prohibition of political parties has proven to be one of the most influential competences of the AYM. The specific impact of this instrument of militant democracy on the political landscape in Turkey and the AYM’s role in this regard will be discussed in Chapter II.4.1. Art. 68 and 69 TA stipulate the regulations for the prohibition of political parties in such detail that hardly any discretion is left to the legislator. Although two fundamental constitutional amendments in 1995 and 2001 restricted the reasons for prohibiting a party, nothing substantial has been changed.

According to Art. 69 (4, 5) TA, the final decision regarding the dissolution of political parties shall be taken by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the High Court of Cassation. A political party shall be dissolved if its statute and programme violate the provisions specified in Article 68 (4) TA, obliging political parties to respect the following principles: the independence of

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the State, the indivisible integrity of its territory and nation, human rights, the principles of equality and rule of law, the sovereignty of the nation, and the principles of the democratic and secular Republic. Furthermore, party activities shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to commit crime. The decision to dissolve a political party may be taken only when the AYM is convinced that the party in question has become a centre for operating of such activities (Art. 69 (6) TA). Instead of dissolving a political party, the AYM may also stipulate that the party concerned should be wholly or partially deprived of state aid, bearing in mind the seriousness of the actions brought before the court (Art. 69 (7) TA).

3.6 Financial Checks on Political Parties

Art. 68-69 TA; Art. 3 (e) CCA

The AYM also plays an important role in controlling the finances of political parties. In accordance with Art. 68 (8) TA, the state provides the political parties with adequate financial means in an equitable manner. The principles regarding aid to political parties, as well as collection of dues and donations, are regulated in Art. 61-77 of the Law on Political Parties No. 2820 (22/04/1983). The income and expenditure of political parties shall be consistent with their objectives, and the application of this rule is regulated by law. The AYM is in charge of monitoring the acquisitions, revenue, and expenditure of political parties in terms of conformity with the law. It also audits the methods and sanctions to be applied in the event of non-conformity. The Constitutional Court shall be assisted by the Court of Accounts in performing its auditing task, and the judgments rendered by the AYM based on the audits shall be final (Art. 69 (3) TA). The financial check decisions of the Court are published in the Official Gazette with the note “Political Party Financial Check” (Siyasi Parti Mali Denetim) and generally relate to the final financial files from the year before last.178

178 To give only one example: E. 2014/29 (Siyasi Parti Mali Denetim) (Doğru Yol Partisi /DYP), K. 2015/78 (19/11/2015) concerns the budget of the DYP from 2013. The party had submitted its final financial report in 2014 and the Court only took a decision on it in 2015.
3.7 Constitutional Complaints

_Art. 148(3-5) TA; Art. 3 (c), Art. 45-51 CCA_

In 2010, three new paragraphs (paras. 3-5) were inserted into Art. 148 TA. With these amendments, the constitutional complaint procedure was introduced into Turkish constitutional law: the right to “apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities” was granted to everyone after ordinary legal remedies have been exhausted (para. 3). Since the constitutional amendment regulated only the basic principles of this new competence of the AYM, the right to individual constitutional complaint took effect in September 2012, after a transitional period of two years, during which the procedural elements and substantive law specifications were incorporated into the amended Constitutional Court Act (CCA) and the RoP of the Constitutional Court.

As detailed above, the right to individual complaint has been discussed in Turkey since the establishment of the AYM. Legal scholars and ana-

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181 The initial date of 23 September 2012 for allowing constitutional complaints relates to the Transitional Article 18 (7) of the Constitutional Amendment Act of 12 September 2010, which provided that the AYM Act should be enacted at the latest within two years and that individual complaints should be allowed after entry into force of that Act. The CCA No. 6216 was enacted by Parliament on 30 March 2011 and entered into force upon publication in the Official Gazette on 3 April 2011. However, the Transitional Article 1 (8) of the CCA No. 6216 provided that the Court may only accept constitutional complaint applications which deal with acts and court judgements which became binding after 23 September 2012. The implementation of the new comprehensive competence of the Constitutional Court was therefore fixed by statute. Correspondingly, Art. 76 of the Act provided that provisions on constitutional complaint proceedings (Art. 45-51) did not enter into force until 23 September 2012.
lysts\textsuperscript{182} as well as representatives of the legal professions\textsuperscript{183} have repeatedly stressed the importance of this instrument in order to improve the protection of fundamental rights and liberties in Turkey. The motivation of the constitutional amendment of 2010 which finally introduced this legal remedy explicitly refers to the high number of complaints of Turkish citizens to the European Court of Human Rights (ECtHR) and expresses the expectation that the new competence of the AYM should reduce this number by introducing a national filter.\textsuperscript{184} This explains why, other than similar mechanisms in Germany, Austria, or Hungary, Art. 148 (3-5) TA links the national remedy not (only) to the fundamental rights guaranteed in the Turkish Constitution, but to the respective provisions of the European Convention of Human Rights (ECHR). Consequently, not all fundamental rights and freedoms guaranteed by the TA fall within the scope of constitutional complaint, but only those guaranteed also by the ECHR.

4. Effects and Scope of AYM Decisions

In addition to the constitutional provisions determining the competences of the AYM, the CCA explicates the procedural rules and the effects of the AYM decision-making in more detail. Further specifications are contained in the RoP of the Court. In the following paragraphs, these norms which directly impact the scope and the effects of AYM decisions are briefly described in order to better understand the internal decision-making process of the Court analysed in Chapter I.5.

4.1 Suspensive Effect and Interim Measures

The question of suspensive effect primarily arises in abstract and concrete judicial review procedures. In concrete judicial review procedures, it is of great importance, how long the decision of the case in question can

\textsuperscript{182} Cf. Sabuncu 1982; Göztepe 1998; Pekcanıtez 1995; Sağlam 2012.
be delayed by the submitting court: what are the consequences, if the Constitutional Court does not decide within the prescribed time frame? In abstract review cases, the question is whether or not the AYM may stipulate an interim measure, resulting in a temporary suspension of the provision(s) under review.

As mentioned in Chapter I.3.2, the suspensive effect mechanism in concrete judicial review procedures was repeatedly altered. During the first 20 years of the AYM’s existence, the submitting court was entitled to decide on the constitutionality of an applicable legal provision according to its own conviction, if the AYM was unable or unwilling to issue a ruling within the set time limit. The 1982 Constitution departed from this system and strictly implemented the principle of centralised constitutional review. According to the current Art. 152 (3, second sentence) TA, “the trial court shall conclude the case under the legal provisions in force” in case its concrete judicial review application is not decided by the AYM within the five-months deadline.

In abstract judicial review cases, the contested law, decree having the force of law (until the constitutional reform of 2017), presidential decree (since 2017), or parliamentary RoP remains valid until the Court’s judgement declaring the unconstitutionality of the provision comes into force. Art. 153 (3) TA determines that the contested norm “shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That duration shall not be more than one year from the date of publication of the decision in the Official Gazette”. This article provoked huge discussions, because the Court established a practice of publishing the operative provisions of a ruling earlier than the legally valid integral decision in the Official Gazette. Hence, the question of the effective date of annulment turned out to be a difficult one to answer. The launch of the Court’s website even consolidated the unconstitutional practice of publishing the tenor and operative provisions of a ruling without a justification on the grounds, as summaries of judgements were made available online even before this justification was finalised. In 2015, the Court announced its serious intent on abolishing this practice, and since then Court President Zühtü Arslan has successfully implemented the rule that annulment decisions are not announced without a simultaneous publication of the merits.

185 Anayasa Mahkemesi 2015, p. 269.
Although the Constitution allows the postponement of decisions for up to one year, the repeal of the contested provision until the stipulation of a legally valid judgement is not provided for in either the Constitution or the CCA. The AYM nevertheless found a way to issue temporary orders in order to prevent very serious and irreversible consequences if the contested provision were to be implemented before its (un)constitutionality was finally decided upon. While the Court refrained from ascribing itself this competence when the problem was first addressed in the *Death Sentence* ruling (1972), analysed in Chapter II.4.3.4, it finally changed its doctrine on the question of repeal in 1993, in the abstract review procedure *Judicial Emancipation in Review of Statutory Decrees*. Since this initial judgement, the AYM has made frequent use of its self-ascribed competence. Regarding abstract norm control proceedings, however, this legal remedy was not included in the amended CCA of 30 March 2011. Yet in the case of the constitutional complaint procedure introduced at the same time, the requirements for temporary orders have been included in the CCA and the RoP. In accordance with Art. 49 (5) CCA, “the chambers may, ex officio or upon request of the applicant, decide on measures they deem necessary for the protection of the applicant’s fundamental rights. In the event a decision to take measures is made, the decision on the merits must be made within six months at the latest. Otherwise, the decision on measures is revoked *ipso facto*”. Art. 3 (1) RoP clearly limits this CCA provision by narrowing the scope of temporary orders to “a serious threat to the life or to the physical or intellectual integrity” of the applicant. Hence, only a small fraction of basic rights can actually be protected by means of interim measures.

While the RoP are more restrictive than the CCA regarding the scope of the temporal order, Art. 3 (4) RoP allows the AYM to extend its term of validity, although the six-month period stipulated in the CCA continues to apply for the decision of the case. With the option of extending both the consequences of the temporary order and the decision-making period, the RoP clearly go beyond both the spirit and purpose of the underlying legal text. Admittedly, the RoP regulations correspond to the security function of temporary legal protection measures more than the respective CCA provision, but the tendency to extend the competences of the AYM via

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188 Cf. also Chapter II.5.4 for details.
subordinated regulations is problematic. According to Art. 73 (4) RoP, the interim measures terminate automatically if no decision of extension has been taken by the AYM, if the constitutional complaint was rejected, or if the application was withdrawn.

4.2 Scope of Decisions

a. Dismissal decisions concern cases in which the AYM does not find a breach of constitutional law. They differ in form: negative judicial review decisions (both abstract and concrete) may be based on permissibility requirements (usul) and/or on substantive law (esas). The permissibility requirements can include the factual jurisdiction of the AYM, the jurisdiction of the submitting court (in concrete judicial review cases), a failure to comply with the period for filing an action, or the incompetence of the applicant. If an abstract judicial review case is rejected under substantive grounds, there is still the option of bringing the provision before the AYM by way of a concrete judicial review procedure. However, if the Court then rejects the application again on substantive grounds, Art. 152 (4) TA stipulates a barring clause of ten years. In view of the dynamics of Turkish society and its rapidly changing living conditions, this time span is justifiably criticised as being too long and as a hindrance to judicial advancement. It should be emphasised that according to the text of the Constitution, this ten-year barring clause can only be applied in concrete judicial review procedures due to reasons regarding the content of the application. The Constitutional Court, however, has repeatedly applied it also in abstract judicial review procedures, thereby disregarding the wording of the Constitution and impeding the possibility to re-check the norm in question by means of concrete judicial review procedure within ten years. This practice violates the text of the Constitution and it contradicts the purpose of the norm.

190 Art. 152 (4) TA: “No claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits”.
b. If the AYM determines the unconstitutionality of a contested provision, it is declared invalid. As mentioned above, the entry into force of this decision can be delayed for up to one year by means of not publishing it in the Official Gazette. Such a postponement serves to prevent a loophole in the legal system. While Art. 153 (4) TA stipulates that in these cases “the Grand National Assembly of Turkey shall debate and decide as a priority on the government bill or private members’ bill designed to fill the legal void arising from the annulment decision”, this has not always been the case. Whenever the legislative body failed to act in time, the AYM profited from the opportunity to ultimately decide on a controversial political issue.193

c. The method of interpretation in consistency with the Constitution is not a thoroughly-developed concept in Turkish legal literature. It is illustrated only in a few texts referring to German legal precedents,194 but the method has not been developed further. Even in the case law of the AYM, the term yorumlu red/ret is only found in the dissenting opinions without a concrete reference to the legal literature or to the definition, scope, or consequences of the term.195 When the AYM renders an interpretation in consistency with the Constitution, the application for determining unconstitutionality is rejected, and the contested provision remains in force. In this case, special significance is accorded to the reasoning of the ruling.

d. Concerning constitutional complaints, the AYM decides whether or not a violation of the Constitution exists in an individual case, i.e., it does not establish an abstract judicial review.196 However, the permissibility requirements are more complex than in judicial review procedures. They


193 Two such cases are part of the selected key decisions analysed in detail in Chapter II.4.3.5 and documented in Part III: Equal Treatment of Spouses in Case of Adultery I (E. 1996/15, K. 1996/34 (27/12/1996), III.319); Equal Treatment of Spouses in Case of Adultery II (E. 1998/03; K. 1998/28 (13703/1999, III.20).


195 Cf. for the very first decisions E. 1984/08, K. 1984/10 (28/12/1984); E. 1984/12, K. 1985/6 (17/05/1985); the most prominent decision is the Headscarf II decision, E. 1990/36, K. 1991/8 (09/04/1991, III.3.4), analysed in Chapter II.4.3.1. As of 2022, the AYM has not yet decided whether it regards itself as “a court hearing a case” according to the meaning of Art. 152 (1) TA in constitutional complaint procedures against instance court decisions. If this were the case, the norm on which the lower court had built its decision could be subject to concrete judicial review as well, opening an indirect access to (concrete) judicial review procedures.