Politik und Recht

von Steinsdorff | Göztepe| Abad Andrade | Petersen

The Constitutional Court of Turkey

Between Legal and Political Reasoning

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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 Consitutional 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.

Dieter Grimm
Professor of Public Law, Humboldt Universität zu Berlin
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.

Hopefully, 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 Böcü, 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.

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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).

FP	Fazilet Partisi (Virtue Party)
HSYK	Hâkimler ve Savcılar 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 Kararname (Statutory decree)
MHP	Milliyetçi Hareket Partisi (Nationalist Movement Party)
MİT	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)[4]
SPK	Siyasi Partiler Kanunu (Political Parties Law)[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)[6]
THKO	Türkiye Halk Kurtuluş Ordusu (People's Liberation Army of Turkey)
TİP	Türkiye İşçi Partisi (Workers' Party of Turkey)

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

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

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).

TMK	Türk Medeni Kanunu (Turkish Civil Code)[7]
TÜİK	Türkiye İstatistik Kurumu (Turkish Statistical Institute)[8]
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
YHK	Yüksek Hakimler Kurulu (High Council of Judges)[9]

7 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).

8 The English abbreviation is TURKSTAT.

9 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).

TABLES AND FIGURES

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.[10] 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.[11]

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.[12] 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.[13]

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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.
13 Cf. Gençkaya / Özbudun 2009, p. 22; Işiksel 2013.

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".[14]

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".[15] 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.[16] *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.[17]

More than five years later, it seems still not finally decided whether or not these acts of "self-abandonment"[18] are irreversible. In any case,

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14 Belge 2006, p. 654; for similar assessments cf. Özbudun 2000; Özbudun 2010.

15 E. 2016/6, K. 2016/12 (not published in the Official Gazette, but accessible on the Court's website (electronic archive).

16 Cf. E. 2016/166, K. 2016/159 (04/11/2016); E. 2016/167, K. 2016/160 (04/11/2016); E. 2016/171, K. 2016/164 (08/11/2016); E. 2016/172, K. 2016/165 (08/11/2016). Cf. also Sağlam 2018.

17 Cf. Wefing 2017.

18 Göztepe 2018b.

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.[19]

In this context it is particularly revealing that Artun Ünsal's book *Politics and the Constitutional Court*,[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*[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

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.

explanation for what he sees as a path-dependent lack of consistency in the Court's decision-making.[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[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.[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.[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.

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22 Cf. Ergül 2016.

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).

24 Cf., for example, Örücü 2009, p. 209.

25 Cf., among others, Belge 2006, Hazama 2011, Aydin-Cakir 2018, Kogacioglu 2003; 2004; Tezcür 2009; Shambayati 2008; Bâli 2012; 2013; Varol et al. 2017; Moral / Tokdemir 2017.

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.[26] Likewise, the (de)stabilising effect of (constitutional) courts in consolidated authoritarian regimes has been analysed in some detail.[27] 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.[28] 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.[29] While more sophisticated versions of this model developed over time,[30] they still conceptualise constitutional courts as 'ordinary' political actors among others, such as governments or parliamentary opposition.[31] As the original attitudinal

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26 Cf., among others, Daly 2017; Issacharoff 2015; Stone 2012; Scheppele 2005; Ginsburg 2003; Sadurski 2002; Epstein et al. 2001; Schwartz 2000.

27 Cf. Ginsburg / Moustafa 2008; Trochev 2006.

28 Cf., among others, Dahl 1957; Epstein / Knight 1997; Tsebelis 2002; Segal / Spaeth 2002; Bailey / Maltzman 2011.

29 Cf. Dyevre 2010, pp. 300 - 302; Segal / Spaeth 1993; Spaeth / Segal 2000.

30 Cf. Epstein / Knight 1997.

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[32] or external pressure group influence,[33] 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,[34] 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[35] or tried to measure whether the political positioning of the court varies according to different judicial proceedings.[36]

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".[37] 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.[38] 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.[39]

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-

32 Cf. Vanberg 2005; Giles / Blackstone / Vining 2008.
33 Cf. Epstein / Knight 1997; Collins 2008.
34 Cf. Ferejohn / Pasquino 2002; Ferejohn et al. 2009.
35 Cf. Davis 1999; Magalhes et al. 2017.
36 Cf. Ewert / Hein 2016.
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.[40] 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.[41] 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.[42] 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.[43] Regarding the AYM's founding after the military coup of 1960, this 'hegemonic preservation' theory seems most convincing.[44] 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.[45] 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

40 Cf. Stone Sweet 2002; Shapiro / Stone Sweet 2002; Shapiro 2005.
41 Cf. Ishiyama Smithey / Ishiyama 2002.
42 Cf. Ginsburg 2003.
43 Cf. Hirschl 2005; Hirschl 2007.
44 Cf. Bâli 2013; Belge 2006, p. 662; Can 2012; Özbudun 2006, p. 218.
45 Cf. Belge 2006; Can 2012; Isiksel 2013.

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 Europeanisation.[51] Nevertheless, other scholars continue to explain AYM adjudication by

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.
51 Cf. Belge 2006, p. 664.

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".[52] 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,[53] 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[54] and referral reasons, very roughly distinguishing between issues of "state principles" and claims of "horizontal accountability".[55] 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."[56]

A recent study by Aylin Aydın-Çakır analysing the impact of "the court's political preferences"[57] 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".[58] In this context, one finding concerning the "legal preferences" of the Court is particularly telling: regardless of the political context, there is a signifi-

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 Aydin-Cakir 2018, p. 1101.
58 Ibid., p. 1119.