Constitutional Courts During Political Upheavals:

The Case of the Turkish Constitutional Court

Abdullah Erdem Demirtaş

Boğaziçi University

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Abdullah Erdem Demirtaş

Boğaziçi University

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DECLARATION OF ORIGINALITY

I, Abdullah Erdem Demirtaş, certify that

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ABSTRACT

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Constitutional courts operate at the intersection of law and politics. Their task is to defend the normative superiority of the constitution by reviewing the constitutionality of laws. In doing so, they engage with other political institutions such as political parties, legislatures and executives. In times of political upheaval, the nature of the relationship between constitutional courts and other governmental organs is contested. This provides an ideal situation to observe the political dynamics of constitutional judicial review. This study aims to understand how constitutional courts fare during political upheavals by examining the Turkish Constitutional Court over an extended period of time. The Turkish Constitutional Court is a crucial case because Turkey has undergone episodic political upheavals where constitutional norms have been contested by different governmental institutions. The methodology of this study can be described as constitutional ethnography, which involves a close examination of the socio-political context that underlies legal institutions and relations. To this end, I examined politically salient court cases, interviewed judges, reviewed newspaper articles; I also used various secondary sources. My research has determined that the Turkish Constitutional Court has adopted one of three strategies during episodes of political crises: judicial activism, deference and avoidance. Furthermore, I contend that the court strategy depends on the degree of fragmentation of political power, the profiles of sitting justices, and extra-judicial alliances that the court can leverage against challengers.

ÖZET

Siyasal Kriz Dönemlerinde Anayasa Mahkemeleri:

T.C. Anayasa Mahkemesi Örneği

Anayasa mahkemeleri hukuk ve siyasetin kesişiminde faaliyet gösterirler. Görevleri yasaların anayasaya uygunluğunu denetlemek suretiyle anayasanın normatif üstünlüğünü savunmaktır. Bunu yaparlarken, siyasal partiler, meclis ve hükümet gibi diğer siyasal kurumlarla etkileşime girerler. Siyasal kriz zamanlarında anayasa mahkemeleri ve diğer siyasal organlar arasındaki ilişkiler sorgulanır. Bu durum anayasa yargısının siyasal dinamiklerini gözlemlemek için ideal bir ortam yaratır. Bu çalışma T.C Anayasa Mahkemesi'ni uzun dönemli bir incelemeye tabi tutarak anayasa mahkemelerinin siyasal kriz dönemlerinde nasıl davrandıklarını anlamayı amaçlamaktadır. Türkiye dönemsel olarak anayasal normların farklı siyasal kurumlarca tartışma konusu edildiği krizler yaşadığı için T.C. Anayasa Mahkemesi böyle bir çalışma için ideal bir vakadır. Bu çalışmanın metodolojisi, hukuki kurum ve ilişkilerin ortaya çıktığı sosyopolitik bağlamın yakından incelenmesi anlamına gelen anayasal etnografi olarak nitelenebilir. Bu çalışmayı yaparken, siyasal öneme sahip mahkeme kararlarını inceledim, hakimlerle mülakatlar yaptım ve gazete taraması gibi ikincil kaynaklara başvurdum. Araştırmam Anayasa Mahkemesinin kriz dönemlerinde üç tip kurumsal strateji geliştirdiğini ortaya koydu; bunlar yargısal aktivizm, yargısal itaat ve yargısal kaçınma davranışlarıdır. Ayrıca, mahkemenin kurumsal stratejisinin siyasal sistemdeki bölünmüşlük, hakimlerin kişisel profilleri ve mahkemenin kendi dışında kurabildiği ittifaklara bağlı olduğunu gösterdim.

Curriculum Vitae

Name: Abdullah Erdem Demirtaş

EDUCATION

PhD, Political Science and International Relations. Boğaziçi University 2021

Visiting PhD Candidate, UC Berkeley, Center for the Study of Law & Society 2020

MA, Political Science and International Relations. Yıldız Technical University 2012

BA, International Relations. Kadir Has University 2009

AREAS OF SPECIAL INTEREST

Comparative Judicial Politics, Law and Society, Authoritarian Regimes, Political Economy of Development

PROFESSIONAL EXPERIENCE

May 2014 – March 2022: Research Assistant, Boğaziçi University Department of Political Science and International Relations.

February 2013 – April, 2014: Research Assistant, Koç University Department of International Relations

October 2010 – December, 2011: Student Assistant, Yıldız Technical University Center for Global Studies

PUBLICATIONS

Book

Ortadoğu'da Devlet ve İktidar: Otoriter Rejimler Üzerine Bir İnceleme (State and Power in the Middle East: An Inquiry into Authoritarianism), Metis, 2014. (in Turkish)
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Erdem Demirtaş (2015). Review of Ryan Gingeras '*Heroin, Organized Crime, and the Making of Modern Turkey*' *New Perspectives on Turkey*, 52, pp 165-169. http://journals.cambridge.org/action/displayJournal?jid=NPT

Article

Erdem Demirtaş (2016) Otoriter Rejimler ve Bilginin Yönetimi, Birikim, 322 (in Turkish)

AWARDS

August 2019 – June, 2020: Fulbright Dissertation Research Fellowship

December, 2009 – September, 2011: Prime Minister's Scholarship for Master's Education

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ABBREVIATIONS

AKP	Justice and Development Party (*Adalet ve Kalkınma Partisi*)
ANAP	Motherland Party (*Anavatan Partisi*)
BMM	Grand National Assembly (*Büyük Millet Meclisi*)
CHP	Republican People's Party (*Cumhuriyet Halk Partisi*)
CS	Republic's Senate (*Cumhuriyet Senatosu*)
CUP	Committee of Union and Progress (*İttihat ve Terakki Cemiyeti*)
DP	Democrat Party (*Demokrat Parti*)
DYP	True Path Party (*Doğru Yol Partisi*)
ECtHR	European Court of Human Rights
HSYK	High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*)
MBK	National Unity Committee (*Milli Birlik Komitesi*)
MGK	National Security Council (*Milli Güvenlik Kurulu*)
MHP	Nationalist Movement Party (*Milliyetçi Hareket Partisi*)
MİT	National Intelligence Agency (*Milli İstihbarat Teşkilatı*)
MM	National Assembly (*Millet Meclisi*)
PKK	Kurdistan Workers' Party (*Partiya Karkeren Kurdistan*)
TBMM	Grand National Assembly of Turkey (*Türkiye Büyük Millet Meclisi*)
TCC	Turkish Constitutional Court (*T.C. Anayasa* Mahkemesi)
YARSAV	Judges and Prosecutors Association (*Yargıçlar ve Savcılar Birliği)*

CHAPTER 1

INTRODUCTION:

CONSTITUTIONAL REVIEW DURING HARD TIMES

Constitutional courts are created for tough times. In the midst of political upheaval, they confront divisive political disputes, and their actions or lack of action have a deep impact on political processes. At times they even precipitate political crises. Most political scientists would agree that courts, even constitutional courts, are "the least dangerous branch." Nevertheless, contemporary political science treats constitutional courts as significant political forces in their own right, and as significant institutions to be weaponized by others in the context of political conflict. This dissertation explores how constitutional disputes can erupt into deep crises and how constitutional courts respond to political upheavals. In addressing these issues, this dissertation also addresses long-standing debates in public law and comparative politics concerning the nature and sources of judicial power, the limits of judicial independence, and the role of constitutional review in regime politics.

The idea that specialized tribunals should guard the constitutional order gained ground after the Second World War. Postwar constitutionalism aimed to help the reconstruction of their countries and prevent the recurrence of such a catastrophe in the future. Constitutions embraced a charter of individual rights, often coupled with provisions for constitutional judicial review. Some constitutional courts, such as the Constitutional Court of South Africa and the Constitutional Court of Colombia (although these were late in the game of democratic constitution-making), guided the democratic transitions of their countries and championed human rights in post-authoritarian settings (Epp, 1998; Cepeda-Espinoza, 2004; Roux, 2013).

Although constitutional courts probably derive most of their prestige and notoriety from their rights protection function, their more important but less-understood function is restricting governmental authority within its constitutionally defined limits. Three waves of constitution-making—in the aftermath of WW II, in the wake of decolonization, and in the democracy movement in South America and Eastern Europe in the 1980s—embraced limited government, judicial review, and ambitious provisions for constitutional courts. However, the hope that courts would be bulwarks for protecting and reinforcing democratic institutions has not been borne out. Despite notable exceptions (e.g., in Germany, Japan, India, South Africa, and Colombia), the constitutional limits of the executive have been swept aside in a great many former colonies (Paul, 1974; Prempeh, 2006), replaced and rewritten with impunity in South America, and brazenly ignored in still other places as declarations of a state of emergency and military coups have superseded constitutional government (Landau & Dixon, 2020).

Scholarship on comparative courts has tried to make sense of these developments. One group has explored the *origins* of constitutional judicial review and the political foundations of judicial independence, asking why some constitutions provide for robust judicial review and others do not (Ginsburg, 2003; Hirsch, 2004, 2007). In contrast to some of the best work in this field, which explores the origins of provisions setting out the functions of constitutional courts, this dissertation explores the fate of robust constitutional courts during periods of political upheaval. Although we do not yet have a parsimonious model from which we can deduce necessary and sufficient conditions that explain the various forms of judicial review and judicial behavior (Shapiro, 2013, p. 397), we do have a body of impressive scholarship on ample observations that offer mid-range theories which

identify salient factors and guide our investigations (Kapiszewski, Silverstein, Kagan, 2013).

Like the best work in this field, this dissertation seeks generalizations about judicial power and the role of courts in the broader political system. Thus, it is comparative. But comparative analysis can proceed in one of two ways: either by comparing the same institutions (here, constitutional courts) in different political systems or by comparing a single court over time in the same political system. Both have their strengths and weaknesses. One could approach this task by comparing different constitutional courts in different countries and from very different legal traditions (like Shapiro, 1986; Ramseyer, 1994; Ginsburg, 2004; Hirschl, 2007 did in their seminal work on courts). This approach treats judicial actions as reactive and dependent institutions (variables) shaped by larger political processes. But often it is not dynamic and thick, so one can never be sure what the next political upheaval might bring. We might call the major flaw of this approach a *temporal fallacy*, generalizing a time-bounded episodic causal relationship into a general rule.

This thesis opts to examine a single court over time in order to compare its powers and its fate in a succession of different political regimes. The disadvantage, of course, is that it does not allow for the comparison of courts operating in different political traditions and political cultures. But the advantage is that, by holding political tradition and culture more or less constant when exploring different episodes in the court's history and the political system, we have a way to escape the temporal fallacy and are therefore better able to explore the institution's agency. That is, this dissertation treats courts themselves as salient political actors so as to more easily ascertain the variety of their functions amid frequent political turmoil and upheavals. It traces the changes in one country's regime, the shifts in the governing coalition,

and the composition of its courts to determine how courts are both the actors and the acted upon in the midst of intense political conflict (see e.g., Baxi, 1980; Trochev, 2008; Moustafa 2009; Hilbink 2011; Massoud, 2013).

Turkey lends itself to this form of comparative analysis. Over the past hundred years, Turkey has experienced dramatic cultural and political changes, and since 1962, the constitutional court has been a central institution in the political process. Tracing the judiciary's role in political conflict over time reveals a number of different roles the courts have played in the political system. Indeed, its roles and functions are so numerous and varied that it is beyond the scope of this dissertation to discuss them all. My study builds on a vast literature that details the early history and the role of the courts in modern Turkey. It reviews this material in search of insights into the nature of modern Turkey's judiciary up to the 1990s, concentrating on a series of political upheavals in the early 2000s. The reason for this focus is that Turkey has experienced major political upheavals in a short span of time during which the judiciary—particularly the constitutional court—has played a major role.

1.1 Research Problem

Comparative judicial politics has explained the political origins of constitutional judicial reviews (Ginsburg, 2003; Hirschl, 2007; Moustafa, 2009) and judicial independence (Ramseyer, 1994, Chavez, 2004). We now know that the strategic calculations of the incumbent elite play a great part in the creation of courts. On the other hand, the burgeoning literature on authoritarian legalism explains how revisionist political parties dismember liberal constitutions and pack courts to consolidate their rule (Landau, 2013; Scheppele, 2018; Ginsburg&Huq, 2018; Halmai, 2018). The purpose of my research is to address how constitutional courts

act in times of constitutional crisis, when revisionist political parties infringe on the constitutional order. The job of the courts in ordinary times differs vastly from their everyday function. Contradictions in modern politics increase and lend themselves to analysis during episodes of political crisis. These moments are crucial for the courts "in which the central operations of core institutions of the society are called into question" (Issacharoff, 2010, p. 537). Courts, we are told, are agents of the ruling regime (Dahl, 1957; Shapiro, 1986; Graber 1993; Hirschl, 2007) and also strategic actors (Helmke, 2009; Clark, 2010; Popova, 2012; Roznai, 2020). When confronting incoherence, fragmentation, and deep division that borders on open defiance within that regime, the question of how the courts react comes into play. How do courts fare in the absence of clear signals from the major political actors in an unstable regime? To better understand the questions that arise, I examined the Turkish Constitutional Court (the TCC) during successive episodes of political upheaval over the last sixty years.

Judiciaries in particular are sticky. The modern judiciary must appear to be independent and thus have a number of protections surrounding it. It is difficult enough to get rid of an individual judge. Dislodging a court or an entire section of a judiciary as a whole is even more difficult. Furthermore, judges have their own means of generating staying power. Most of their work is not politically salient, and someone needs to perform this function. Strong-arming someone out the door is politically costly. Enacting legislation and amending the constitution are time-consuming. Replacement and court-packing are less costly, but making a difference takes time. In a system of fragmented politics, all these strategies are even more difficult. Judges are able to make enough adjustments and garner enough supporters to make an all-out attack by their opponents difficult, if not impossible. On different

occasions, we have seen all these efforts succeed. At times, political movements have been strong enough to sweep away previous institutions and create new constitutional institutions. New constitutions that privilege their architects. Provisions that entrench incumbents. Selective implementation of judicial review. Strategic shifts in methods for judicial selection. A special constitutional court with an extraordinary range of powers. Establishing new law schools takes time and is unpredictable. State control of the bar generates deep resentment. Shifts in standing as to who can bring constitutional cases.

Though those who have lost out usually reclaim at least some of their powers and get more bites of the apple. However, the political and constitutional structure of modern Turkey has been transformed in a myriad of ways that preclude a return to what preceded it. Indeed, each regime has left indelible marks on the landscape that cannot be erased. Among other things, for instance, the defense of a return to Islamic features of the state is defended not in terms of natural features of an overwhelmingly Islamic society, but in the name of pluralism in a representative democracy.

This dissertation focuses on four episodes between 2002 and 2018 that precipitated either significant structural changes in Turkey's political system or major transformations within the ruling regime; in both cases, there were significant consequences for the judiciary, and the constitutional court in particular. For the most part, the causes of these cataclysmic changes were exogenous to any particular activities of the constitutional court, but at times, the actions of the constitutional court created tipping points that led to regime change. The logic behind this approach is that extreme political transformations or actions are likely to reverberate across all major governmental institutions, including the courts. This kind of situation provides

an opportunity to examine the relationship between politics and courts. Of course, ordinary litigation may provide evidence for such insights, but in the clash of major contests, the relationship will be highlighted and more visible, and thus the nature of political jurisprudence will starkly be revealed. Focusing on these crisis episodes, this dissertation argues that constitutional courts are creatures of regimes and that they have a limited arsenal to stop regime change without broad popular and institutional support.

1.2 Why Study Turkey to Understand the Political Function of Courts?

In the common tradition, law is understood as flowing from a time-honored custom that has its roots in the acceptance of communal practice and natural rights; the constitution is an unwritten understanding about institutions, practices, and customs. Change, even major change, is disguised as flowing naturally from the past with a minimum of disjuncture. Law and constitutionalism in modern Turkey, however, is akin to the polar opposite. Born amidst crisis and into an increasingly secular, democratic, and industrialized capitalistic era, modern Turkey confronted the failures of a collapsed empire, political absolutism, a religion-based legal system, and a traditional economic system, none of which were consonant with the aspirations of the emerging elites, who were attracted to developments in Europe.

One result was a felt-urgency to transform Turkey into a modern state with European-like institutions and aspirations. As we will see in Chapter 3, change agents were in a hurry, and to this end, they enlisted law, constitutions, and constitutionalism to help them construct their project of a modern Turkey. One result was that law (modern, secular law, at least), courts, and constitutions were understood as instruments, as means to an end. Politicians and political parties

wanted to construct their own visions of modern Turkey, and they competed with each other to realize them. They regularly turned to jurists to serve as their architects to design laws, institutions, and constitutions, and then to staff them. If their designs did not work, politicians sought to get rid of the architecture and architects; they were means to an end. Competing visions led to different visions and different expectations, which in turn led to struggles between politicians and those who staffed the institutions they had created.

Established in 1961, the Turkish Constitutional Court assumed a central role in the Turkish political system and state-society relations. From its inception, the Court was granted vast powers. It could review the constitutionality of laws after their promulgation upon referral from political parties in the parliament, or at the request of one-sixth of the members of the two chambers of the parliament, by directives from high courts and universities for legislation related to their fields, or from the president of the republic (abstract review). The Court could also review laws referred by trial courts about a pending case (concrete review). The Court's powers were not limited to constitutional review. It could close down political parties after the indictment of the chief public prosecutor and inspect the budgets of all political parties. Besides these powers, the 1961 constitution bolstered judicial independence with formal guarantees for judges. Throughout the 1960s and 1970s, the Court expanded its powers beyond what its creators had intended. It created innovative precedents to broaden its powers, including reviewing the constitutionality of constitutional amendments. With its rulings, the Court protected the bureaucratic autonomy of independent institutions, the judiciary, and universities against the military and right-wing governments.

On September 12, 1980, the Turkish armed forces staged a coup d'état. The coup leaders and right-wing politicians complained that the 1961 Constitution, which followed the 1960 coup d'état, which was too liberal for Turkey. The new constitution, drafted by a committee overseen by the junta, was approved overwhelmingly by a popular vote in 1982. The 1982 Constitution of Turkey was a retreat in terms of separation of powers, judicial independence, and democratic rights. It trimmed the judicial review powers of the constitutional court, the court nevertheless continued to play a major role in Turkish politics. Before the 1980 military coup, universities and minority parties in the parliament were the main agents who brought claims of multiple unconstitutionality claims to the court. The new constitution, however, disallowed this. The coup crushed labor unions, suppressed civil society, and abolished the independence of the universities. The regime defined rising Islamist and Kurdish movements as new domestic threats, so the main function of the TCC changed accordingly, that is, to keep the regime clear of Islamist and Kurdish identities. In line with this policy, the TCC closed down several Kurdish and Islamist parties between 1982 and 2002. The Court also espoused a very strict version of secularism—one that denied any presence of religious symbols in the public sphere. Its decisions regarding Islamic politics and religious freedoms laid the foundation of the contention between the court and Islamic movements in the following decades.

Throughout the 1990s, the Court primarily owed its power to Turkey's fragmented party system and weak coalition governments. In addition, thanks to the semi-corporatist nomination system, the Court was able to retain its ideological homogeneity. Most of the court judges were high judges nominated by other supreme courts. Turkey had only two law schools before 1978, so all the judges had trained in

either the Ankara University or the Istanbul University law school, both of which were famous for their positivist legalism and secularism. Finally, the 1982 Constitution granted the Turkish Armed Forces a privileged position in Turkish politics; it worked as an informal veto player. Though most of the judges shared a distaste for the military, the military and the judiciary shared the same views regarding the principle of secularism and a unitary state.

In hindsight, what we see when we look at the TCC over an extended period is a court that will at times confront and hold forth against the political regime, but also one that, when push comes to shove, is likely to adapt to a new system or new regime. This dissertation concentrates primarily on the period between 2002 and 2019. The argument I put forth is that the behavior of the Turkish Constitutional Court is mostly attributable to the structure of the political competition and the regime. The Court responded to the rise of Islamism and unsteady governing alliances by generating several coping strategies to defend the constitutional regime and its autonomy.

1.3 Organization of the Dissertation

Chapter 2 lays out the research questions that entertained this project and discusses various concepts and theories of political jurisprudence. It establishes that constitutional courts are creatures of political regimes and that their decisions depend on several institutional and extra-legal factors. First, I argue that the distribution of power in a political system, whether the power is fragmented or monopolized, can facilitate constitutional courts taking action against unlawful actions of incumbents as well as hinder them from doing so. Second, I contend that the composition of the courts and judges' political allegiances matters. A court divided along partisan lines

can hardly generate a unified action, while a court that speaks with a single voice can assert its authority unanimously. Third, I argue that the domestic and international rule of law networks could motivate judges to assert their power against revisionist governments.

Chapter 3 lays out the historical backdrop against which constitutional politics has been played out in Turkey through mini case studies of critical constitutional junctures. It explores the major historical events, trends, and cleavages underlying the law and politics in Turkey from 1876 to 2000. I contend that cyclical regime ruptures have characterized Turkey's constitutional development, the instrumentalization of law as a means of social control, and a judicial system embedded into the political regime. Drawing on secondary sources and legal texts, I show that major socio-economic crises and political deadlocks that could not be resolved peacefully within the regime that preceded every constitutional rupture. Also in this chapter, I trace the origins of constitutional review in Turkey and evaluate the relevance of the hegemonic preservation thesis to explain the emergence of the Turkish Constitutional Court.

Why does a constitutional court engage in an open fight with a government that controls both the executive and the legislature and enjoys wide electoral support? Chapter 4 offers an answer, focusing on the 2007–2010 constitutional crisis that ended up with court-packing. During this period, the pro-Islamist Justice and Development Party (Adalet ve Kalkınma Partisi, AKP) and traditional Islamic groups embarked on a constitutional dismemberment effort to consolidate their grip on the regime. The Turkish Constitutional Court fought off the Islamic challenge, but in the end, it was ineffective in its attempt to hinder the transition of power from the secular state elite to the pro-Islamist alliance. This chapter shows that the unique institutional

design of the Turkish Constitutional Court fostered ideological homogeneity at the helm of the Turkish judiciary, which in turn motivated Turkish judges to engage in an open fight with the pro-Islamist AKP from 2007 to 2010.

Chapter 5 explores the interim period (2010–2014) during which the Turkish Constitutional Court was packed and the newly-packed court strove to foster a new constitutional identity for the regime. The TCC overturned its decades-long understanding of secularism and redefined the very identity of the republican regime with its decision on the Education Reform Act. I also explain in this chapter how Islamist judicial networks operated in coordination with the government to pack the high courts. I show that the TCC turned a blind eye to this extra-legal process of court-packing. This chapter suggests that a packed court that enjoyed the support of major regime forces was able to play a decisive role in regime building by legitimizing, justifying, and endorsing the government's policies.

Why does a packed court stop deferring to its creators and strive to contain political conflict? How do courts navigate in the absence of clear signals from the major political actors in an unstable regime? Chapter 6 seeks to answer these questions by focusing on the TCC between 2014 and 2016 and the disintegration of the pro-Islamist alliance. Although the TCC endorsed government policies in the making of a new regime between 2010 and 2013, the Court challenged the government between 2014 and 2016 to contain the political upheaval and prevent it from escalating into a regime crisis. This episode also marked the introduction of individual complaints to the Constitutional Court, which opened a new venue for strategic litigation and internationalized the Court's source of legitimacy. This period ended with a failed coup attempt in 2016.

How do courts fare when the constitutional limits on the government fade away under an emergency rule in an unstable regime? Chapter 7 answers this question by investigating the often-neglected powers of the Courts, one of which is the power to influence political contestation by ducking controversial cases. The TCC adopted several strategies, e.g. postponing the hearing of a case or rejecting an application on procedural grounds, to keep some issues off the agenda. Particularly during the state of emergency (2016-2018), the Turkish Constitutional Court used its passive powers to evade some cases where the government had publicly stigmatized the plaintiff. Nevertheless, the Court's power has limits. I argue that the excessive monopolization of power and amendments to composition of the Court accounted for the Court's avoidance strategy. However, the cases I examine in this chapter show that the international allegiances of the TCC once helped it to justify its activism from 2014 to 2016.

CHAPTER 2

THE POLITICS OF CONSTITUTIONAL JUDICIAL REVIEW

The central contention of this dissertation is that law is a political relation and courts are political institutions. We can isolate neither legal institutions nor juridical relations from their historical and immediate political contexts. This is not to deny the normative content of law, but to explore the web of power relations that shape the way the law is understood. This study builds on a rich scholarly literature on law and politics and asks how constitutional courts deal with challenges in times of political upheaval. In this chapter, I intend to clear away the conceptual underbrush about constitutional politics, map out the theoretical terrain of the inquiry, and discuss my research method.

The first part addresses the elementary concepts of comparative constitutional politics: constitution, constitutionalism, and constitutional regime. Although these terms are often used interchangeably, they imply different things. Having clarified the central terms of the study, I explore strategic-realist theories of judicial politics and seek an answer to the questions of why constitution-makers establish constitutional courts in the first place and what the origins of court power are. The first part concludes with an elaborate discussion of judicial behavior and contextual factors that shape court decisions during political upheavals. The central contention of this part is that different configurations of three factors—the composition of the court, the distribution of political power, and the judicial support structure—account for different court strategies.

The second part presents the methodology and outlines the research design. This study employs a longitudinal case study method to understand how the Turkish

Constitutional Court reacted in successive episodes of political upheaval. I explain why I chose those episodes and how I selected politically salient court cases for each episode. A brief discussion of the difficulties I encountered while interviewing judges closes this chapter.

2.1 Conceptual Clarifications: Constitutions, Constitutionalism, and Regimes

Constitutions are a body of fundamental rules, principles, and precedents that establish the government Constitutions divide and allocate power among different state institutions and determine their competencies and functions. Constitutions also set up the procedures for making laws and altering governmental power. In addition to organizing the government, constitutions determine the nature of the relationship between the governments and their subjects by conferring rights and duties on each.

Constitutions are based on the idea that some laws are superior to others. Constitutions contain rules of recognition (Hart, 1997) or primary norms (Kelsen, 2007) that help determine the legality of ordinary laws. Therefore, constitutions, as the fundamental laws of a polity, are binding for all governmental organs, including legislatures. In addition to specifying the procedures for making laws, constitutions restrict the content of legislation. An ordinary legislative act cannot contradict the constitution. Constitutions also set the procedures for changing constitutional rules (Lutz, 1994). Those rules set higher standards for constitutional amendments than for changes to ordinary laws. Some written constitutions contain inviolable rules and principles that no one can change without abolishing the constitution altogether (Roznai, 2015).

Constitutionalism connotes limited government (Sartori, 1962). The basic method of limiting state power is a functional division of power between different

branches of government so that power will not concentrate in the hands of a few. Separation of powers has normative and functional consequences. Montesquieu (1748) suggested that dividing state power between a legislature, executive, and judicial branches is a precondition for liberty. It has become a mantra of democratic constitutions to divide state power between three different organs. Of course, pure separation of power is a theoretical construct rather than a reflection of how constitutional states work. Functions of law-making, administration, and law enforcement usually overlap. For instance, courts make laws by precedent, legislatures judge high officials in some countries, and executives issue decrees and sometimes have the power to veto legislations. Separation of power does not mean strict isolation of state powers from one another; instead, it creates a division of labor to increase efficiency in administration (Vile, 1998; Feeley & Rubin, 2000, p. 314). Oftentimes administrative institutions interpret laws whose true meaning is determined by how they are put into practice. Some scholars argue that constitutions are just bundles of text and meaning. Authoritative agencies interpret those rules, adjust them to circumstances, and determine their meaning (Troper, 2006). Courts are one of those agencies.

The idea of a limited government gained a new meaning with the diffusion of human rights. Especially after World War II, more constitutions adopted a charter of human rights that restricts the use of state power against its subjects (Law and Versteeg, 2011). A menu of fundamental rights has become a key principle of modern constitutions. Constitutionalism now means protection of human rights as much as it means separation of powers. Separation of power and individual rights create commitment problems (North & Weingast, 1989; Elster, 2000). Divided powers are meant to check each other. Nevertheless, in most cases, disputes arise

between governmental organs or between local and central authorities. Constitutional judicial review is one of the practical solutions to this commitment problem (Freeman, 1990). In common-law countries, constitutional judicial review is decentralized. Ordinary courts can review the constitutionality of laws during litigation. Other countries have opted for centralized constitutional review, which entails a separate constitutional court or tribunal (Stone-Sweet, 2012). Regardless of why constitutional courts emerged and spread in the first place, they tend to broaden their jurisdictions and undertake more administrative tasks.

2.2 The Political Origins of Modern Constitutionalism

So far, I have described the general characteristics of constitutions. Political analysis of constitutions is more concerned with explaining the social and political sources of constitutionalism. Of course, there are cases where victors have imposed constitutions on defeated states (Albert, Contiades, Fotiadou, 2020). With those exceptions, a strategic realist approach suggests that constitutions are manifestations of power struggles during the formation of constitutions (Ginsburg, 2003; Hirschl, 2013). Constitutions enshrine the interests and values of powerful societal actors. The struggle over what principles should guide the government and which actors should retain their power after the promulgation of the constitution entertains the constitution-making processes. In this sense, constitution-making is a process of elite bargaining, and constitutions are contracts to preserve the equilibrium outcome they reach (Ginsburg, 2013, p. 185). One could therefore say that constitutions are forward-looking documents that aim to affect the future distribution of power in a society. Legal institutions created by constitutions, e.g., property rights, electoral rules, term limits, and social rights, are designed to control the future distribution of

political power. Dominant actors who lead the constitution-making process want to secure their privileged positions and policy preferences to protect themselves in the event they lose their current powerful position in the future (Ginsburg, 2003; Finkel, 2005, 2008; Dixon & Ginsburg, 2017). Hence, if dominant actors believe that constitutional limits on power will benefit them or at least constrain their rivals, they embrace those constitutional limits.

Once established, we expect successful constitutions to form constitutional regimes. A constitutional regime involves more than constitutional texts and case laws. Constitutional relations, practices, and shared meanings that social actors attribute to constitutional rules make up a constitutional regime (Elkins, Ginsburg, Melton, 2009, p.39, p. 45). Bruce Ackerman (1991), for instance, defines a constitutional regime as "the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life" (p. 59). Constitutional regimes provide the "structure within which ordinary political contention occurs" (Tushnet, 2004, p. 1). Besides providing the rules of the game, a regime implies a constitutional identity (Jacobsohn, 2006, 2010), a particular vision of a political society (Finn, 2014). Sometimes constitutions include direct references to identity claims, and sometimes the constitutional identity emerges in the process of regime formation. All constitutional institutions, including courts, are embedded in a regime context. Constitutional regimes mediate their functions, strategies, and relations with other institutions and citizens.

Constitutions do not endure by standing still. Constitutional scripts can remain in place, but constitutional meaning and practices change (Strauss, 2001). It takes at least one governmental organ to agree to espouse a new understanding of rules and change their practices accordingly (Voigt, 1999). Thus, constitutional

regimes are dynamic orders in which different governmental organs negotiate rules, meanings, and practices. This study, however, is interested in transformative, episodic, and contested regime changes and the role of constitutional courts in those changes. Constitutional history and theory abound with constitutional ruptures where a revolutionary group abandons the existing constitutional regime and defines the terms of the new one (Ackerman, 2019; Jacobson, 2014). Constitutional revolutions (Jacobson and Roznai, 2020) and post-authoritarian constitutions are results of such constitutional ruptures through which charismatic leaders, revolutionary parties, or elite pacts establish a new constitutional order.

2.3 Constitutional Crisis

Constitutional crisis is an elusive concept. The term occurs more frequently in journalistic jargon than in the scholarly lexicon. Not all political upheavals or constitutional disputes erupt into a constitutional crisis. Constitutional showdowns between different institutions, while quite common, do not necessarily amount to a constitutional crisis (Posner & Vermeule, 2008). A constitutional crisis erupts when there is "a serious danger that the constitution is about to fail its central tasks" (Balkin, 2017, p. 147). According to Balkin, the central task of constitutions is "keeping the disagreements within the boundaries of ordinary politics" (p. 147). Hence, a constitutional crisis must be something that can potentially result in violence, anarchy or breakdown of the constitutional order. In these episodes, the constitutional system is tested (Whittington, 2002, p. 2098).

Constitutional crises can come in different forms. Sometimes, the constitutional framework does not resolve a political dispute and results in a political deadlock. This might be called an "operational crisis" (Whittington, 2002, p.2101).

At other times, a political party or movement may challenge the foundational arrangements of the constitutional regime. As I have discussed above, constitutional regimes are power-sharing arrangements as well as "idealized representations of a political community" (Whittington, 2002, p.2111). The viability of a constitutional regime depends on the commitment of major political actors to maintain these arrangements. What happens when a revisionist political group challenges the foundational values and power-sharing arrangements of a constitution? The regime can suppress the revisionist groups, coopt them or incorporate some of their demands. The capacity of the existing regime to incorporate or suppress a revisionist movement decreases the chances for a constitutional crisis. On the other extreme, the revisionist groups can eradicate the constitutional regime altogether with a coup or revolution.

But today, what we see more often is a revisionist political party contesting existing arrangements, taking over the government through elections and scraping constitutional limits to bring about a radical change in the dominant understanding of constitutional rules. They do not suspend or replace the existing constitution altogether; instead, they use constitutional procedures to radically transform the constitutional regime. Of course, some of those constitutional contestations could bring progressive changes in the regime's nature, such as expanding social and individual rights, adapting international norms or imposing stronger checks on the arbitrary use of power. Or they could well result in the erosion of the separation of power and a transgression of individual rights and liberties (Landau 2013, Scheppele 2018). It is more suitable to refer to these cases as crises of constitutionalism rather than constitutional crises.

The recent literature on the crisis of constitutionalism has emphasized political struggles that result in constitutional transgressions (Scheppele 2018, Graber, Levinson, Tushnet 2018, Levitsky & Ziblatt 2018, Ginsburg & Huq 2018). When we look at those cases, we see the culmination of a constitutional crisis when a revisionist political party that is dissatisfied with the existing regime pushes for a transformative change, despite the resistance of many other actors. But revisionist parties often have radical agendas that threaten entrenched interests, which makes a smooth constitutional change impossible. Like all institutions, regimes are sticky; they resist radical changes. Actors and institutions that benefit from the existing distribution of power want to protect the political equilibrium. Impetus from regime change generally emanates from changing socio-political relations and culminates in a regime crisis when the existing constitutional order can no longer adapt to or absorb the change. In times of major political transformations, the pace of institutional does not always overlap with political change; there is almost always a lag between the two (Skowronek, 2011; Balkin, 2020). Therefore, institutions such as constitutional courts become battlegrounds where revisionist forces and entrenched interests wrestle for what the future direction of a polity should be.

2.4 The Origins of Constitutional Judicial Review

Where do constitutional courts fit in this picture? Constitutional courts are creatures of their culture and the political regime (Dahl, 1957; Shapiro, 1986; Graber, 1993; Gillman, 2006). They perform specific political functions such as invalidating laws, making laws (precedent formation), and upholding or impeding the implementation of government policies. Still, constitutional courts are courts of law. They are bound by constitutional rules. They interpret and enforce laws made by more overtly

political institutions. Like all courts, constitutional courts exert social control, administer, and make laws (Stone Sweet, 2007). In doing these things, they need to maintain a semblance of independence from conflicting parties; that is the basic feature of courtness (Shapiro, 1986).

Courts derive their legitimacy from the perception that they are courts of law and that they act in a strictly neutral fashion toward disputants. In criminal or civil law trials, disputants are private individuals with whom the court has no structural affinity. We expect judges to act as an umpire between conflicting parties. In public law trials, however, things get complicated. Like all courts, public law courts derive their legitimacy from the appearance that they rule independently from the interests and values of conflicting parties. Because constitutional courts are structurally dependent on regimes, judicial independence becomes a burning issue. If people believe the court is barely independent of the regime, the court becomes an ordinary administrative agency. For this reason, most constitutions grant extended formal guarantees to constitutional courts.

But why do constitution-makers clip their wings by introducing entrenched rights and establishing independent courts in the first place? The strategic account of political jurisprudence tells us that constitution makers empower autonomous institutions because they believe they serve the best of their interests. The desired function of those institutions may vary. Political uncertainties about their future positions, such as in an electoral competition, may encourage dominant actors to hedge their bets by introducing individual rights and creating independent courts to protect them (Ginsburg, 2003). In those cases, independent constitutional courts serve as an insurance policy for dominant actors who are afraid of facing the wrath of their rivals. In some cases, authoritarian regimes empower constitutional courts to

provide credible commitments to international investors (Moustafa, 2007). In some other contexts, the political elite who lead the constitution-making want to use constitutional courts as political enclaves to maintain their policy preferences (Dixon & Ginsburg, 2017). They create autonomous enclaves that preserve their favorite policies even if they lose their law-making power in the legislature. Ran Hirsch (2004), for example, posited that in culturally divided societies, the modernist elite who are afraid of losing their power to peripheral groups after a transition to electoral democracy create autonomous enclaves to perpetuate their hegemony. The hegemonic preservation theory appealed to many constitutional scholars who aim to explain the origins of constitutional review in Turkey (Belge, 2006; Özbudun, 2006; Tezcür, 2009). These scholars posited that, after the military coup in 1960, the military-bureaucratic elite established a strong constitutional court to secure their power vis-à-vis democratically elected governments. Although the Court had been the stronghold of the secularist elite from 1963 to 2010, the Court fostered its own vision of a constitutional regime and exploited the rifts in the ruling alliance to assert its powers. In Chapter 3, I revisit the hegemonic preservation thesis and evaluate its validity in explaining the Turkish experience.

Functionalist-rationalist accounts of judicial politics explain a great deal about the emergence of independent courts. They attribute the independence of constitutional courts mainly to insecurities of incumbents at the time of constitution-making. Nevertheless, there are other sources of independent courts that functionalist accounts have left unexplained. A historical institutionalist/developmentalist analysis provides the perfect supplement to functionalist models (Clayton & Gillman, 1999; Smith, 1988). Most constitutions that were created after World War II and the so-called third wave of democratization adopted independent constitutional courts.

Constitution-makers do not live in a void; they learn from the experiences of other nations. Institutional isomorphism and international advocacy are responsible for the spread of constitutional review as well (Tebbe & Tsai, 2010).

Another lesson that can be taken from historical institutionalism is that there is no perfect institutional design (Elster, 1989). Most institutional inventions yield undesired consequences (Pierson, 2000). Constitutions are not immune to this design failure (Elster, 2018). Still, historical institutionalism tends to attribute too much deterministic power to moments of institution-building and claims that those moments create path dependency for institutional development. Like strategic theories of political jurisprudence, historical institutionalism sees institution-building as a form of entrenchment. Constitutional entrenchment is ill equipped to lock in policy preferences of constitutional-makers (Versteeg & Zackin, 2016). Constitutional change is common and frequent. The history of Turkish constitutionalism is emblematic of unintended consequences. For instance, five years after the creation of the Turkish Constitutional Court, the military that wrote the constitution began complaining about what they had created. The military was uneasy with the Court's independence. In 1973, the military urged the parliament to curb the power of the Court with an amendment. The parliament duly enacted the amendment, but the court found innovative ways to overcome the restraints that had been imposed on its powers. Another example is the introduction of the individual complaint system in 2010. The Turkish government introduced a provision that allowed individuals to file complaints, with the aim of reducing the number of human rights complaints that were being submitted to the European Court of Human Rights. However, introducing individual complaints to the TCC opened a new avenue for domestic rights claims and created a space for the TCC to exercise its

autonomy. The Turkish experience shows that once we create institutions, they can evolve in directions that their designers had not intended. Therefore, explanations of the birth of constitutional courts do not always explain future actions of the courts or their survival.

Finally, the historical development of legal systems accounts for judicial autonomy. In comparing the constitutional review systems of Japan and the United States, Malcolm Feeley (2002) distinguishes between autonomous laws and bureaucratic laws. He maintained that American courts retain institutional autonomy from the American state thanks to independence of the legal profession and the bar. The recruitment of judges is highly politicized, however; the bar has a huge say in the legal training and discipline of lawyers in the U.S. Judges emerge from lawyers, who maintain their ties with the bar. By contrast, judgeship in Japan is a bureaucratic job. Judges are trained and socialized within the judicial bureaucracy. Japan is in no way alone in bureaucratic law—the U.S. is more of an exception. In countries where it was the bureaucracy that undertook modernization, the legal profession and law became an integral part of state-making. Turkey is another example where state bureaucracy carried out the modernization of law and the state. Law has been seen as a tool for modernizing the state and society, for which reason the legal profession has identified with the state itself.

2.5 Constitutional Courts During a Crisis

We are now ready to address the main subject of this dissertation. Why do some disputes between governments and courts lead to crisis, and how do constitutional courts handle political upheavals? Tensions between high courts and other government organs are commonplace. Constitutional court decisions are likely to

upset governments when the court strikes down a law or censures a government for having violated the rights of citizens. For the most part, prudent, incremental decisions provide advantages to constitutional courts by reducing the chances of clashing with other governmental organs (Shapiro, 1998, p. 13). Courts activate their powers in low visibility cases, and they often make piecemeal policy changes instead of radical turns.

Instances of clashes between courts and governments are not rare, and they can easily end up in inter-branch conflict (Helmke, 2017). Political disputes sometimes erupt into a regime crisis when revisionist political parties challenge the existing constitutional arrangements or resort to non-conventional ways to impose their constitutional understanding. Facing revisionist political parties, constitutional courts can respond in one of three ways. At one extreme, courts can fight with revisionist governments to protect the constitutional order by invalidating laws and acts to dismantle the existing regime. Alternatively, courts can bunker down (Roznai, 2020), avoid confrontation with the new regime, or endorse its policies. But courts often act strategically, evaluating the political conditions and tailoring midway strategies to protect their autonomy and the constitutional regime where they are embedded.

The most famous example comes from the U.S. at the beginning of the New Deal regime, when the Supreme Court was referred to by the name of its chief justice, Charles Evans Hughes. The Hughes Court started with the first strategy but ended up with the second, i.e., by quietly deferring to the new regime. In 1935, the Court unanimously struck down the Emergency Farm Recovery Act and the National Industrial Recovery Act, which constituted the main pillars of the New Deal program. Against mounting resistance from the Court, President Roosevelt put

forward a court-packing plan to get rid of the Court. Roosevelt got the unified support of congress and also enjoyed popular support, which made him a credible threat to the Court. The Hughes Court ceased to impede the construction of the new regime by quietly deferring in its rulings. The Supreme Court upheld a state minimum wage law, the National Labor Relations Act, and the Social Act within a few months, albeit with a slim 5-4 majority (Friedman, 1997, p. 83).

In other examples—for instance in Hungary, Poland and Venezuela, where the political system was more polarized—the court and the incumbents totally diverged in their understanding of constitutional meaning, evidence that court battles can easily end up with court packing (Urribarri, 2011; Halmai, 2017; Sadurski, 2019). We will see in Chapter 4 that the Turkish Constitutional Court vociferously fought to defend the secular constitutional regime against an Islamic government, but a broad alliance of Islamists, conservatives, and liberals packed the court after three years of intense battles. Apparently, the Court saw it not as a fight against the government, but as their fulfilling their designated role in defending the constitution. What they played might be fairly described as defensive judicial activism in the face of a revisionist government.

However, constitutional courts often find alternative, midway solutions instead of going for extremes (Mann, 2018). As Alexander Bickel (1962) suggested, courts use justiciability doctrines such as political question, ripeness and standing to abstain from engaging in divisive issues (p. 42). Judicial avoidance does not always mean giving up powers or total deference. Courts sometimes refuse to hear cases on divisive issues by using similar doctrinal tools. Let the issue simmer for a time. The most recent example of this strategy is from the U.S. Supreme Court's marriage equality case (Obergefell v. Hodges, 2015). The Supreme Court had refused to hear a

similar case in 2013 by invoking lack of standing. In the meantime, more individual U.S. states granted marriage equality to same-sex couples, and public opinion leaned toward the positive side. Observing these developments, the Supreme Court granted *certiorari* to four petitions in January 2015 and ruled in favor of the petitioners in June 2015 (O'Mahony, 2015).

Another tool courts can use to avoid hearing a case is docket control (Delaney, 2016). Each court has different means to control their agenda, but we might say all courts have one way or another to control their dockets. In Turkey, the Chief Justice has absolute control of the agenda of the Court in abstract review cases. As for individual application cases, the Court works as two sections. A section president heads each section. Section presidents determine the agenda of their respective section. We will see in Chapter 7 that the court has used its agenda-setting authority to postpone the hearing of politically risky cases.

So far, we have delineated three modes of court behavior that are applied in times of crisis. The first is to stay and fight; the second is to bunker down, and the third is avoidance. In the next section I explore a mix of institutional (intra-court) and contextual factors that shape the court strategy.

2.5.1 Factors That Shape Court Behavior

Like all political action, court action is contingent on solving coordination problems. Because constitutional courts decide by majority vote, they must first solve any coordination problem among its members to take action and then observe the possible coordination problems of its opponents to gauge the probability of political backlash. The structure of the courts and the regime informs both of these coordination problems and shapes court behavior.

Table 1. Factors That Shape Court Behavior

Contextual Factors	Court Assertiveness
Political fragmentation	More likely
Ideological homogeneity at the court	More likely
Extra-judicial alliances of the court	More likely
Dominant party	Less Likely
Divided court	Less Likely
Isolated court	Less Likely

Comparative political jurisprudence has identified various institutional and contextual factors that shape the constitutional court strategy in controversial cases. We can classify those factors into three broad categories. The first has to do with the composition of the court and how its members engage in reaching decisions. It is common sense to talk about constitutional courts as if they were individual entities, but they actually comprise a group of individual judges who might have different perceptions about the crisis. At times, one vote can change a lot. For example, the Hughes Court saved itself from being packed by a swing vote from Justice Roberts. That event was the source of a humorous variation on a familiar proverb: "a switch in time saved the nine." Of course, a court that is divided along ideological lines will hardly generate a unified response to executive onslaughts. But a court that speaks with a single voice will stand much firmer than a divided court against revisionist governments. The institutional design of some court systems helps maintain ideological homogeneity in the court. For instance, the 1982 Constitution of Turkey designed a semi-corporatist nomination process for constitutional court judges. The constitution restricted the pool of nominations to make sure that high appeal courts would fill most seats. Aylin-Çakır (2019) showed that the ideological preferences of the Turkish Constitutional Court justices played a major role in the Court's increasing aggression toward the pro-Islamist government between 2002 and 2010, even though the government was monopolized. We will see in Chapter 4 that it was

the corporatist nomination system which made possible the ideological homogeneity at the helm of the Turkish judiciary.

The second category of factors involves how the political power is distributed between the government institutions and how political competition shapes judges' strategic calculations. Political fragmentation has occupied the center of comparative judicial studies over the last twenty years (Ramseyer, 1994; Cooter&Ginsburg, 1996; Epstein&Knight., 2001; Helmke, 2009). A fragmented political system creates a political opportunity structure for the courts to activate their powers (Chavez, 2003, 2004; Ríos-Figueroa 2007). It works in two ways, one of which is by distributing political power among competing institutions (e.g., the legislature and the executive); this creates coordination problems for governments that want to carry out a united action against unruly courts. Constitutions generally require supermajorities, or else they place several veto points to intervene in high courts. Governments need to ensure interbranch corporation if they aim to pack the courts. Of course, constitutions are sometimes described as *parchment barriers*, and a committed revisionist government can invoke a nuclear option. However, these are costly options, so anything that reduces the chances for the formation of anti-court coordination suits the courts. Institutional fragmentation allows courts to play one governmental power against the others. Balancing one power against the other reflects the basic logic of the separation of power. Some studies have noted that the logic of institutional fragmentation works in factionalized political parties and even in military regimes. A factionalized single-party government (Magaloni, 2008) or a military regime (Barros, 2003; 2008) can provide the same political opportunity structure for constitutional courts. The other way the political competition increases the chances for independent court action—even in non-democracies—is by motivating judges to distance

themselves from a waning regime (Helmke, 2009) or by motivating incumbents to hedge their bets on an independent court in case they lose power (Epperly, 2016). Studies on the relations between political competition and judicial independence have made the case for the context-dependent nature of judicial politics. Despite the literature's increasing emphasis on political competition as a prerequisite for independent judicial action, Popova (2012) shows that, in competitive authoritarian regimes, the logic of political competition works the other way around. In those regimes, the risk of losing power is so high that political competition motivates incumbents to put more pressure on the courts. What is sure is that political fragmentation and the nature of the competition are solid indicators of court behavior, though the direction of their impact may vary across different regimes.

The third category of factors that shape the constitutional court strategy in controversial cases includes ways constitutional courts assert their autonomy vis-à-vis incumbents. The courts that enjoy wide social popularity can be more confident in protecting their autonomy, as opposed to courts that lack such social capital. The belief that judges act on the principle of neutrality is the basis of court power (Shapiro, 1986; Gibson, Caldeira, Baird 1998; Staton, 2010). Equally important for bolstering court autonomy is the support of the so-called "legal complex," i.e., the bar, the legal academy, and bench judges (Halliday & Karpik, 1997). When lawyers are divided or are distanced from court judges, judicial autonomy is fragile (Halliday, Karpik, Feeley, 2004). Because lawyers and advocacy groups both carry rights-violation cases to the courts, they popularize the legitimacy of court decisions. Finally, constitutional courts' international linkages, such as European rule-of law-institutions, give them an impetus to protect rights and rely on their international credibility as a leverage against governments. Although Hungarian and Polish

examples have proved that without political support, European rule-of-law networks cannot save domestic courts from being packed (Scheppele, 2014; Bugaric & Ginsburg, 2016), their transnational connections and international obligations are intervening factors for both the court and government strategy during political crises. In the Turkish case, as we will see in Chapter 6, the TCC's fear of losing its legitimacy in the eyes of the European Court of Human Rights (ECtHR) prompted it to stop its practice of refusing to hear politically salient cases. However, squeezed between domestic concerns and international obligations, in most cases, the Court sends the ball to the ECtHR court. It decided to hear and reject cases instead of outright refusing to hear them.

The three contextual factors discussed above do not have isolated effects on the court behavior. Rather, different configurations of these factors either boost or mitigate their impact. For instance, Sanchez et al. (2006) have shown that, in Mexico, when the ideological division in the court corresponds to political cleavages in the political system, court activism is more likely. In the same vein, Aylin-Çakır (2019) showed that the legal preferences of Turkish Constitutional Court justices played a major role in the Court's increasing assertiveness against the pro-Islamist government between 2002 and 2010, even though a single party was dominating the political system. In the Mexican case, we see how the composition of court justices and political fragmentation work in synergy and lead to a more assertive judiciary. In the Turkish case, as Aydın-Çakır (2019) has shown, ideological commitments of constitutional court justices outweighed the risks that emanated from monopolization of the political system. In Chapter 4, I argue that, although a single-party government was monopolizing the political system, Turkey's political regime was fragmented

between competing bureaucratic factions, and that the TCC majority had aligned with the republican faction against the pro-Islamist government.

2.6 Research Design

This study employs the case study method to explain how constitutional courts handle political conflict, what strategies they implement, and how they respond to changes in the dominant political regime. The job of the courts in ordinary times is different from the role they play in political upheavals. Episodes of political crisis are times when the contradictions of modern politics sharpen and lend themselves to analysis. Those are extraordinary moments for the courts "in which the central operations of core institutions of the society are called into question" (Issacharoff, 2010, p. 537). Constitutional courts are designed for bad days. Whether they are designed to protect individual rights or entrenched interests, we expect them to perform in times of "systemic stress" (Issacharoff, 2019, p. 6). For the sake of political analysis, singling out politically salient court decisions from among an abundance of cases which bear less political salience is crucial. Since politically salient cases cluster at during of political upheavals, crisis situations let us examine the critical features of politics that we rarely observe during the normal course of politics.

I suggest that Turkey is a crucial case (Eckestein, 1975; Gerring 2007) for examining the intricate relationship between the courts and the political regime for a number of reasons. Originally, Eckstein (1975) described a crucial case as one "that must closely fit a theory if one is to have confidence in the theory's validity, or, conversely, must not fit equally well any rule contrary to that proposed" (p. 118). In my view, theories of political jurisprudence do not necessitate such a validity test,

since they are mid-range theories and do not claim to be a general theory. What we need is a comprehensive theoretical dialogue and reevaluation of theories of judicial politics to get a better understanding of judicial politics. As Gerring (2007) stated, a crucial case provides "a strongest sort of evidence in a non-experimental, single case setting" (p. 232) for testing theoretical argument. I therefore suggest that Turkey is a crucial case for such a research undertaking because Turkish history enables us to examine relationship between the courts and the political regime and allows us to amend our theories by looking at a single court over time, with changing majorities across different political regimes.

The comparative character of the study comes from a longitudinal comparative analysis of different crisis episodes in Turkish political history. Our theories of judicial politics do a good job of explaining why some episodes of a longitudinal development while failing on explaining some others. This historical variation enables us to make multiple and contrasting comparisons across time in a single case (George & Bennett, 2005, p. 32; Gerring, 2007, p. 21) and to evaluate how competing explanations fare in different episodes (George & Bennett, 2005, p. 91). Another advantage of a longitudinal approach is that it avoids the *temporal fallacy* that haunted the regime theory of the judiciary for a long time. Graber (2016) expressed this succinctly in one of his recent interventions:

> Regime theory's efforts to describe stable alliances between Supreme Court justices and members of the dominant national coalition capture the bipartisan elite that exercised a disproportionate influence over the federal judiciary during the twentieth century, but do not do justice to the more complicated relationships between the justices and the polarized elites of the twenty-first century. By implicitly treating the structure of constitutional politics at the time of the Warren Court as a constant rather than as a variable, neither the grand constitutional nor regime theory identify or analyze the contemporary political foundations of judicial power. (p. 149)

The Turkish case provides us with an almost experimental setting where the parameters of politics changed several times in a short period. We can make multiple

observations about judicial politics in a single country, but in quite different and contrasting political contexts. To be sure, those episodes are not detached from each other; rather, they follow a historical pattern of political development. Therefore, we need to trace the development of underlying factors historically while isolating episodic changes in the configuration of the political regime and episodic contingencies. To pursue this approach, I followed the lead of Doug McAdam's technique described in his seminal study, *Political Process* (1999). McAdam examined the episodes of social movement mobilizations in different episodes of American history. He examined not just peak mobilization moments but pre- and post-mobilization periods as well (Armato & Caren, 2002, p. 98). Following a similar strategy for each episode, I explored the patterns of political regimes and court relations that preceded and followed each episode.

2.6.1 Selection of Episodes

The episodes examined in this dissertation represent three major political upheavals in Turkey that have occurred since the election of the Justice and Development Party (AKP) to power in 2002 and an interim period between the first and second crisis episodes. The AKP has kept its majority in the parliament in the subsequent four general elections and has thus ruled Turkey since November 2002. Recep Tayyip Erdoğan has presided over the AKP and headed four governments, and since 2014, he has been President of the Republic. Three political upheavals, which precipitated cataclysmic changes in the political regime, have marked the AKP's rule.

The first episode: 2007–2010

The TCC's increasingly defensive activism against the AKP's quest to monopolize state power and to erode the existing secularist constitutional order characterizes this

episode. During this period, the Constitutional Court struck down an AKP-made constitutional amendment, halted the presidential elections, and heard a party closure case against the AKP. The period also witnessed the emergence of a pro-Islamist alliance to pack the courts and break the back of the military tutelage. This period ended with the packing of the Constitutional Court in 2010, which was a clear win for the Islamists.

The second episode: 2011–2014

The second episode marks an interim period between 2011 and 2014, during which time the new TCC used its powers to redefine the regime identity and aid the pro-Islamist coalition in carrying out regime restructuring. All the while, the AKP enjoyed popular support. The alliance between the AKP, the Gülenists, and President Gül was strong. With the support of the government, the TCC went on boldly to use its powers to fortify the new regime.

The third episode: 2014–2016

This episode witnessed the collapse of the pro-Islamist alliance, the emergence of intra-party cleavages, and a judicial tug of war between different Islamist factions. Also, the Turkish Constitutional Court began hearing individual applications in human rights cases. During this period, a civil war erupted between various state institutions controlled by different political factions. The fragmentation of political power and the introduction of individual applications facilitated the packed TCC to activate its powers and assert itself in politics. Amid political catastrophe, the TCC strove to keep the constitutional order from falling apart with its decisions. This period ended with a failed coup attempt on July 15, 2016.

Fourth episode: 2016–2019

This episode involves the emergency rule that was declared after the failed coup attempt in 2016. After that event, two judges of the TCC were arrested because of their alleged ties to the Gülenist Islamic network, who the AKP believed were the orchestrators behind the coup attempt. Between 2016 and 2018, the AKP restructured the whole state machinery by issuing emergency decrees. Thousands of public officials, judges and university professors were dismissed from their jobs by executive order, without due process. This episode also witnessed a regime change from parliamentarianism to a presidential system that gave the president unprecedented powers over the judiciary.

Table 2 summarizes the contextual factors that account for the different modes of judicial behavior in each episode.

Table 2. Crisis Episodes and the Political Context

	2006–2010	2011–2013	2014–2016	2016–2019
Composition of the Court	Secularist majority	Conservative majority	Conservative majority	Divided between conservative liberals and nationalists
Political System	Parliamentary-Dominant Party	Parliamentary-Dominant party	Parliamentary-Dominant Party	Presidentialism-legislative coalition with ultra-nationalists
Structure of the Governing Coalition	Secularist judiciary-military-pro Islamist	Stabile alliance of pro-Islamists	Fragmented alliance, informal factions	Stabile alliance between pro-Islamists and ultra-nationalists
Judicial Support Structure	CHP, High Courts, President	Pro-Islamist Government	European and domestic human rights network	Isolated itself

2.6.2 Selection of the Court Cases

Most of the work that the courts have done has little political salience. Courts routinely do a technical review and apply written rules to cases that are writ large, but some cases carry more significance for the courts, governments, and litigants. Some landmark cases might leave an enormous imprint in legal precedent, but others might involve a political interest. Thus, we should distinguish between politically salient cases and non-salient ones.

But what does it mean to be politically salient? The answer changes according to the research question. My purpose in this dissertation is to understand how political changes affect the court's decision-making, particularly the court's assertiveness and deference vis-à-vis the government. Accordingly, in this study, political salience refers to court cases that compel justices to take into account the considerations of the political elite (Kapiszewski, 2011).

For the first episode, it was relatively easy to select politically salient cases because there were three milestone TCC court cases that defined the crisis: a decision to halt presidential elections, the invalidation of a constitutional amendment to allow women to wear headscarves in government offices and schools, and the closure of a political party.

The second episode was an interim period during which the TCC used its powers to consolidate the new regime. I selected two court cases. With the Education Reform Act case, the TCC departed radically from its long-established understanding of secularism. It redefined secularism in a way that Islamists had long advocated (Kuru, 2007), thus rendering the state in the service of Islamic education. The second case I chose shows how the TCC turned a blind eye to the efforts of the Islamists to capture the high judiciary by endorsing the government's dubious court-packing

plan. The government expanded and changed the rules for judicial elections so as to eradicate republican domination in the high courts.

With the third episode (2014–2016), the TCC began hearing individual application cases, which caused the number of cases to skyrocket (see Table 3). I therefore employed a different method to select politically salient cases from the third and fourth episodes.

Table 3. Number of Individual Applications to the TCC

	2013	2014	2015	2016	2017	2018	Total
Number of applications	9,897	20,578	20,376	80,756	40,530	38,186	210,323
Number of decisions	4,924	10,926	15,378	16,100	89,653	35,395	172,376

Source: TCC website, anayasa.gov.tr

When the number of cases is great, it is sometimes impossible to analyze them all, and trying to do so risks glossing over salient cases, which might be obscured by the massive number of politically insignificant ones. Random sampling was not suitable for my purpose because salient cases are not evenly distributed temporally. Another issue is related to the temporality of court cases: the salience of a case for the court when it is heard might be different from the salience that an analyst attributes to a case after it has been heard. If the purpose of the analysis is to understand what the case meant for the court when it was heard, one needs to figure out the historical or contemporaneous salience of the case (Epstein & Seagal, 2000; Clark 2015). The political significance of cases also depends on the issue at hand. While some issues gain political significance, others are depoliticized, for example, so the salience of specific issues is also context-dependent. In addition, sometimes some cases gain more salience—not because of the rights issue involved, but because of the identity of the applicant. Granting particular rights to some plaintiffs might be more difficult for the court than granting the same rights to others. Evaluating the

court's assertiveness based on case salience is more telling than issue salience when examining court behavior.

Salience is an abstract concept. It manifests itself to observers through its effects. Analysts have used several surrogates to figure out salient cases. Some scholars invoke constitutional law books, law reviews, and congressional quarterlies to determine whether a case is politically salient. These publications reflect biases in the legal academy, but they do not allow us to make a distinction between legally salient cases and politically salient cases. Also, we need to know what a given case meant for the court at the time they heard it. To overcome these problems, Epstein and Segal (2000) proposed a novel method to determine the salience of U.S. Supreme Court cases through a systematic newspaper review. They assumed that *New York Times* editors are receptive to salient cases and that they print them on the front page.

Eptein & Segal's (2000) method has become the gold standard in identifying salient cases. Nevertheless, this method has its drawbacks. The front page of the *New York Times* is a precious asset. Sometimes other news can occupy the front page, pushing U.S. Supreme Court decisions to the back. Regardless, the U.S. Supreme Court has a unique place in the U.S. political culture, for which reason its cases may find a place on the front page more easily than court decisions in other countries. Not all countries have long-lasting news outlets that are relatively autonomous. In Turkey, for example, it is not uncommon for ownership of media outlets to change several times. Editorial policies also change accordingly.

I adopted a more synthetic approach to identifying salient cases. Because my purpose was to figure out how the TCC responded to political crises, I relied on the rulings of the TCC. For the abstract review cases, i.e., ones where the Court reviews

the constitutionality of laws, I reviewed all cases the Court heard between 2002 and 2018 and then identified the ones that related to episodes of political crisis. For individual application cases, I reviewed two newspapers—*Milliyet*, a mainstream news outlet, and *Yenişafak*, a pro-government daily—to extract politically salient cases. I did a keyword search in their online search archives. I counted a case as "salient" if the prime minister, deputy prime minister, a government spokesperson, or someone in the Ministry of Justice had made a comment about the case before or after the court decision (see Appendix A).

For the individual application cases, I supplemented the newspaper research with a review of legal journals and rulings produced by the General Council of the Court. The TCC has two panels that are authorized to deliberate individual applications. The head of each panel can take an application to the General Council of the Court if the case has the potential to bring about a sea change in the legal precedent or if it is likely to spark a political controversy (Interview 11, 09.07.2019). I compiled all cases that the General Council of the Court heard between 2012 and 2019. Then I compared those cases with the newspaper review data to see if I had missed any politically salient case. The Turkish Constitutional Court publishes selected case reports every year. I also reviewed these reports.

The Turkish Constitutional Court is authorized to protect the individual rights of Turkish citizens, which are also protected by the Turkish Constitution and the European Convention of Human Rights. The European Court of Human Rights (ECtHR) oversees the TCC's performance is to gauge to what extent the TCC follows the Convention and the case-law of the ECtHR. Getting the approval of the ECtHR is a matter of institutional prestige and legitimacy for TCC. Turkey, in fact, introduced individual application to the TCC to get rid of heavy fines imposed by the

ECtHR. It is also important for Turkish governments to resolve legal disputes domestically without the involvement of international actors. If the ECtHR decides that the TCC is no longer an effective domestic agent for protecting individual rights, it can start receiving individual applications from Turkey without waiting for the plaintiffs to exhaust domestic remedies. This might mean a loss of credibility for both TCC and the government.

The Turkish Constitutional Court used the ECtHR as a justification for its assertiveness in rights issues. In my interviews, I realized that some of the TCC judges have an idea of dual obligations. They feel more comfortable when they decide on individual applications because they are applying a "foreign law" according to "foreign standards." However, they act more conservatively when they make a constitutional review, because they have to respect the legislative power (Interview 9-10, 09.07.2019). One judge told me they did not want to be embarrassed in front of their European colleagues when the ECtHR decides a rights violation in a case that had been upheld by the TCC (Interview 3, 08.11.2018). TCC also occasionally deliberates a case which has waited in the docket for a long time—after the ECtHR signaled it would put the case on its agenda. To supplement these observations with illustrative cases and to understand how the ECtHR influenced the TCC decision-making process, I prioritized cases heard by the ECtHR that influenced the TCC's behavior.

2.6.3 Interviews

During 2018 and 2019, I interviewed four constitutional court judges, two constitutional court rapporteurs, three public prosecutors, and two ordinary court judges (Appendix B). The interviews were conducted two years after Constitutional

Court judges had been arrested and thousands of judges and prosecutors had been purged and jailed. Interviewing judges was therefore a daunting task. I tried to contact the Court judges via e-mail and personal secretaries in the courthouses. Only one judge agreed to talk to me. Months later, I found another judge through a personal contact. He agreed to talk to me in his office in the TCC building. Because I arrived at the interview very early, I encountered him in a conversation with other two judges in the court. After introducing myself, I invited the other judges to take part in the interview, and luckily, they accepted. The same day, I also interviewed the chief rapporteur of the Court. He provided invaluable information about the workings of the court and the logistics of individual applications.

I also wanted to interview local court judges to understand how they perceive the judicial battles in Turkey. Many refused to talk to me, and many more did not even reply to my request for an interview. At the beginning of my research, I wanted to reach out to judges from three Turkish judge associations. The Turkish Association of Judges and Prosecutors (Yargıçlar ve Savcılar Birliği, YARSAV) was the first association of its kind in Turkey, consisting mainly of secular judges. The AKP government shut down YARSAV after the 2016 failed coup attempt. I interviewed two judges who were former YARSAV members. One Istanbul judge had been re-assigned to a small Anatolian city. He moved to his new office, leaving his family behind in Istanbul. The other judge retired very early from his duty three years before I interviewed him. I also interviewed the president of the Democrat Judiciary (Demokrat Yargı), a liberal judge association with a small membership. The president of the Demokrat Yargı was also removed from his court because of his criticism of the government. The Union of Judges (Yargıda Birlik), the largest judges association, was founded in 2014 by a group consisting of nationalist, conservative,

and liberal judges with the mission to eradicate the Gülenist sway on the judiciary. The Ministry of Justice was involved in the foundation of the Yargıda Birlik and encouraged judges to join. The interview with the president of this organization was the most difficult one to arrange. I tried almost six months to contact a judge from the Yargıda Birlik, but all my attempts failed. Interestingly, I figured Turkish judges were probably active Facebook users, so I focused on Facebook groups to reach out to judges. After several failed attempts, I managed to get the personal phone number of the secretary of Yargıda Birlik. Finally, I was able to interview the president and a senior member of the association.

Before the interviews, I assured the judges that I was not going to record the interviews and would not reveal their names in my dissertation. I took notes during the interviews and organize them immediately after the meetings in local coffee houses near the courts. The interviews provided me invaluable insights about the state of Turkish judiciary and judges. Unfortunately, many statements of the judges have to be kept off the record.

CHAPTER 3

LAW, COURTS, AND THE TURKISH STATE

This chapter summarizes constitutional development in Turkey by focusing on historical cases of political conflicts that precipitated new constitutional regimes. Turkey's constitutional history is punctuated by military coups that obliterated the existing constitutional order and created a new regime. Military coups marked the tipping point in the episodic political upheavals, which were underlain by socio-economic conflicts. Each coup engendered a new political alliance between bureaucratic, political and societal forces, all of which wanted to entrench their own interests into a new constitutional framework. In the following pages, I examine these constitutional episodes, the sources of political conflict, the contending constitutional visions, and the resulting constitutional regime. I also pointed out some of the themes that emerged in the early years of the Turkish Republic—ones that still entertain constitutional debates. Besides common themes and path dependencies, we also see contingent developments that have played a decisive role in Turkey's constitutional development.

I have organized the chapter into four sections, each corresponding to a period in the constitutional history of Turkey. Section 3.1 examines constitutional developments in the late Ottoman Empire. During the 19th century, economic underdevelopment, which sprang from nationalism among Ottoman subjects and subsequent military defeats, conditioned Ottoman reformations. Under the pressure of these forces, the Ottomans reformed their administrative and legal structure to deal with these challenges. The process of Ottoman reformation, which included the recognition of equality before law regardless of religion, the dissociation of secular and religious courts, and the establishment of provincial assemblies, culminated in

the declaration of the first Ottoman constitution in 1876. In this section, we also see the interruption of the constitutional regime in 1878, the return of the absolutist rule of Sultan Abdülhamit and again the reinstitution of the Ottoman constitution after a popular uprising swept the Ottoman Empire in 1908. All these ups and downs of Ottoman constitutionalism created precedents for the decades that would follow.

Section 3.2 covers the first republican constitution that lasted from 1924 to 1960. After the disintegration of the Ottoman Empire in 1919, Turkish nationalists fought Greece in a war of independence and founded the Republic of Turkey on October 29, 1923. Led by Mustafa Kemal Atatürk, they founded the cadres of the republic and embarked on a cultural revolution that involved adopting Western laws, secularizing the court system, and creating modern law schools to train a generation of republican lawyers for the young republic. During this period, we also see the emergence of the Kemalist state ideology, which put national sovereignty and the secularization of the Turkish culture above everything else.

Section 3.3 examines the second constitutional period of the Turkish Republic between 1961 and 1980. With the democratic elections held in 1950, the Democrat Party (DP) ended a 27-year single-party regime. Turkey enjoyed a post-war economic boom between 1950 and 1954. However, as economic growth stagnated, the populist economic policies of the Democrat Party created dissatisfaction among the emerging urban middle classes and the industrialist bourgeoisie. The looming socio-political crisis ended in a military coup on May 27, 1960. A military faction toppled the Democrat government, abolished the constitution and, in an alliance with bureaucratic-intellectual cadres, wrote a new constitution. The 1961 constitution was built on a strong separation of powers system that guaranteed judicial autonomy and created the Turkish Constitutional Court

(TCC). Throughout the 1960s and 1970s, the TCC expanded its powers and protected the autonomy of the bureaucracy, the universities, and the judiciary against elected governments. This period also witnessed rapid industrialization, unionization and the spread of leftist ideologies, particularly among university students. Like many countries that implemented import substitution industrialization (ISI) during the 1960s, the Turkish economy entered a severe crisis in 1970. The liberal rights regime of the 1961 constitution provided a fertile ground for Turkish civil society to flourish. Faced with increasing labor militancy and popular mobilization, the Turkish military toppled the government, but this time it did not take over the rule. Instead, it forced the parliament to amend the constitution to restrict individual liberties and the power of the courts. Despite the military's increasing clout in the political system, the TCC challenged the military-led legal and constitutional changes and protected the autonomy of the courts and bureaucratic institutions.

Section 3.4 focuses on the post-1980 regime in Turkey. The military's intervention in 1971 did not quell the social unrest. Turkey drifted into a period of terror and street violence between various leftist and nationalist factions. Weak coalition governments were not able to bring peace and order to the streets. This time, on September 12, 1980, the Turkish military toppled the government, abolished the 1961 constitution, banned all political activities, shut down all civic associations, and silenced the streets. The army proctored the drafting of a new constitution, which was the reverse image of the 1961 constitution. Rights and liberties were restricted, judicial independence was severely limited, and the separation of powers was weakened. The military regime did not shut down the TCC, but it did change the way justices were appointed. In the years to come, the TCC gradually grew into a more conservative court that deferred to major regime interests. Turkey returned to

democracy in 1983, but it was an electoral democracy under military tutelage. Throughout the 1990s, the TCC dealt with new Islamic and ethnic challenges to the regime. It restricted the display of religious symbols in the public sphere and closed down several Islamic and Kurdish political parties.

3.1. The Origins of Turkish Constitutionalism in the Late Ottoman Period

Founded in 1923, the Republic of Turkey emerged from the Ottoman Empire, a multi-ethnic multi-religious empire that stretched from Budapest to the Arabian Peninsula in its most expansive period. The Ottoman patrimonial order was transformed under the pressure of European military might and expanding capitalism in the 18th century (Kasaba, 1988; Findley, 2008). A string of military defeats and domestic unrest urged the Ottomans to modernize their state structure in order to compete with their European rivals. Throughout the 19th century, the Ottomans made several reforms to upgrade their military, centralize state power, and establish a modern bureaucracy to save the Empire (Davison, 1962, p. 6). Some of these reforms were prompted by European pressure to open Ottoman lands to trade and to improve the conditions of the Christian minorities, but all of them also reflected the diagnosis of Ottoman statesmen: that the Empire could not survive unless it transformed itself to mirror European states (Findley, 1980, pp. 114-115).

The idea of a rule-bound government was not alien to the Ottomans. The concept of a circle of justice, which stressed the restriction of royal authority with supreme law of sharia and custom, was the single most important political philosophy (Fleischer, 1983, p. 49) and legitimizing ideology (Hallaq, 2012, p. 76) of the Ottoman Empire. Historians note that from the 16th century onward, as the Ottoman Empire expanded into new territories, the imperial order transformed into

one where Ottoman jurists occupied a central role (Gerber, 1994, p. 78; Barkey, 2008, p. 106; Tezcan, 2010). The monetization of the Ottoman economy and the emergence of an imperial market economy created a new economic elite that challenged the privileged position of the classical royal bureaucracy, required a more flexible adaption of imperial laws, and disturbed the classical Ottoman social order (Tezcan, 2009). Tezcan (2010) noted that in the midst of these socio-economic transformations, two scholarly positions emerged from Ottoman jurists about how to handle the transformation of the Empire: one supported an absolute sovereign who had no restrictions, while the other maintained that the sovereign should be restricted by jurists, who would have the ultimate authority to decide what the law was (p. 48). The constitutionalist elites had differing visions about social change. Some wanted to protect their positions against the newly emerging economic elite; others wanted to steer the change and adapt the Ottoman legal order to reflect the changing socio-economic relations. Whatever their differences were, Ottoman constitutionalists won over the absolutists and effectively limited the power of sultans. By the 17th century, the Empire was governed by jurists and bureaucrats (Abou El-Haj, 2005, p. 5). The power of Ottoman jurists was revealed during the political crisis that imperiled the Empire in the 17th century, which resulted in the deposition of the Ottoman Sultans Ibrahim (1648), Mehmed IV (1687), and Mustafa II (1703). In these instances of grave political crisis, the leading Ottoman jurists convened, discussed and decided that the deposition, or sometimes regicide, of the sultan was legally justified. Thus, they established a political order in which sultan's authority was effectively restricted by both sharia and Ottoman common law.

What we see in the 19th century is the transformation of the Ottoman legal order into a modern constitutional monarchy, where the classical circle of justice was

accompanied by representation and equal citizenship. In terms of constitutional development, the period between 1839 and 1876 has particular importance. The 1839 Imperial Edict of the Rose Chamber (Gülhane Hatt-ı Hümayunu) and the 1856 Imperial Reform Edict (Islahat Hatt-ı Hümayunu) marked the beginning of modern constitutionalism in Turkey. With these reforms, the Ottoman sultan granted equality before the law to his subjects, regardless of their religion (Davison, 1963, p. 40). Subjects of the classical Empire were treated according to their religious affiliation. The Empire was ruled by the Islamic law of Sharia; the sultan's acts notwithstanding, Orthodox Greeks, members of the Apostolic church of Armenians, and Jews were free to govern their internal affairs according to their respective community's religious orders. In their relations with the state and with the Muslim community, they were subject to the traditional Ottoman order. While the sharia preserved its place in family law, the Ottomans began secularizing their criminal, property, trade, and taxation laws to integrate the Empire into the modern European state system. For instance, in 1840, a new penal code considered all Ottoman subjects equal, established mixed tribunals of Muslim and non-Muslims, and ended unequal taxation of non-Muslims (Davison, 1963, p. 44). This was also the first step toward the adoption of a single supranational citizenship for all Ottoman subjects (Hanioğlu, 2008, p. 74).

Another aspect of the Ottoman reformation was the centralization of the administration. For more efficient tax farming and social control, Ottomans modernized their fiscal bureaucracy. To train new cadres for the administrative state, they opened new schools, mostly modeled on French institutions (Hanioğlu, 2008, p. 102; Mardin, 1962, pp. 206-209). Their engagement with European culture, science,

and philosophy bred constitutionalist ideas. Known as the Young Ottomans, these new intellectual bureaucratic strata formed the first constitution of Turkey.

3.1.1. The First Ottoman Constitution: Kanun-i Esasi (The Basic Law)

The Tanzimat reforms were significant steps toward modern constitutionalism, but the state was still an absolutist monarchy that relied on a different understanding of political legitimacy. But the idea of constitutional government took hold among intellectuals, soldiers, and bureaucrats, who were educated in the Tanzimat school and were witnessing the predicament of the Empire. By the last quarter of the 19th century, the Ottoman economy was in a miserable condition. Inclement climate conditions hit agricultural production in 1873 and 74. Increased taxation of the peasantry sparked a revolt wave in Serbia, Bulgaria, Romania, and Egypt. The Empire borrowed increasingly large amounts from European banks to finance exhausting wars throughout the century. In 1875, the Ottoman treasury defaulted on its debts and declared a moratorium (Pamuk, 2004). The inability of the sultan to deal with the economic misery sparked protests in Istanbul.

ln May 1876, Mithad Paşa, a former governor who had been exiled due to his affiliation with the Young Ottomans, led a successful junta comprised of Ottoman commanders and statesmen and overthrew Sultan Abdülaziz. The junta enthroned Crown Prince Murat, who was known for his sympathy to a constitutional government. Soon after his appointment, however, the new sultan suffered a mental breakdown, and was replaced by his younger brother Abdülhamit, on condition that he would declare a constitution for the Empire (Davison, 1963, p. 361). Mithad Paşa then formed a constitutional committee of Ottoman civil officials and jurists to draft a constitution. The commission reviewed several European constitutions along with

proposals drafted by Ottoman intellectuals and statesmen, and months later completed their own draft, which was presented to and accepted by the junta leadership. The draft was then presented to Sultan Abdülhamit, who had no choice but to approve it. Thus, the first written constitution in Turkey (the Kanun-i Esai [Basic Law]) was adopted on December 23, 1876.

The constitution recognized the Sultan as the sole sovereign and head of state (Tanör, 2015, p. 135). It created a two-chamber parliament that consisted of the Heyet-i Ayan (House of Notables) and the Heyet-i Mebusan (House of Representatives). The sultan appointed all members of the Heyet-i Ayan, while members of the Heyet-i Mebusan were elected by popular vote. Although the Heyet-i Mebusan was vested with legislative power, the Heyet-i Ayan and the sultan were accorded absolute veto powers. Apart from that, the sultan could temporarily suspend or abolish the parliament at will (Tanör, 2015, pp. 138-139).

The Kanun-i Esasi did not establish a true constitutional monarchy, since it placed no meaningful restriction on the absolute power of the sultan. However, the constitutional order depended on the power of the Young Ottomans to shape the sultan's will, which, under the circumstances, they were able to do. Nevertheless, the Kanun-i Esasi was a step toward a parliamentary democratic government. It acknowledged that all Ottoman subjects were equal, and it created a representative assembly. Provincial assemblies, established in 1864, functioned as an electoral college to elect representatives to the Ottoman parliament (Davison, 1963, p. 374). For the first time in Ottoman history, non-Muslims gained the right to participate in making laws for the Empire. In fact, one-third of the representatives in the first Ottoman parliament were non-Muslim Ottoman subjects.

The constitution was even more progressive with respect to reforming the Ottoman judiciary. It endorsed court independence and judge security, created secular Nizamiye Courts, which were responsible for trying civil, commercial, and criminal issues, and established the Supreme Court of Appeals. With these reforms, the Ottomans recognized the separation of administrative and judicial functions, which had been unthinkable just a few years before. The traditional Ottoman judge, *kadi* in Turkish, worked as a jurist, judge, and local administrator. In some occasions, the kadi inspected markets, supervised Islamic endowments, collected taxes, and appointed mosque preachers (Rubin, 2011, p. 38). From 1876 onward, the administrative duties of the kadis were delegated to local administrators. That separation of administrative and judicial functions was novel to the Ottomans and created many tensions between the judges and administrators. Ottoman governors expected flexibility from judges when their duties intersected. There were numerous petitions to the ministry of justice complaining about local governors. In those cases, the ministry defended independence of the courts (Rubin, 2011, pp. 42-43). Local administrators were not the only ones who had a distaste for judicial independence. Foreign consulates, who had once been able to intervene in trials through their connections with local authorities, quickly found that this source of influence had disappeared (Rubin, 2018, p. 3)

As promising as all this was, the Ottomans' first experiment with parliamentary government was short-lived. In April 1877, just four months after adoption of the constitution, a revolt against Ottoman rule broke out in Serbia and escalated into what is known as the Russian-Turkish war. The war was catastrophic for the Ottomans. The Russian army almost reached Istanbul; the capital was saved only by the last-minute intervention of the United Kingdom and Prussia. Still, the

Ottomans lost Serbia and Romania (Zürcher, 2004, p. 75). Mithat Paşa, who had risen to become Sadrazam (prime minister) just before the promulgation of the constitution, along with the junta and the army, were blamed for the humiliating defeat and lost their prestige and popularity. By contrast, the sultan emerged with significant powers. He dismissed and exiled Mithat immediately. Subsequently, he shut down the parliament, and for the next 30 years (1878-1908), Sultan Abdülhamit ruled the Empire without few if any real checks on his power (Zürcher, 2004, p. 76). Although he never abolished the constitution, he ignored it with impunity throughout the rest of his long reign.

Nevertheless, the transformation of the patrimonial order into a centralized bureaucratic state continued apace during Sultan Abdülhamid's long period of authoritarian rule (Findley, 1980, p. 240). The civil bureaucracy and modern education institutions continued to expand his regime, and in so doing, created fertile ground for opposition. The sultan's tyrannical rule alienated a generation of young intellectuals who were enamored with the European ideas of liberty and equality. These so-called Young Turks comprised an increasingly restless portion of students, young military officers, and bureaucrats (Zürcher, 2004, p. 86).

The Young Turks, organized mostly in the Ottoman Balkans and Europe, formed a small clandestine group to advance liberal political ideas. The most notable of them was the Society of Union and Progress, which then turned into the Committee of Union and Progress (CUP). They wanted to end the absolutist rule of the sultan and resuscitate the near-defunct constitution. They did not have a clear ideology, but their ideas were colored with different shades of political liberalism. They shared a vision of creating a modern Ottoman nation from an ethnically and religiously diverse population, and in so doing, save the Empire. The Union of

Progress expanded its secret networks in schools and the army. They had a masonic organizational structure, initiation rituals, and took an oath to be member of the Union (Ahmad, 1969).

3.1.2. The Constitutional Revolution of 1908

Constitutionalist ideals spread not only among Young Turks and intellectuals; it had widespread popular appeal among the Ottoman urban population. Between 1906 and 1909, tax revolts hit the Ottoman provinces hard. Provoked by the economic catastrophe, people stormed government buildings, sent telegrams to the capital demanding a reduction in taxes, and demanded a meaningful system of political representation (Kansu, 1995, pp. 37-61). The sultan was unable to quell the unrest or improve the economic situation. The Empire became financially, if not territorially, a European colony. The Ottomans lost their financial sovereignty when European debtors installed an agency in Istanbul to collect payments that the Ottomans owed to European companies and banks in 1881. The Young Turks viewed the constitution as a panacea, a way out of this dilemma, and a means to save state sovereignty and national pride (Sohrabi, 2011, p. 34).

Riding the wave of popular distress, in July 1908, the CUP declared liberty in Ottoman Macedonia. The Declaration of Liberty was received with enthusiasm across the Ottoman Balkans. People sent telegrams to the Palace in Istanbul for the reinstitution of the constitution and the Ottoman parliament. The clamor was so intense that Sultan Abdülhamit felt compelled to restore the constitution and summon the parliament thirty years after he had shut it down (Kansu, 1995, pp. 131-140.

This ushered in the “second constitutional era,” whose impact was substantially different from the first one. Following sultan’s call, popular elections

were held in the Empire. These resulted in a sweeping victory for the CUP. The young and inexperienced CUP leadership chose to stay out of the cabinet, which was composed of experienced Ottoman bureaucrats and soldiers, but they used their parliamentary majority to exert control over the government (Ahmad, 1993, p. 35; Akşin, 2005, p. 27). The 1876 constitution granted ultimate power to the sultan to form and control the government. This created tensions between the CUP, the sultan, and the cabinet in the first months following the elections. Nevertheless, the parliament and the cabinet gained de facto autonomy from the sultan. For example, the cabinet presented their program and asked for a vote of confidence from the parliament, even though the constitution did not require it. This indicated that the new government embraced the legislative supremacy, thus making the executive authority responsible to the legislature (Tanör, 2015, p. 187).

The 1908 constitution was even more far-reaching; in fact, it can be termed a genuine constitutional revolution. Unlike the case of the 1876 constitution, the revolutionaries of 1898 had broad public support, and they used it to establish a law-making parliament and then install a representative. For the first time in Ottoman history, the constitution created a popularly elected parliament that became the nation's main law-making body and simultaneously restricted the authority of the sultan. Like all revolutions, however, the 1908 revolution created a backlash among traditionalists. In April 1909, traditionalist soldiers and students stormed the parliament building, killed two representatives, and demanded the resignation of the government and the restoration of the sultan's authority. The uprising quickly spread across Istanbul, and insurgents took control of the military headquarters (Akşin, 1980, p. 126-127). However, CUP leaders in Thessaloniki organized an army (Hareket Ordusu, a Movement Army) of revolutionary soldiers and marched to

Istanbul. In less than two weeks, the Movement Army, consisting of elite forces from the Ottoman army, suppressed the revolt and restored the parliament. The parliament reconvened on April 27 and in a short time deposed Sultan Abdülhamid, exiled him to Thessaloniki, and then replaced him with his brother, Mehmet Reşat (Akşin, 1980, p. 133).

Following its success in putting down the uprising, the parliament consolidated revolutionist gains. The parliament amended all 21 articles of the constitution (Tanör, 2015, p. 192). Among the more salient changes were that the sultan retained his title as head of state, but his powers were severely constrained. New sultans had to pledge loyalty to the constitution before taking the throne, and budgetary powers were placed under parliamentary control. And while the sultan retained the authority to appoint the Sadrazam (prime minister), both the prime minister and the cabinet were no longer responsible to the sultan, but to the parliament. In effect, this forced the sultan to select a prime minister who was sure to receive the approval of the parliamentary majority. With these amendments, the Ottoman Empire was transformed into a parliamentary monarchy.

In addition to constitutional amendments, the parliament further reorganized the state to create loyal bureaucratic cadres. For each ministry or state department, a reorganization commission was established to examine civil servants. The commissions consisted of three members of the relevant department, a member of the senate, and a member of parliament (Findley, 1980, p. 296). Those with whom the commissions found fault were summarily dismissed from their jobs without any gratuity or unemployment benefit. Those who were found fit for public service were relocated to different departments or offered a gratuity. According to the British ambassador's reports in 1909, the reorganization commissions claimed that 27,000

civil servants who had been purged from the different levels of the state bureaucracy were thought to be supporters of the now-deposed sultan. They were replaced with supporters of the revolution and parliamentary sovereignty. From this point on, periodical purges were carried out in the Turkish state and its bureaucracy. I trace the contemporary implementations in the next chapters.

Turkey underwent a vibrant democratic experience between 1908 and 1912. Several political parties and civil and professional associations sprang up in the Empire. In 1911, an opposition party, Hürriyet ve İhtilaf Fırkası (Freedom and Accord Party), was founded by liberals who had split from the CUP. Damat Ferit, the son-in-law of Sultan Abdülmecid, was its first president (Tunaya, 1988, p. 263). The February 1912 elections, marred by fraud and brutal electioneering, ended in favor of the CUP. The elections resulted in a landslide CUP victory, but rampant fraud ignited protests across the Empire (Tunaya, 1988, p. 272). A military faction aligned with Freedom and Accord issued an ultimatum in July 1912 that created a new bipartisan cabinet. Around this time, the Empire suffered a series of defeats in the Balkans, which resulted in the loss of its European lands. Amid this turmoil, in January 1913, CUP leaders raided the Sublime Port (the government building), killed the minister of defense, and took control of the government (Ahmad, 1993, p. 37).

Between 1913 and 1918, the CUP governed the Ottoman Empire. In 1914, it engaged the Empire in World War I on the side of Germany and Austria-Hungary. The results of the war were catastrophic: almost half a million Ottomans died. In 1915, the CUP government forced Ottoman Armenians from the Anatolian heartland to Syria. The expulsion of the Armenians resulted in a total human tragedy. More than half a million Armenians were killed by soldiers or bandits or died from disease on their way to Syria (Zürcher, 2004, p. 155). At the end of the war, the Ottoman

army was defeated, the Christian population was virtually decimated, the CUP leadership was torn apart, and Istanbul was occupied.

3.2 The First Turkish Republic

The Ottomans lost most of their territory in Europe and the Middle East at the end of World War I. Allied forces occupied Istanbul and the Anatolian heartland in the aftermath of the war. In 1919, Greek forces occupied western Turkey and marched toward Ankara. Led by a young Ottoman general, Mustafa Kemal, who, along with scores of soldiers, bureaucrats, and local notables—most of whom had been members of Union and Progress—organized a resistance network against the occupation (Ahmad, 1993 p. 52). Because the capital, Istanbul, was occupied by English and French forces, resistance movement moved the parliament to Ankara in 1920 and adopted a new constitution the following year. The Grand National Assembly (Büyük Millet Meclisi, hereafter BMM) elected Mustafa Kemal as the chair of the assembly and then commander-in-chief to orchestrate the independence war against the Greek occupation. The BMM adopted a new constitution in 1921. After the independence war was fought and the Greek army was defeated, the BMM abolished the Ottoman throne on November 1, 1922.

There were two main factions in the BMM: the Kemalists, who united under the leadership of Mustafa Kemal on one side, and the more liberal wing of the BMM on the other. The Kemalists founded Halk Fırkası (Peoples Party, hereafter the HF) in April 1923 and eliminated the second group with a snap election in June 1923 (Tunçay, 1981, p. 49; Demirel, 2003, p. 571). The HF-dominated parliament ratified the Lausanne Treaty in July 1923, which provided international recognition for the Ankara government. After securing the peace treaty, the BMM declared the

foundation of the Republic of Turkey on October 29, 1923 with a constitutional provision introduced into the 1921 constitution. Mustafa Kemal was elected as the first president of the Republic of Turkey.

3.2.1 The 1924 Constitution

One of the first orders of business of the new regime was to draft a new constitution. In 1924, the parliament, now the Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi, TBMM), adopted a new constitution. Although there was no opposition party in the parliament, intraparty opposition was fierce. The new constitution rested on the principle of national sovereignty. It boldly stated that the Turkish state was a republic and that sovereignty belonged to the nation. National sovereignty was nested in the parliament (TBMM). The TBMM exercised legislative power itself, and its executive power was delegated to the president of the Republic, who was also an elected member of the TBMM. But the president was politically dependent on his prime minister and the cabinet. He was allowed to use many of his powers only with the approval of the prime minister.

The constitution acknowledged the judiciary as a separate power. It stated that judges were to be independent and free from any intervention (Constitution of Turkey, 1924, article 54). However, judicial security was not entrenched in the constitution. The constitution left the regulation of judicial affairs—including job security for judges—to the legislature. This left the judicial independence to the will of parliament. There was no judicial review mechanism to check the constitutionality of laws, so the parliament had the ultimate authority to interpret and change the constitution at will. Though it was a democratic constitution in essence, it lacked an

effective system of checks and balances, which in turn promoted majoritarianism in the name of national sovereignty.

For a brief period between 1923 and 1925, Turkey had a vibrant parliamentary government. Despite a single-party majority, different party factions clashed in the parliament. In 1924, a liberal faction splintered from the HF and founded the Progressive Republican People's Party (Terakki Perver Cumhuriyet Fırkası). They embraced a more liberal view of the economy and religion. However, this multi-party experience did not live long. In 1925, a Kurdish uprising flavored by nationalist and Islamist elements broke out in the eastern provinces (Tunçay, 1981, p. 129). The massive Kurdish uprising threatened the regime, which had not yet consolidated its power across the country. The TBMM enacted the Law on Maintenance and Order (Takrir-i Sukun), which granted the government emergency powers for two years to ban any organization, publication, or political party that was considered disruptive to law and order in the country (Zürcher, 2004, p. 171). The law also established Independence Tribunals (İstiklal Mahkemeleri) to try insurgents. Members of the parliament served as judges in these tribunals. Appealing their decisions was not possible. With these powers at its disposal, the government stringently suppressed the uprising, arrested the rebel leaders, tried them in Independence Tribunals, and executed 47 of them (Akyürekli, 2013, p. 74) The Kemalists used the uprising as a pretext to suppress all forms of opposition, not just the Kurdish uprising, and to bolster an authoritarian single-party regime. The Kemalists accused some members of the newly formed Progressive Party of supporting the Kurdish uprising and shut down the party.

Between 1925 and 1950, a single-party regime governed Turkey. After consolidating his power, Mustafa Kemal concentrated on cultural and legal reforms

to realize his modernization project. His grip on the party and the parliament allowed him to launch a series of legal, institutional and cultural reforms to eradicate the Islamic legacy of the Ottoman period. The revolutionary reforms were so significant that many themes in the following chapters of this study can be traced back to this Kemalist episode. In what follows, I examine the formation of the ideological underpinnings of the Turkish Republic, often referred to as Kemalism. As we will see, it is an eclectic modernist ideology that has taken different and sometimes contradictory forms throughout modern Turkish history. Nevertheless, the institutional practices of Kemalist regime created a path-dependent trajectory for future constitutional development.

3.2.2 The Rise of the Kemalist State Ideology

The single-party government fostered a state ideology called Kemalism, or Atatürkçülük. The ideology of the regime was concertized in the personality and ideas of Mustafa Kemal and articulated in six principles: republicanism, nationalism, populism, statism, secularism, and revolutionism. Mustafa Kemal's Republican People's Party (Cumhuriyet Halk Partisi, CHP) adopted these six principles in its party program in 1931, and the TBMM added them to the constitution in 1937. Kemalism was entrenched in the 1962 and 1982 constitutions. These principles are still taught in schools and universities today as the guiding principles of Turkey. They are protected by the constitution and cited in numerous court decisions. The content of these principles has changed over time; many have lost their meaning entirely—statism and revolutionism, for instance. However, political parties, the military, and courts have utilized these principles as discursive tools in their political battles.

One of the prominent experts on Kemalism defines it as a nationalist, secularist, statist right-wing ideology (Parla, 1992). Parla notes that its nationalism is territorial and defensive, not irredentist. But it was also ethnocentric and anti-pluralist. It exalts rationalism, positivism, and modern science over traditional values. However, its secularism is instrumental in keeping religion under state control to prevent Islam from mobilizing against the regime (Akan, 2017, p. 299). It is also anti-liberal and anti-socialist. From the 1920s to 1938, when Mustafa Kemal died, one of the common themes of his speeches was the rejection of class conflict. Originally Kemalism's ideal society was one where various classes work in harmony (Parla, 1992). Kemalism aimed to elevate the Turkish nation to the levels of contemporary western civilization. I would like to emphasize the nationalist and secularist aspects of Kemalism that will help us understand the contemporary constitutional debates in later chapters.

During the single-party rule, Kemalism created a meta-narrative about the history and identity of Turkey. This narrative was imposed on society through the ideological apparatus of the state, mainly through education and legal texts. This narrative was not without contradictions. Kemalists sometimes defined citizenship in political terms. The 1924 constitution, for example, said, "The name Turk as a political term shall be understood to include all citizens of the Turkish Republic without distinction or reference to race and religion" (article 88). However, the ethnocentric and religious elements have always been part of a Kemalist understanding of citizenship. Christian Turks, who spoke only Turkish, were transferred to Greece after the war of independence in exchange for Muslims in Greece (Kirisci, 2000; Özsu, 2011). After the 1930, Kemalists turned to anthropology and history to create a nationalist narrative as an alternative to the

Ottomanist one (Toprak, 2012). Modern Turkish people were related to the ancient Mesopotamian civilizations of Hittites and Sumerians (pp. 263-271). Eccentric linguistic theories which posited that Turkish was the mother of all languages found supporters among the Kemalists. Despite these ethnocentric elements, Kemalist nationalism was integrative so long as other ethnic groups acceded to Turkishness. Turkey harbored several ethnolinguistic communities from Caucasia, the Balkans, and Mesopotamia, but those who resisted the nationalist integration project—Kurds, for instance—faced denial and repression. Recurring Kurdish revolts against the republican regime created an obsession with national unity among Kemalists.

Kemalist secularism had roots in 19th-century French positivism and Ottoman pragmatism with respect to religion. They held Islam responsible for the backwardness of the country. However, Kemalist secularism has never advocated a strict separation of the state from religion (Parla, 2004, p. 14), nor has the state been impartial to different belief systems. Kemalists had not pursued a radical anti-clerical policy nor had they dealt with the economic origins of religiosity. Their anti-religious approach was limited to the symbolic level. Kemalists wanted to keep the public sphere clear of Islamic symbols and discourse, but Islam had always occupied a privileged place in the state (Yıldız, 2001). Following the Ottoman Empire's regulation of Islam, the Kemalists aimed to control religion and mobilize it when necessary. Turkish secularism never aimed to separate religion from state affairs (Berkes, 1998, p. 481; Gözaydın, 2008: 224). Rather, the regime used secularism to control religion.

The regime created a Directorate of Religious Affairs (Diyanet İşleri Başkanlığı, hereafter Diyanet) as early as 1924. The Diyanet was in charge of administering all mosques, training religious personnel, and making payments for

religious expenses such as a monthly stipend for imams. The purpose of Diyanet was to monopolize the state's authority over Islam and furnish a unified religious discourse in conformity with the regime (Arslan & Turner, 2013). Atatürk believed that as society progressed toward modernity, religion would peter out. He also thought that religion was tainted by Arab culture and intended to rescue it from Arab influences (Özdalga, 2006, p. 553). To achieve that aim, he had the Quran to translated to Turkish and prohibited the use of Arabic in Friday sermons and the daily calls to prayer.

The progressive optimism of Kemalists faded in the following decades. Islam continues to occupy an expanding place in Turkish politics. After the transition to democracy, populist political parties figured that Islamic culture provides a repertoire of discursive tools to appeal to the rural electorate. The Turkish state maintained its ambivalent relationship with Islamic culture and Islamic groups. At times, it has mobilized Islam against its enemies, e.g., communism, while striving to keep the political sphere free of Islamist demands.

3.2.3 Law as an Instrument of Cultural Transformation

The republican reforms were different from the Ottoman ones. Like other classical empires at the periphery of European capitalism —China and Japan, for example— 19th-century Ottoman reforms aimed to save the Empire and keep European colonialism at bay. In line with that agenda, Ottomans modernized their laws regulating trade and property relations from 1839 onward and gave European powers privileged access to the Ottoman market (Pamuk, 1987). The rising the tide of nationalism also urged the Ottomans to reform their constitutional order to keep its multi-ethnic multi-religious populations together. Sharia was restricted to family law,

and equality before the law was granted to non-Muslim Ottomans. By the end of World War I, however, the Empire had disintegrated, pogroms and population exchanges between Turkey and Greece virtually wiped out the Christian population, and Turkey was fully integrated into the world economy (Keyder, 1981). Republican reforms were mainly cultural reforms driven by a nationalist elite to get rid of the Islamic culture and to transform Turkey into a secular European nation. Hence, secularism became a state ideology, a civilizing mission for the state elite, and the Republic assumed a quasi-religious character (Gülalp, 2005, p. 352).

After 1925, the Kemalist revolution turned to transforming national mores with an iconoclastic drive (Berkes, 1998, p. 474). Kemalists enacted a series of revolution laws to launch their cultural modernization project. In September 1925, the regime shut down religious shrines (türbe) and dervish lodges (tekke). These religious sites had a significant place in the lives of Muslims. In November, the traditional headgear of Ottoman men, the turban and the fez, were prohibited, and the modern hat (şapka) became compulsory. This reform faced unexpected resistance from some Muslim groups because the hat was considered a Christian symbol (Zürcher, 2004, p. 173). Hat revolts spread to many cities across Anatolia. The resistance to the headgear reform was harshly suppressed by the regime. Many were persecuted in Independence Tribunals and 26 people who had participated in the revolts were executed (Aybars, 1994, p. 180). In 1926, the Islamic calendar was replaced by the Gregorian calendar, used in Europe. In 1928, Turkey adopted the Latin alphabet, quitting the Ottoman alphabet, which based on Arabic alphabet.

The most remarkable of the reforms were legal reforms, which were adaptation of laws in European states. The Kemalists wanted a more radical

departure from tradition. Mustafa Kemal outlined his approach to legal reforms in one of his early speeches in 1924:

> The important point is to immediately free our legal attitude, our codes, and our legal organizations from principles dominating our life that are incompatible with the necessities of the age …. The direction to be followed in civil law and family law should be nothing other than that of Western civilization. Following a road of half measures and attaching ourselves to age-old beliefs is the gravest obstacle to the awakening of nations. (Parliamentary Records, II/7, 1961, p. 5)

To this end, the Turkish Parliament (TBMM) passed the Judicial Reform Act on April 8, 1924, abolishing the religious courts that had been responsible for most family law issues. In 1926, the parliament replaced the sharia-based family law with family laws based on the Civil Code of the Swiss canton Neuchatel. The TBMM also adopted the Italian penal code and the German commercial code (Demirel, 2014, p. 82). In 1928, the TBMM passed legislation repealing the constitutional article that declared Islam as the state religion. Nine years later, in 1937, the TBMM adopted the six principles of Kemalism as a constitutional provision and declared Turkey a republican, nationalist, populist, statist, secular and reformist state.

3.2.4 Creation of a State-Dependent Judiciary

The question of who would interpret the laws was as critical as the nature of the laws themselves. Mustafa Kemal distrusted the jurists, judges, and lawyers of Ottoman times. He believed most of them had not internalized the revolutionary spirit of the new republic. They had trained in Ottoman schools where secular and Islamic law were taught together. They also had a nostalgic allegiance to the sultan.

The story of Lütfi Fikri Bey, president of the Istanbul Bar, is illustrative. Ten days after the declaration of the Republic, on November 10, 1923, Lütfi Fikri wrote a critical essay about the abolishment of the monarchy, stating he would have preferred a constitutional monarchy to a republic. He advocated that national sovereignty could

be ensured under a constitutional monarchy, and that a caliphate without a throne was nonsense. His ideas piqued the wrath of the Kemalists. Lütfi Fikri was tried in the Independence Court and sentenced to five years of penal servitude (Tunçay, 1981, pp. 81-82).

As early as 1924, the Republican regime regulated the lawyers and the bar. On the one hand, this was a part of legal unification reforms of the republic. On the other, the regime was distressed by the disloyalty of lawyers. As in the Lütfi Fikri case, some lawyers criticized the deposition of the throne and they were against Mustafa Kemal. In 1924, the TBMM enacted the Attorney's Code (Law no: 460, 26.04.1924) to align the bars with the republican regime. The Code stipulated that all attorneys had to be investigated within two months of its enactment by a screening committee comprised of an official from the ministry of justice, four lawyers from the bar under investigation, and four judges. Treason or any violation of professional ethics were grounds for the regime to eliminate lawyers with dissenting views. According to Özman (2010), who carried out an ethnographic study of the bar, the regime aimed to disbar members who had carried out “anti-Kemalist and anti-nationalist activities”(p. 78). The investigations resulted in a great purge in which 374 of the 805 members of the Istanbul Bar Association were disbarred.

However, ensuing incidents proved that the purge was ineffective. Lütfi Fikri Bey got out of jail with an amnesty and the Istanbul Bar elected him president again. Mustafa Kemal was frustrated. In the inauguration of the Ankara Law School, he complained about the election of Lütfi Fikri Bey as bar president for having advocated for the preservation of the monarchy and the caliphate. He asserted that this demonstrated the real intentions of those lawyers who followed the rotten legal mentality of the past. He concluded that this incidence “proved that the biggest and

most insidious enemy of the revolution was the rotten law and its unamenable lawyers" (Yargıtay Dergisi, XII, 1981).

Eliminating all dissident lawyers was impossible because there were not many loyalist alternatives to replace them. Istanbul Darülfünun was the only law school in the country that seemed to have issues with the new regime. To train a new generation of lawyers in line with the spirit of the Kemalist revolution, Mustafa Kemal opened the Ankara Law School in 1925. In his inaugural speech, Mustafa Kemal expressed succinctly what role he thought the law should play in the making of modern Turkey. He stated that "the Turkish revolution, which has been going on for years will strengthen its existence and mentality on the basis of the new law, which was the basis of life" (Yargıtay Dergisi, XII, 1981).

The Kemalist regime opened the Ankara Law School to train a generation of jurists, lawyers and judges in line with the new regime's ideology. The ministry of justice appointed the teaching staff, choosing them from among the lawyers who had trained in Europe and regime bureaucrats who occupied key positions in the ministry of justice and deputies of the CHP. The government closely monitored the curriculum and the teaching. Until the Ankara Law School was fully operational and began to graduate new lawyers, Istanbul's Darülfünun continued its lawyer training programs. As Mazıcı (1995) noted, Darülfünun was one of few institutions which dared to raise its voice against the Kemalist regime. The Kemalist regime was no longer able to tolerate Darülfünun. In 1933, the regime closed down Darülfünun, dismissed 92 of its 151 professors, and opened Istanbul University in its place (Mazıcı, 1995). Until 1978, the Ankara and Istanbul law schools were the only two law schools that trained Turkish judges and lawyers.

In 1936, the regime started drafting a new code for attorneys. The new Code, enacted in 1938, further tightened the regime's grip on lawyers. It banned them from defending persons accused of committing crimes against the regime. Bars were instructed to disbar those members. Özman (2010) founds parallels with the German Attorney Code. To Özman, the German code aimed to free courts from the influence of attorneys. In the Turkish case, it aimed to impose a Kemalist mindset on the profession.

3.2.5 Transition to Democracy and Constitutional Failure

After the death of Mustafa Kemal Atatürk in 1938, the single-party regime survived for a good eight years. İsmet İnönü, a war hero and Atatürk's prime minister, became president. Although Turkey was not involved in World War II and pursued an impartiality policy throughout the war, it had been expeditious to align with the allied forces in the aftermath of the war. Concerns about probable Soviet aggression and anti-communism, along with the traditional Western orientation of the regime motivated the single-party government to calibrate their policies in line with those of the West. All the while, the political bases of the Kemalist regime were crumbling. It was an alliance of soldiers, bureaucrats and, the nascent national bourgeoisie that sustained the regime during the single-party rule. During the war years, Turkey kept a large army (Zürcher, 2004, pp. 207-209). The regime relied on printing money to the feed army, which in turn caused inflation and reduced the purchasing power of civil servants and wage earners. The private business which had prospered during the war years became powerful enough to put pressure on government. Farmers were particularly deprived. The regime suppressed agricultural prices to subsidize capital accumulation in non-agricultural sectors (Özbek, 2003, p. 236). From 1940 onward,

the government forced farmers to sell their crops to the state monopoly at far below the market price, disproportionately increasing the burden on small farmers (Pamuk, 1988, pp. 27-30).

There was also a growing opposition within the CHP. The liberal wing of the party wanted to have more say in party administration and pushed for a relaxation in statist economic policies. The bureaucratic wing of the party understood they could no longer get the support of the national bourgeoisie, so they turned to small farmers, who made up 80% of the population. The party leadership therefore proposed a land distribution reform (Karaömerlioğlu, 1998). The liberal wing, representing primarily the interests of the landed and trade bourgeoisie, opposed it. Celal Bayar, Adnan Menderes, Fuat Köprülü and Recep Koraltan warned the party in a memorandum to step back from its plans. In return, the party ousted Menderes and Köprülü in 1945. Bayar and Koraltan quit the party themselves to protest the leadership, and in January 1946, they established the Democrat Party (DP). The party soon became a platform for economic and religious freedoms (Keyder, 1987, p. 117). The elections would be held in 1947, but İnönü called for an early election in 1946 to deny the Democrats time to organize and broaden their base. The CHP won the election notwithstanding; it was undoubtedly rigged in their favor. Differences between the two parties vanished back then. The CHP introduced religion classes into primary education, opened vocational religious secondary schools, and erected religious shrines and tekkes to make peace with a religious majority (Ahmad, 1993, p. 107). The Party also gave up statism and embraced more liberal economic policies. However, the Democrats were more organized when the 1950 elections came around. They won a landslide victory with 53% of the votes, thus ending 26 years of long single-party regime (Ahmad, 1993, p. 108).

The 1950 elections were remarkable in Turkish history. Turkey had had elections since 1876, but participation was limited mostly to city dwellers and notables in the countryside. Although Turkish women got the right to vote in 1934, they had no choice but to vote for the single party. The idea of a representative government had taken hold among Turks, but it was not until the 1950 elections that Turkish people had the chance to determine who would run the government. Frustrated by economic misery and repression, they flocked to the Democratic Party.

In the first term of their rule, the Democrats took their share of the post-war boom of the world economy. The Turkish economy grew 11%, with 13% in agricultural growth between 1946 and 1953. Real income increased 73% over 1943 levels (Boratav, 1998, pp. 80-83). Turkey also enjoyed American cash aid and benefits in kind for farm machinery under the Marshall Plan. Farmers, industrialists, and city dwellers were especially well off during the Democrats' first term. Agricultural production boomed thanks to state subsidies and to the introduction of new machinery and the government's guarantees to purchase their produce. Arable land expanded from 9.5 to 14 million acres between 1948 and 1956 (Akşin, 1997, p. 123). In 1952 Turkey joined NATO. The U.S. provided a large amount of military aid to Turkey. The economic success paid off in the 1954 elections: the Democrats increased their votes to 57%, while the CHP's dropped to 36% (Akşin, 1997, p. 126). The 1954 general elections proved that the Democrats had cultivated solid electoral support.

3.3. The Second Turkish Republic

3.3.1 Evolution of the Crisis

However, the Democrats' second term was marked by an economic downturn, a chronic deficit in the balance of payments, and high inflation. Average growth between 1954 and 1961 dropped to 3% (Boratav, 1998, p. 89). The Turkish lira depreciated against the dollar and real income plummeted. In parallel with the plunging economy, government authoritarianism expanded. Facing a growing economic downturn, Democrats harassed the opposition; particularly, the press, intellectuals, and universities. For instance, before the 1954 election, a new law was enacted to silence the criticism that appeared in the press (Zürchrer, 2004 p. 223). Many observers of Turkish politics noted that despite their unprecedented electoral success, Menderes did not feel secure in power. The CHP had close ties with the bureaucracy and the military. In 1955, the Democrats carried out a great purge in the bureaucracy, judiciary, and universities by retiring civil servants who had served more than 25 years (Zürchrer, 2004, p. 230). The populist economic policies of the Democrat Party were unable to satisfy the needs of the industrial bourgeoisie, who demanded a more rational allocation of resources, especially the scarce foreign currency. A faction that aligned with industrialists split from the party and formed the Hürriyet Partisi (Liberty Party)(Özçetin & Demirci, 2005, p. 545). They then joined the CHP, which was looking for a new alliance to beat the Democrats. The CHP declared a politically liberal program in 1959. According to their program, the Party pledged to allow strikes and lockouts, create a senate, grant autonomy to the universities, create a council of high judges to improve judicial independence, grant autonomy for public press agencies, and establish a constitutional court (Tuğluoğlu, 2017, p. 290). All these suggestions found their way into the 1961 constitution.

Finally, in April 1960, the Democrat majority set up a committee to investigate subversive activities in the CHP, aiming to instigate a military revolt (Ahmad, 1993, p. 114). During the investigation, all political activities outside the parliament were banned, even political reports in the press (Zürchrer, 2004, p. 240). The creeping authoritarianism of the DP annoyed the country's urban classes. What Asli Daldal (2004) called a "progressive urban coalition" soon mobilized against the DP rule. Professors in the Ankara and Istanbul Law Schools criticized the investigation committee and declared that it was a violation of the constitution. When the Democrats took disciplinary action against professors, students sided with their professors and flooded the streets to protest. The government then closed down universities and used the military to suppress the unrest. Lawyers from the Izmir and Istanbul Bars organized marches to protest the government. In the face of increasing social unrest, Menders attempted to ease the tension by abolishing the investigation committee, but this gesture was too little and too late (Ahmad, 1993, p. 114). On May 27, 1960 a junta of mostly young soldiers staged a coup d'état.

The coup had been brewing among military ranks since before 1960. The core members of the junta made sure their members were placed in critical positions in Istanbul and Ankara; these members would then be the ones to carry out the logistics of the coup. Most of them were young colonels whose vision for the country was different from that of their superiors. After colonel Alparslan Türkeş—who later the founder of the ultranationalist National Movement Party (MHP)—read the coup declaration on public radio, the junta arrested the Democrat Party leaders, including Prime Minister Adnan Menders and President Celal Bayar. Menders and two of his ministers, Hasan Polatkan and Fatin Rüştü Zorlu, were tried in the revolutionary court and sentenced to death for treason.

The junta called itself the National Unity Committee (Milli Birlik Komitesi, hereafter MBK), which comprised 38 members. In the aftermath of the coup, there was disagreement among the junta about how long the military rule should be extended. Hardliners were reluctant to hand over power to civilians once a new constitution was made. They advocated that the junta should stay longer in power. However, the soft-liners won them over and sent 14 hardliners abroad to serve in diplomatic missions, effectively exiling them (Özdemir, 2005, p. 232).

The putschists declared from the first day that they would return the government to civilians after a new constitution and an electoral law were made. The same day, they summoned the president of Istanbul University, renowned jurist Sıddık Sami Onar, to Ankara and tasked him with forming a scientific committee to draft a constitution (Soysal, 1997, p. 46). The draft Onar and his colleagues prepared stirred controversy within the MBK. Scholars from Ankara University also came up with a draft and suggested that a constitutional assembly should take up the task of drafting the constitution. The MBK decided to form a constitutional assembly that consisted of a house of representatives and the MBK. The house comprised the representatives of political parties, bars, universities, teachers, labor unions, chambers of commerce, farmers, and press (Soysal, 1997, p. 47). However, because the members of the Democrat Party represented almost half of the electorate in the last elections, they were not allowed to participate in the constitutional assembly, so it was far from democratic representation.

The house of representatives formed a constitutional commission to draft the new constitution. It consisted of members of the Assembly, most of whom were prestigious law professors from the Ankara and Istanbul Law Schools and politicians. The draft passed through the house of representatives and the MBK

without much change. As a final step, it was presented for a public referendum and was approved with 61% of the votes cast by Turkish electorate in July 1961 (Tanör, 2015, p. 376).

3.3.2 The 1961 Constitution

When we look at the minutes of the constitutional council, we see a sophisticated scholarly discussion of constitutional theory, particularly the separation of power and individual rights (Öztürk, 2012). Those ideas had evolved among scholars during the 1950s. In those works, constitutional scholars such as Turhan Feyzioğlu (1951), Münci Kapani (1958), and Bahri Savcı (1960) advocated a constitutional tribunal to review the constitutionality of laws enacted by the parliament. Apart from this, discussions about judicial independence, freedom of the press, university autonomy, and the right to strike were dominated by academic journals during the Democrat Party rule.

Article 2 of the 1961 constitution declared Turkey a democratic, secular and social state based on human rights and the rule of law. These characteristics reflected the liberal spirit of the post-war order and the constitutional questions that emerged during the Democrat Party rule. The social state emphasized the positive obligations of the government to create a welfare state. This conformed with the social-democratic ideas within the commission. To be sure, the common concern was to prevent arbitrary use of state power (Tanör, 2015, p. 394). Besides emphasizing the separation between the executive, the legislature and the judiciary, the constitution divided the executive between the president of the republic and the prime minister, and the legislature between the National Assembly (Millet Meclisi, MM) and the Senate of the Republic (Cumhuriyet Senatosu, CS). During the constitution talks, the

creation of the senate and its composition were discussed at length. It was proposed that the Senate check the main legislative body, the MM (Öztürk, 2012, p. 274-282). Members of the MBK would be natural members of the Senate. The main legislative organ was the MM. The Senate had the right to veto legislative bills, but the MM could override it.

Another novelty of the constitution was the creation of autonomous public institutions (Soysal, 1969). To rationalize the bureaucratic process and prevent populist inflictions on economic decision-making, the constitution created an autonomous state planning agency. The composition of the planning agency stirred conflict within the commission. Some members advocated for an agency that would be controlled directly by the representatives of the business. But this plan failed to garner the support of others, so a more bureaucratic control was espoused. Nevertheless, the transition to an electoral democracy was recommended. The constitution also granted institutional autonomy to universities and the state news agency. University students and mobilized against the DP rule just before the military intervention. Law professors who had raged against the DP rule played a significant role in the constitutional assembly. Their weight was reflected in the new constitution. It stipulated that universities must be autonomous in their administration and that faculty members could not be dismissed—they were to be free in their research (Turkish Constitution 1961, article 120).

The progressive element of Turkey's constitutional revolution can be seen in the expansion of individual rights. The constitution adopted a detailed catalog of rights and entrenched individual and collective freedoms. In addition to classical liberal rights, the constitution introduced a series of social rights. These included the right to strike and to bargain collectively; the right to work; the right to occupational

safety and just wages; and the right to social security, healthcare, and education (Turkish Constitution of 1961, articles 40-50). Another novelty regarding individual rights was the constitution's emphasis on the point that those rights and freedoms could only be restricted by law, without touching the essence of them (article 11). To be sure, Turkish lawyers and intellectuals who steered the constitution-making were following post-war constitutional developments in Europe and the U.S. They wanted to create an orderly industrial society that was protected against class conflict and Islamic revival. Social and individual rights and autonomous enclaves, which were meant to be governed by bureaucratic rationality, were two insurances that were written into the constitution to maintain their social vision.

The 1961 constitution endorsed judicial independence. Courts had judicial autonomy under the 1924 constitution, but that constitution lacked the necessary guarantees to protect the courts from the intervention of other branches. This time the constitution provided tenure security for judges and established the High Council of Judges to administer judicial affairs (Turkish Constitution of 1961, articles 132-133, 142). The Council had 18 members, six of whom were elected by the Supreme Court of Appeal, six by court judges, and the remaining six by the Senate and the MM. The constitution also stipulated that all acts and actions of the administration were subject to laws. To this end, the constitution authorized the Council of State (Danıştay), which functioned as a supreme administrative court. The Danıştay would hear appeals from administrative courts as well as function as a first-instance court to try questions about administrative actions of the government (articles 139-140).

The 1961 constitution established two novel and far-reaching institutions: the National Security Committee (Milli Güvenlik Kurulu, hereafter MGK) and the Turkish Constitutional Court. Though the military had long played an outsized role

in Turkish political history, Mustafa Kemal and his associates paid particular attention to keeping the army away from politics. As a former Ottoman general, Mustafa Kemal knew that politicizing the army would fragment the military ranks into political factions and weaken the organized power of the army. The army soon politicized after his rule, however, and the new and ambitious young cadres of the Turkish military were envisioning a political role for themselves in the new regime. In stark contrast to its democratic credentials, the 1961 constitution institutionalized the role of the Turkish Armed Forces in the political system. The MGK became a consultative organ (Turkish Constitution of 1961, article 111). It consisted of the president, the prime minister and his cabinet, the commander-in-chief, and representatives of armed forces. With the establishment of the MGK, the junta secured its place in the new constitutional order. A junta member who also served in the Constitutional Assembly succinctly expressed why they established the MGK: to prevent a new coup that might result from the degeneration of the Second Republic by political parties who had taken the government with their electoral majority (cited in Çınarlı, 2015, p. 65). The idea behind the MGK was the comprehensive national security doctrine of the cold war that merged domestic and international security. The MGK became a forum for the army to express its views, concerns, and suggestions on domestic political issues more than on national defense (Bayramoğlu, 2004, pp. 77-79). From 1961 onward, the institutionalized role and the political clout of the army would be an indispensable part of Turkish politics.

3.3.3 Genesis of the Turkish Constitutional Court (TCC)

The second novel innovation of the 1961 constitution was the creation of the Turkish Constitutional Court. In the Turkish case, the creation of the Court was not

attributable to insecurities of the military elite about their survival (Ginsburg, 2003). The military was powerful enough to rely on its power after the transition to democratic rule. The Turkish military enjoyed popular support and entrenched its position in the political system with the MGK. The army was more concerned about protecting the regime against revisionist electoral majorities than about their own survival. The insurance logic might have been at play, at least for the CHP and the secular bureaucratic elite who dominated the constitution-making process. The CHP, as the founding party of the Republic, who ruled Turkey for 27 years, understood that falling from the government could amount to falling from grace. During the DP rule, the CHP, its leadership, and its organic intellectual community faced disempowerment and harassment.

Ran Hirschl (2004) developed his hegemonic preservation thesis account for the adoption of individual rights and judicial review in Israel, Canada, New Zealand and South Africa. In all these cases, the constitutionalizing of rights and the emergence of judicial review coincided with the transition from a state-coordinated economy to neoliberalism (Hirschl, 2006, p. 105). His theory explains the rise of individual rights and judicial review as a last-minute effort by a waning regime to cling to at least some of its powers and protect at least some of its interests. Although the constitutional review in Turkey did not quite fit this causal story, the core logic of Hirschl's thesis is valid. All constitutions embody the values and interests of their makers. In the Turkish case, the republican bureaucratic elite who made the constitution understood that electoral politics might not be hospitable to their policy interests. They designed the constitution in a way that restricted the power of electoral majorities and bolstered the autonomy of republican strongholds which included the army, the judiciary, the state planning agency, and universities. The

autonomous enclaves aimed to ensure the continuation of a policy (Dixon & Ginsburg, 2017, p. 997), not a specific group of military elites. The task of the TCC was to protect the constitutional regime with its various institutions and ideological framework, which were specifically designed to sustain an orderly society.

Although it was a military junta that carried out the coup, a social coalition that longed for a new constitutional regime had been in the making for some years. It was a coalition of republican secularists, the Kemalist bureaucracy, secular intellectuals, and the industrialist bourgeoisie that Asli Daldal (2004) dubbed the "progressive urban coalition" that steered the constitution-making process. Secular intellectuals were concerned about an unruly government that ignored academic freedom and rational governance. Turkish scholars and intellectuals kept a keen eye on constitutional developments in Europe, and constitutional review was in vogue at the time. Scholars like Turhan Feyzioğlu (1951), Münci Kapani (1958), and Bahri Savcı (1960) advocated for the creation of a constitutional tribunal. Along with the intellectuals, the urban bourgeoisie demanded rationalization of state governance. In 1957, a liberal faction that represented mainly industrialist interests split from the DP and formed the Hürriyet Partisi (Özçetin & Demirci, 2005). The Hürriyet Partisi program also advocated for the establishment of a constitutional court (Çakmak, 2008, p. 164). It appears that rather than being a result of rational calculations of a single actor, it was a plethora of different motivations and interests that coalesced around the idea of constitutional review with an elective affinity.

The Constitutional Council agreed that the rule of law and individual rights could be protected only by a powerful constitutional tribunal (Sunar & Sayarı, 1985, p. 174). The fragility of the 1924 constitution in the face of the DP's unconstitutional acts was the main theme during constitutional talks. According to the draft of the

constitution, the court would review the constitutionality of laws after their promulgation, and it would review constitutional questions raised by ordinary courts about a pending case. In the deliberations about who would elect court justices, some members advocated for a corporatist system where all members of the Court would be elected by other high courts. Other members objected that this would amount to juristocracy and proposed instead that the legislature and executive should elect at least some members of the Court (Yılmaz, 2017, p. 45). The final version provided for a court with 15 justices. High courts, the Supreme Court of Appeal (4), the Council of State (3), the Court of Accounts (1) would elect eight justices from among their members. The National Assembly would elect three and the Senate would elect two justices. The remaining two would be filled by the president of the Republic, who had to pick one justice from the Military Supreme Court of Appeal. Each justice would serve a single fifteen-year term.

The 1961 constitution further enhanced the power of the Court by providing for an expansive right of standing (i.e., the right to appeal to the Court) to a variety of actors (Turkish Constitution of 1961, article 149). The president of Republic, political party groups in the TBMM, political parties that received at least 10% of total votes in the elections, and one-six of the members of the senate or the National Assembly could apply to the Court for constitutional review. Other entities that could appeal to the Court included the High Council of Judges, the Supreme Court of Appeal, the Council of the State, the Military Supreme Court of Appeal, and universities.

The constitution also permitted trial courts to submit constitutional questions about pending cases to the Turkish Constitutional Court (Turkish Constitution of 1961, article 151). If the TCC was unable answer their questions within six months,

the petitioning court could decide the case according to their own convictions. That was a significant power granted to the trial courts to solve constitutional questions. The constitution allowed petitions to be submitted about laws enacted before the coup, which permitted political parties and trial courts to appeal to the TCC in cases that would erase the legacy of the DP party.

A wave of petitions following the creation of the TCC challenged the laws enacted by the DP government (see Appendix C). As Ceren Belge (2006) noted, in a series of decisions, the TCC reversed several provisions that had been made prior to 1961 about the regulation of bureaucracy and civil servants. In these decisions, the TCC transferred powers had been given to the executive to the Council of State to check the legality of hiring, firing, and disciplinary actions of administrations.

3.3.4 Transition to Democracy and Failure of the Constitution

After the Constitution was approved in the July 1961 referendum, Turkey went to elections in October. The junta closed down the DP and banned many politicians from running in the elections. The Justice Party (Adalet Partisi, hereafter AP) was established during the junta regime. It appealed to the same electorate as the DP. The results of the elections were indicative of the political polarization in the country. The CHP received 36% of the votes, and the newly established AP followed with 34% (Zürcher, 2004, p. 246). The president of Republic, Cemal Gürsel, appointed the leader of the CHP to form the cabinet. The CHP did not have the parliamentary majority to form a government, so the army pressured the AP to join CHP to form a coalition government (Özdemir, 2005, pp. 243-44). Between 1962 and 1965, weak coalition governments ruled Turkey under the auspices of the army. In the 1965 elections, the AP won a landslide victory with its new young leader, Süleyman

Demirel. Another major development was the success of the Workers Party of Turkey (Türkiye İşçi Partisi, TİP). For the first time, a socialist party made its way into the parliament.

If the separation of power, social rights, and bureaucratic autonomy were the constitutional underpinnings of the post-1961 regime, import-substitution industrialization was its economic basis. Between 1965 and 1969, Turkey enjoyed high economic growth and an increase in per capita income. In parallel with Turkey's economic and social development, labor movement became a significant political actor (Yıldızoğlu and Margulies, 1984). Between 1960 and 1970, the number of university students increased, and university autonomy provided a fertile ground for an assortment of leftist student organizations to flourish on the campuses (Alper, 2010). Organized in unions, small revolutionary parties, and student associations, the Turkish left became the center of defiance against mainstream parties.

Before the 1969 elections, the parliament changed the electoral system to impede the entrance of small parties, especially the Workers Party, to the parliament. Nevertheless, the labor movement and student militancy were growing in factories, in the universities, and in the streets. From 1965 onward, the AP government supported Islamic organizations in an attempt to counter rising socialist influences in the universities, the bureaucracy and the press (Özkan, 2020, p. 171). Bureaucrats who adhered to Turkey's traditional Islamic orders were appointed to key positions to check progressive groups and individuals in the state (Özkan, 2020, p. 175). Anti-communist unions and student associations, formed mostly by Islamists and nationalists, enjoyed the full support of the state (Özkan, 2020, p. 186).

Although the AP came out of the 1969 elections with the greatest number of votes and retained its parliamentary majority, Turkish politics entered a new phase of crises and instability after 1969. From 1968 onward, the economic model of import substitution run out of steam in the face of a currency squeeze and rising labor militancy (Barkey, 1990, pp. 90-98). The AP's legislative attempts in 1970 to restrict the power of labor unions ignited widespread violent protests which could only be quelled by martial law.

The AP government tried to ease import substitution and steer industrialists to export markets to relieve the currency shortage. The AP's policy, met by a backlash by industrialists, was born dead. Workers mobilized against the APs anti-labor policies, further fueling the concerns of the industrialist class. The AP, the industrialists, and the military were all voicing their complaints about the constitution. Prime Minister Demirel criticized it for prioritizing the rights over state authority (Akça, 2010, p. 258). Business associations were demanding that labor rights be restricted, to keep wages stagnant (Tanör, 1994, pp. 39-40). The AP government, however, lacked the legislative power to amend the constitution to restrict labor rights.

In the face of a rising economic crisis, social unrest, and political gridlock, radical ideas were proliferating within the military as well (Ulus, 2011). We now know that a radical faction within the military was considering taking over the government and forming a leftist-nationalist military rule (İrtem, 2020, p. 196). This faction was associated with the leftist-Kemalist intellectual circle. However, the intelligence agency exposed their plans, and the right-wing military command wiped out the leftist faction on March 9, 1971 (Hale, 1994, p. 187).

After eliminating the leftist-Kemalist faction, on March 12, 1971, the military issued a memorandum that forced the AP government to step down. The memorandum also demanded that order be established in line with Kemalist principles, which was quite illustrative of how Kemalism could take different forms (Hale, 1994, p. 184). But this time the military did not dissolve the parliament. Instead, it forced the parliament to form a technocratic government that would rule Turkey for two years. The deposed AP also provided five members to the military-led government.

No one can claim that the military intervention's main target was the incumbent AP. In the early days of the military intervention, there was a consensus among the AP, the military, and Turkish industrialists that the 1961 constitution was too liberal for Turkey. The military demanded a change in eight articles that related to basic rights and liberties (Tanör, 1994, p. 45). Under pressure from the military, the CHP leadership also supported the amendments (Tanör, 1994, p. 49). The military closed labor unions, arrested many leftist students, organized sham trials, and executed student leaders.

The interim government passed two broad sets of constitutional amendments in 1971 (Türkiye Cumhuriyeti Anayasasının bazı.., 20.9.1971) and in 1973 (Anayasanın 30, 50.., 15.3.1973) through the parliament, which dealt a blow to the liberal regime of the 1961 constitution. The amendments were designed to increase executive power and to trim the liberal rights regime to curb increasing labor and student activism. Both the AP and the CHP supported the amendment. Constitutional law professors who were involved in the drafting process of the 1961 constitution—Bahri Savcı, Mümtaz Soysal, Tarık Zafer Tunaya, Muammarmer Aksoy—were

detained because they had criticized the planned amendments in the constitution (Tanör, 1994, p. 53).

One set of amendments strengthened the executive and increased the political sway of the military (Tanör, 1994, pp.54-55). For example, amended provisions increased the weight of commanders in the National Security Council, eased the conditions for declaring martial law, and established a Military Administrative Court to end the administrative review of military actions by the Council of the State. As for the executive, the amendment authorized the cabinet to issue executive decrees in the power of law, a power which the AP had long aspired to have. Other amendments increased the executive control over universities and abandoned the autonomy of public radio and television.

The other set of amendments targeted the constitutional judicial review and the individual rights regime. Strategic use of constitutional judicial review by small political parties had been a concern for political elite who controlled the government. The military-brokered amendments curbed the powers of the TCC. The amendments restricted the standing of small parties and prohibited the TCC from reviewing the constitutionality of the substance of constitutional amendments. The TCC was permitted to review only cases that concerned whether procedural requirements were met (Anayasanın 30, 50.., 11.07.1973). Another blow to the 1962 regime was the regulation of individual rights and freedoms. Preservation of the territorial and national indivisible unity of the state was introduced as a justification for the restriction of individual rights. Amendments also banned the unionization of public workers, prohibited university professors from joining political parties, and allowed an extension of the duration of pretrial detention without judge order (Tanör, 1994, pp. 58-59).

3.3.5 The TCC amid Political Turmoil

In addition to passing constitutional amendments, the interim government made several changes in laws and regulations that restricted freedoms, augmented the executive authority, and eroded judicial independence. In a series of decisions, the TCC invalidated the provisions that restricted freedom of association (K:1973/37; K:1974/9; K:1976/51), eroded university autonomy (K:1974/4; K:1975/22) and judicial independence (K:1977/4; K:1979/39).

The 1961 constitution put no restriction on the review of constitutional amendments. In two decisions in 1970 and 1971, the Court ruled that it had the authority to review both the form and substance of the amendments. In its 1971 decision, although the Court found nothing unconstitutional, it underlined the contours of its jurisdiction with regard to the review of constitutional amendments. The Court reiterated that constitutional amendments must not run counter to the spirit and philosophy of the constitution and the requisites of contemporary civilization (Olcay, 2018, p. 328). Defining its interpretive framework in such vague terms allowed the Court to strike down any amendment.

With the 1971 amendments, the military-backed interim government and the parliament aimed to restrict the Court to review whether amendments met procedural rules. Nevertheless, the Court found innovative ways to circumvent what was clearly intended as a ban on its reviewing the substance of amendments. In an application regarding the composition of the military courts, the Court invalidated clauses introduced with the 1971 amendments (K:1975/87). The Court invoked article 9, known as the unamendability clause: “The provision of the constitution establishing the form of the state as a republic shall not be amended, nor shall any motion, therefore, be made to do so.”

The Court reasoned that a formal review should involve the test of the unamendability clause, whether the amendment violated article 9. Then it ascertained that article 9 did not refer to the republic as a state but as a regime, with its characteristics enumerated in the preamble and article 2 of the constitution. In this way, the Court established its competence to review the substance of amendments under the guise of reviewing their form.

The Court invalidated two amendments in 1977 (K:1977/4; K: 1977/117) that prohibited appeals against decisions of the High Council of Judges and the High Council of Prosecutors. In both of its decisions, the TCC stated that an inability to appeal against the decisions of the High Council of Judges and the High Council of Prosecutors violated human rights, the principle of the rule of law, and the principle of equality, which were the foundation of the regime (Olcay, 2018, p. 331)

The TCC's increasing assertiveness during the 1970s poses an anomaly for standard theories of political jurisprudence. How was it possible that a constitutional court that was created ten years earlier by a military regime turn against its creators? After the military intervention in 1971, the military resumed its role in politics, forced the civilian government to step down, and consolidated its power in the political system with a constitutional change. The amendments passed the parliament with the unified support of the major political parties. One would expect the TCC to defer to its creators and parliamentary majority. However, the TCC resisted efforts to curb its powers, and extended its protection to other autonomous institutions created by the 1961 constitution. Belge (2006) attributed the TCC's increasing assertiveness to an emergent cleavage between the army and the CHP. After the 1971 military intervention, a new leadership took control of the CHP. The new leadership reoriented the party toward the left and dissociated itself from the military. Belge

convincingly argued that this rift within the informal "republican alliance" between the CHP and the army allowed the TCC to challenge military-brokered legal changes.

The TCC's assertiveness in protection of the republican alliance did not translate into rights protection. As Belge (2006) demonstrated, the increasing court activism was particularly centered on augmenting the regime institutions that Belge called "Republican Alliance" (see Table 4). The Court protected the autonomy of the judiciary, the bureaucracy, and universities—the so-called republican alliance—against government intervention. While it used its powers rather assertively in protecting the autonomy of the republican alliance, the court was conservative when it came to individual rights (p. 667).

Table 4. Percent Annulments with Respect to Different Issue Areas, 1962-1982

	1962-1970	1971-1977	1978-1982	1962-1982
Republican autonomy	84% (42)	80% (38)	35% (19)	73% (100)
Civil rights and liberties	35% (45)	68% (26)	8% (33)	35% (104)
Other issues	35% (239)	53% (130)	38% (98)	41% (467)
Total	41% (327)	61% (194)	29% (150)	46% (671)

Source: The calculations and the table are adapted from Belge (2006, p. 666)

The following two decisions of the court are illustrative of how the court saw individual rights through the prism of regime interest. The Turkish penal code required the permission of the council of ministers before any group could establish and association that would have a connection with international associations. The AP and TİP challenged this provision, claiming it was a violation of freedom of association. The Court rejected both petitions on the grounds of morality and public order. The Court argued that such associations with international connections could spread dangerous ideas within Turkey, thus justifying the restriction on freedom of association. The next year, the TİP carried a similar provision in the law of associations to the TCC. The TCC maintained its position but revealed more starkly

how it approached rights issues. The Court stated, “the activities of associations established abroad to spread certain harmful ideologies incompatible with the principles of our Constitution can bring us more harm than good” (Belge, 2006, p. 673).

The TCC’s conservatism with respect to rights issues was also reflected in referrals from the military courts. Alpbaz (2020) shows that the TCC rejected numerous referrals by military courts concerning the restrictions on human rights in the Turkish Penal Code. In those cases, military courts defended a more liberal democratic understanding of individual rights by challenging the constitutionality of the Penal Code, whereas the TCC justified the restrictions on the Kemalist principles of national unity and secularism. For instance, a martial court appealed to the TCC about article 142 of the Turkish Penal Code, which stated that distributing propaganda about one social class dominating over another, about ending the existence of a social class, or about overthrowing social and economic order in the country shall be sentenced to the penalty of imprisonment for five to ten years (Alpbaz, 2020, p. 365). The martial court mentioned that the reason, based on article 142, was to protect the state. But according to the constitution, the state was also democratic, and the constitution did not make a distinction between what is permissible to propagate and what is not; the state also had to abide by democratic principles. The TCC rejected the complaint of the martial court, explaining that defending the establishment of the domination of a class over another or ending the existence of a particular class ran counter the nationalism principle of Atatürk; it asserted that this would harm the spirit of harmonious unity (p. 366). Hence, the TCC set the principles of Kemalism as a limit for the exercise of individual rights.

In line with the expectations of strategic theories of political jurisprudence, the court seized the judicial opportunity structure created by divisions in the republican coalition that had constructed the 1961 regime. As the TCC erased the legacy of the Democrat Party regime (1950-1960) with its decisions, it expanded its powers and prestige for the new regime. When the new republican coalition was riven by divisions, the Court used its powers to protect the bureaucratic structure of the regime and judicial autonomy. Fragmentation of power creates an opportunity, but it does not determine judicial policy. Ideological preferences and the legal culture of the court justices decide which direction a court action will take. The TCC justices had a strong identification with what Jacobsohn (2010) calls "constitutional identity." They were educated in republican law schools and had internalized the Kemalist ethos, which sees judges and the courts as agents of modernization (Shambayati & Kirdis, 2009). The TCC justices were respectful jurists and sincere adherents of Kemalism. They possessed the progressive spirit of their time, but they also had the state-centric mindset of their generation. Their ideologies set the parameters of progressive activism of the TCC.

3.4 The Third Republic

3.4.1 The Road Down to the Next Coup

With the October 1973 elections, Turkey returned to a normal course of electoral politics. The elections produced an even more fragmented political system. Most notable were the new parties that gained prominence after the elections: the National Order Party (Milli Nizam Partisi) and the Nationalist Movement Party (Milliyetçi Hareket Partisi, hereafter MHP). Milli Nizam was the first Islamist party ever to achieve representation in the Turkish parliament. It was founded as a replacement of

the Islamist Milli Selamet Partisi of Necmettin Erbakan, which had been closed by the TCC for its anti-secularist activities. Milli Selamet and Milli Nizam would be the beginning of a series of Islamist parties closed down by the TCC (see Table 5). The party appealed to the conservative, petty commodity producers of Anatolia and advocated an alternative industrialist development path to what AP and CHP offered.

Table 5. Political Parties Closed by TCC 1962-1980

Closure date	Party Name	Party Ideology
1971	Workers Party of Turkey	Socialist
1971	National Salvation Party	Islamist
1980	Labor Party of Turkey	Socialist

Source: anayasa.gov.tr
Note: Parties closed on procedural grounds are excluded.

The other party that emerged in the 1973 elections was Alparslan Türkeş's ultra-nationalist Nationalist Movement Party (Milliyetçi Hareket Partisi, MHP). Türkeş was the spokesperson of the 1961 junta. He and his 13 hardliner colleagues were isolated from the domestic scene by the junta leadership, who sent them on diplomatic missions to different countries, because they did not want to resume the democratic system. Although the MHP got only 3.6% of the votes in the 1973 elections (Yüksek Seçim Kurulu Kararı, 31.10.1973), the party increased its share by over 6% in the 1977 elections (Yüksek Seçim Kurulu Kararı, 19.7.1977). The party's political clout, however, did not originate from its electoral support, but from its paramilitary youth organization that mobilized against left-wing students and organizations (Bora & Can, 1991).

Between 1973 and 1980, political instability and conflict plagued Turkish politics. This period saw a series of six coalition governments, during whose tenure the country experienced deepening economic and social crises. The 1971 intervention and the execution of student leaders had not quelled the leftist movement. Mass protests, strikes, factory occupations, and political violence

increased throughout the 1970s. Between 1976 and 1980, more than 5,000 people were killed in conflicts between leftist and nationalist paramilitary groups (Sayarı, 2010, p. 201). Political parties ran on a negative platform and fueled political polarization further. The election of the president of Turkey culminated in a deep crisis because of a lack of consensus among political parties. The parliament was so fragmented and polarized that between March and September 1980, no presidential candidate received the necessary number of votes to be elected, despite 124 rounds of voting.

Amid this turmoil, on September 12, 1980, the Turkish Armed Forces staged a coup against the government, abolishing the parliament and banning all political activities in the country. Unlike the 1960 coup, the 1980 intervention was staged by the hierarchy of the army. Led by commander-in-chief general Kenan Evren, the army declared that they were taking over the rule of the country on behalf of the National Security Council. The 1980 military coup had commonalities with military coups that had swept Latin America during the 1970s (Stepan, 1971, 1988; O'Donnell, 1973). In those countries, rapid economic development had increased the size and power of the working class. Radicalized labor and leftist movements had jeopardized the capital accumulation regime and deepened the crisis of import-substituting industrialization. The crisis of capital accumulation could not have been tackled by the ordinary democratic political systems, as these were under pressure of reelection and sustaining growth. The socioeconomic crisis provided a fertile ground for militaries to step into politics to suppress labor radicalism and reorganize the conditions favorable for capital accumulation. In the Turkish case, the 1980 coup occurred amid creeping social violence and political deadlock (Heper & Evin, 1988; Demirel, 2003). The coup suppressed the political violence in the streets and

restructured the economic system according to the emerging orthodoxy of neo-liberalism (Şenses, 1993; Bedirhanoğlu & Yalman, 2010). The political order established by the 1980 regime was contingent upon keeping the political system clear of the centrifugal forces of leftists, Islamists, and the Kurdish movement. The military coup crushed the labor movement, restricted labor rights, and imprisoned most of the leftist leaders. At least 177 people were tortured to death in prisons. The regime purged 4,891 people from the civil service (12 Eylül Darbesinin 40. Yılında!, 2020).

3.4.2 The 1982 Constitution

The National Security Council (Milli Güvenlik Kurulu, MGK), which consisted of the high commanders, stated that it had taken over the legislative and the executive functions in the aftermath of the coup. On October 27, 1980, the Council issued the Law on Constitutional Order. With this law, the Council declared that the acts issued by the Council would supersede the provisions of the 1961 constitution (Özbudun, 2004, p. 50). The junta did not close the TCC or purge the justices. Nevertheless, the TCC was virtually dysfunctional during the junta regime because the laws promulgated by the National Security Council were exempt from judicial review.

On July 29, 1981, the MGK started the constitution-making process by adopting the Law on the Constitutive Assembly (Kurucu Meclis Hakkında Kanun, 30.06.1981). The Assembly consisted of the MGK and the Consultation Committee, and it was entrusted with the task of making a new constitution and election laws (Özbudun, 2004, p. 51). However, unlike what transpired with the 1961 constitution, this time the military closely oversaw the constitution-making process. The junta directly appointed Consultation Committee members who had no ties with political

parties. Since the junta had banned all political parties and civil associations, there was no meaningful debate over the draft. As a matter of fact, the junta prohibited the declaration of negative views on the constitutional draft (Tanör, 1994, p. 104). After completing their draft, the Consultation Committee would present it to the MGK. The MGK could reject or make changes to the draft constitution before presenting it for popular vote.

The 1982 constitution represents a setback in the constitutional history of Turkey. All Turkish constitutions (1876, 1909, 1921, 1924, and 1961) were an improvement over the previous one in terms of separation of powers, individual rights, and judicial independence. The 1982 constitution, however, represented a countercurrent that began with the 1971-1973 amendments. The junta leaders believed that the 1961 constitution straight-jacketed the state authority. Hence, their constitution aimed to restore state authority and control over society. First of all, the 1982 constitution strengthened the executive's influence over parliament and the judiciary. The president of the Republic was equipped with veto powers, and the cabinet was permitted to issue executive decrees that had the power of law (Parla, 1993, pp. 60-63). Secondly, in addition to specific restrictions enumerated for the limitation of each right, the 1982 constitution placed new and general restrictions over the exercise of all individual rights and freedoms. The principle that restrictions must not touch the substance of the rights and freedoms was omitted from the constitution (Tanör, 1994, p. 136). What is more, the new constitution also eroded the autonomy of the judiciary by redesigning the judicial council, which was in charge of administration, discipline, and promotion of judges. The Constitution united the previously separated High Council of Judges and the High Council of Prosecutors under the rubric of the High Council of Judges and Prosecutors. The

minister of justice and their undersecretary became the natural members of the Council. The Council had no secretariat, so the ministry of justice carried out the bulk of its work. This increased the political clout of the ministry on the judiciary. As for the TCC, the new constitution granted the resident of the Republic to appoint all justices from a pool of candidates nominated by High Courts. During the military regime (1981-1983), seven seats of the 15-seat court were freed up by retirements, and the junta filled those seats with new appointees. Finally, the constitution fortified the role of the military in Turkish politics. The constitution increased the number of commanders in the MGK, extended the MGK's duties to "protecting the social peace and welfare," and stated that the cabinet would give priority to MGK decisions (Bayramoğlu, 2004, pp. 84-85). These changes aimed to keep the government in line with the military in what it regarded as national security issues (Harris, 1988, p. 194; Hale, 1994, p. 258).

What's more, the military regime enacted several laws to fortify the militarist-nationalist regime. For instance, the Law on Higher Education (Yüksek Öğretim Kanunu, 06.11.1981) created the Higher Education Council (YÖK) to centralize the administration of universities. The Law defined the goal of university education was to train students in the direction of the principles of Atatürk and those who were loyal to the nationalism of Atatürk. It is important to note here that the military regime redefined Atatürkçülük, or Kemalism (Gürpınar, 2021, p. 304). The regime stripped developmentalist Kemalism of the 1960s and 1970s from its progressive elements, made it more sympathetic to Islam, and rendered it a moralist state ideology. Another characteristic of the regime was its anti-labor nature. The constitution prohibited labor unions from engaging in politics (Turkish Constitution

of 1982, article 52). The laws further restricted the exercise of unionization and the exercise of labor laws.

The military junta employed a unique blend of Turkish nationalism and Islamism to counter the propagation of leftist ideologies and communism (Toprak, 1990; Copeaux, 2016). The 1982 constitution made religious courses mandatory in primary education and supported several Islamic groups, helping them to flourish after the coup. The coup leader General Kenan Evren organized public gatherings across the country and praised Islam and conservative values. Similar to the U.S.'s aim with its green belt strategy to contain Soviet communism, the military regime hoped that the younger generations would stay away from notorious leftist ideologies if they embraced religion. Ironically, it was the same military regime that put secularism above all in the constitution and did not tolerate the appearance of Islamic identities in the public sphere.

3.4.3 Exit from the Military Rule

On November 7, 1982, the Turkish people approved the new constitution with an overwhelming majority of 91% (Yüksek Seçim Kurulu Kararı, 1982). Before the constitutional referendum, the military had prohibited propaganda against the constitutional bill. In case the bill was rejected, the military rule would be extended indefinitely. The color of the ballots for voting yes or no were different, which meant that people who voted "no" would be revealed. The voters probably saw the referendum as a way to exit from military rule and thus endorsed the constitution.

The junta had planned the transition period as well. The junta linked the election of commander-in-chief Kenan Evren to the presidency to the approval of the constitution. Evren thus became president of the Republic until 1989. He appointed

six more justices to the TCC during his presidential tenure. Another provision of the transition was that leaders of political parties which had operated before the coup were not allowed to run in the elections. The junta also established a puppet political party headed by retired general Turgut Sunalp. Yet another party that ran in the elections was Turgut Özal's center-right Motherland Party (Anavatan Partisi, ANAP). Before the coup, Turgut Özal worked as undersecretary to Prime Minister Süleyman Demirel and stood as a candidate in 1977 parliamentary elections in the ranks of Islamist National Salvation Party. He also served the junta government as deputy prime minister responsible for the economy. He was the mastermind behind the neoliberal economic transition program of the junta. Another party that ran in the elections was Necdet Calp's People's Party (Halkçı Parti, HP). Like Özal, Calp also served in the junta government as an undersecretary. The HP appealed the votes of the republican electorate who used to vote for the CHP.

The elections were held on November 6, 1983. Turgut Özal's ANAP took the majority of the seats in the TBMM with 45% of votes, while the HP ranked second with a share of 30%. Sunalp's Nationalist Democracy Party received only 23% of the votes. Özal's ANAP governed Turkey between 1983 and 1991. Süleyman Demirel, former AP leader, now leader of the True Path Party (Doğru Yol Partisi, DYP) received 22% of votes in the 1986 elections, making DYP the main opposition party (Yüksek Seçim Kurulu Kararı, 1983). Successive ANAP governments between 1983 and 1991 deepened Turkey's integration into the globalizing post-cold war world. An assortment of traditional Islamic groups, most notably the Nakşibendi and Nurcu movements, also integrated with the government under Turgut Özal (Ayata, 1993, p. 64; Gürpınar, 2021, p. 293).

3.4.4 Judicialization of Politics During the 1990s

The Turkish Constitutional Court underwent institutional changes and strove to adapt to the new regime. The Constitution decreased the number of justices from 15 to 11 and gave the final say on the appointment of constitutional justices to the president of Republic. Former junta leader President Kenan Evren appointed six justices before he left his seat to Tugut Özal in 1989. By 1989, nine of eleven seats on the court were appointed by Evren. The Court was quiet during 1980s, unlike in the late 1970s. A single-party government was in power, and the political system was overseen by the president and the National Security Council. The Court faced no political challenges.

Turkey during the 1990s was characterized by political fragmentation, volatility, successive dysfunctional governments, and the emergence of Islamist and Kurdish challenges to the regime. Between 1991 and 2002, seven coalition governments and one minority government ruled the country. Ministries became electoral bounties shared between coalition partners. During this period, 10 different justice ministers headed the ministry of justice (see Table 6). Government coalitions between ideologically opposed parties or between leaders who hated each other hindered the survival of coalitions. Excessive fragmentation of power and a string of Islamic and Kurdish challenges to the regime led to the judicialization of politics during 1990s. On the other hand, Turkey accepted the jurisdiction of the European Court of Human Rights (1990), joined the European Customs Union (1995), and gained “candidate country” status from the EU (1999).

The Turkish Constitutional Court became a robust political actor that shaped the political process. In the following pages, I examine the political fragmentation and the rise of challenger ideologies to Kemalism and the methods the TCC used for

dealing with those challenges. As we will see, this increased judicialization was a direct consequence of the hyper-fragmentation of the political system. With political power of every single party or faction weakened, groups turned to the Court for reinforcement. Conversely, with power fragmented between disparate and uncooperative political actors, the Court found it increasingly easy to intervene in political affairs that earlier courts would have sought to avoid. Before returning the TCC during 1990s, I trace the unfolding of this dynamic below.

Table 6. Changes in the Government and Justice Ministers 1991-2002

Prime Minister	Terms	Duration	Coalition Partners	Justice Minister
Demirel	20.11.1991 05.16.1993	1 year, 177 days	DP-SHP	Seyfi Oktay
Çiller	06.25.1993 10.05.1995	2 years, 102 days	DP-SHP-CHP	Seyfi Oktay
				Mehmet Moğultay
Çiller	10.30.1995 03.06.1996	128 days	DP-SHP	Firuz Çilingiroğlu
Yılmaz	03.06.1996 05.28.1996	114 days	ANAP-DP	Mehmet Ağar
Erbakan	05.28.1996 05.30.1997	1 year, 2 days	RP-DP	Şevket Kazan
Yılmaz	05.30.1997 01.11.1999	1 year, 195 days	ANAP-DSP-DHP	M. Oltan Sungurlu
				Hasan Denizkurdu
Ecevit	01.11.1999 05.28.1999	137 days	DSP	Selçuk Öztek
Ecevit	05.28.1999 11.18.2002	3 years, 174 days	DSP-MHP-ANAP	Hikmet Sami Türk

Source: tbmm.gov.tr

3.4.4.1 The Social Origins of Political Fragmentation

The two-party system that characterized Turkish politics from 1950 ended with the 1980 coup. The CHP, which represented the secular, bureaucratic, Kemalist values lost its central status in the post-coup political order. The party revitalized itself by successfully adopting a leftist discourse after the 1971 military intervention, but it was unable to keep its electoral base after 1980. On the other hand, the other main

political line represented by the DP and the AP survived the coup under the banner of ANAP. However, with the 1987 elections, former prime minister Süleyman Demirel's DYP agenda led the way to the bifurcation of center-right right politics between the two parties.

The nature of the traditional cleavages that had marked the pre-1980 party system changed during the 1980s. The military coup facilitated the transition to an export-oriented market economy. This transformation shattered the social formation of the pre-1980 regime as well. From 1960 onward, the state created a domestic market, protected it with non-tariff barriers, subsidized both the industry and agriculture with cheap inputs, and allowed wages to rise to feed domestic demand. As Turkey transitioned to an export-oriented market economy, the state's role also changed. The state slashed agricultural subsidies, waived trade barriers, suppressed wages, and gave several incentives to the industrial sector to promote export-oriented growth. The abolishment of agricultural subsidies depressed agricultural prices and fueled migration to urban areas (Boratav, 1998, pp. 134-135). The urban population was 4% of the total population in 1927. It had risen to 53% by 1985 and 65% in 1997 (Özler, 2000, p. 41).

Turkish political parties have traditionally used populism and vertical patronage networks (Sayarı, 1977, 2011; Sunar, 1990) to reach the rural population. After 1980, the locus of the poor shifted from rural to urban areas. The clientelist networks of political parties which had operated vertically between the center and periphery were not able to adapt to new circumstances, so populism ceased to be a viable economic policy. As the state's role in the economy recalibrated, the welfare function of the state degraded. Large numbers of urban poor were devoid of welfare provision, job security, and urban services. The Islamic movement capitalized on the

inability of the state and traditional patronage networks to incorporate the urban poor (Sayarı, 2014, p. 661). Islamist grassroot networks proved to be more successful than the state in extending public provisions to the urban outskirts (Buğra, 2007, p. 47).

The 1994 mayoral election was shocking for Turkey's secular establishment. The Islamist Welfare Party (Refah Partisi, RP) won the race in 28 municipalities, including the most developed cities, Ankara and Istanbul, which had been considered secular strongholds (Gülalp, 1995; Toprak, 2005, p. 172). The Welfare Party promised to bring a just order (Adil düzen), a term that connoted the Ottoman idea of the circle of justice. Culturally and economically alienated masses flocked to the Islamist ranks in the pursuit of a just order. In 1995, the Islamists outvoted other parties in the general elections and received the majority of seats in the parliament This was the first time in Turkish history an Islamist party qualified to form the government.

As we have seen in the previous sections, the Turkish state has always had an ambivalent relationship with Islam. The state mobilized Islamic groups against the socialists from 1950 onward while staunchly opposing any manifestation of Islamic culture and practices in the public sphere. With the rise of political Islam in the 1990s, the tacit agreement between the state and the Islamists broke down. The new generation of Islamists was no longer satisfied with the terms of their partnership with the state; they wanted to Islamize the state itself.

Another pattern that characterized Turkish politics during the 1990s was the upturn of Kurdish nationalism and ethnic conflict (Bozarslan, 2000; Watts, 2007). The PKK, founded in 1978 as a separatist guerilla organization that struggled for Kurdish independence, gained momentum after the 1980 coup. Torture and killings of the Kurdish population accelerated the participation in the ranks of the PKK. The

1980 regime imposed an ultra-Turkish nationalism that denied the Kurdish identity altogether. Turkey's response to the Kurdish insurgency mimicked its early republican practices (Yeğen, 2006). The regime took it as a security threat and combated it accordingly. The security apparatus was transformed to carry out an internal warfare against its own citizens. This led to the further militarization of Turkey and aggravated the grievances the Kurds had suffered.

3.4.4.2 Emergence of the Constitutional Court as Guardian of the Regime

The ramifications of socio-political change during the 1980s affected the political system during the 1990s. Between 1983 and 1991, a single-party government ruled Turkey. The former junta leader, Kenan Evren, was president. In 1989, Turgut Özal replaced Kenan Evren and became the first civilian president since 1960. In the 1991 elections, no party got enough votes to form a government on its own, which ushered in a decade of weak coalition governments.

In the 1990s, the increasing number of Islamist and Kurdish challenges was alarming for Turkey's long-standing secular elite. Both challenges targeted the long-established components of the regime identity: secularism and unitary state. At this point, the TCC played a crucial role in protecting the regime against Islamist and Kurdish identity claims. Building on Shapiro's (1986) thesis that courts are administrative agents, Shambayati & Kirdish (2009) argued that the TCC became an "administrative attaché in pursuing the civilizing mission" (p. 774).

The TCC returned to politics to combat the Islamist and Kurdish challenges to the regime. On the one hand, the TCC assertively used its constitutional review power to ban the Islamic headscarf on university campuses; on the other, it closed down Kurdish and Islamist political parties and banned many politicians from

political activity. Both issues illustrate the unfolding of new struggles in Turkey that affected the periods that followed and gave rise to a robust court which then became the major political actor in an environment of political fragmentation and conflict.

The headscarf case is illustrative of a great many other grievances that religious people/groups harbored against militant secularism during the 1990s. To understand the struggle over the headscarf, we need to revisit the development of the TCC headscarf case law over time. Although no law specifically prohibited the use of headscarves in the universities, court decisions have been used to justify a headscarf ban. From the perspective of a Turkish legal positivist, governments have striven to overcome a de facto headscarf ban by legal means, although no such ban existed in the legal universe (Gözler, 2012, p. 87).

After the 1980 military coup, the Higher Education Council ordered universities to prevent students who were wearing headscarves from entering the campus. A university student challenged the rule in the Supreme Administrative Court (Danıştay), asking it to revoke the disciplinary sanction she had received for violating the rule. The Court upheld the university's enforcement of the ban. In so doing, the Court reasoned:

> Some of our girls who have not received proper education use headscarves under the influence of traditional values and their social environment without any bad intention. However, some girls who are well educated …cover their heads to manifest that they are against the secular republic and that they want a government which is based on the religion…For those, the headscarf has become a symbol of a worldview which is against women's liberty and the basic principles of the Republic. (E.1983/207, K.1984/430)

The headscarf issue took on new salience after the elections in 1987, when the center-right Motherland Party gained an absolute parliamentary majority and formed the government. To reverse the ban, the new parliament enacted a provision granting amnesty to university students who had been sanctioned for wearing a

headscarf, which reinstated the earlier law permitting headscarves. After the bill was approved in the parliament, President Kenan Evren appealed to the Turkish Constitutional Court on the grounds that the proposed law was contrary to the Constitution.

The Court held that the bill was unconstitutional on two grounds (E: 1989/l, K: 1989/12). First, it had been drafted for obvious religious reasons. The aim was to permit a certain way of covering the head and neck for Muslims, but by doing so, it violated the principle of prohibiting laws based on religious beliefs. The Court also held that the bill violated the principle of equality by favoring one religious group over others in the public sphere. This would be enough to annul the article. Second, the Court went well beyond a ruling to invalidate in the light of established constitutional provisions; it reviewed the history and the philosophy of the relationship between the headscarf and Turkish political identity. The Court invoked the preamble to the constitution and explained how secularism and reforms and the modernism and the nationalism of Atatürk intertwined to form the constitutional identity. The secularism espoused by the Court amounted to a type of theological secularism, something more and different from a prudent feature of public order and of public administration:

> Laicity is a civilized way of life which renders the leadership of reason by demolishing the dogmatism of middle-ages. [It is] an understanding of liberty and democracy that was developed in the light of science the basis of nationalization, independence, sovereignty and human ideal. It is shared in the [legal] doctrine that—secularism—is the last stage of the organizational and ideational evolution of societies…Laicity is the philosophy of life of Turkey. (E: 1989/l, K: 1989/12)

Undeterred by the defeat, after the Court's ruling, the Motherland Party drafted a new bill with more care. This time there was no reference to religion, nor was there a prescribed way to dress. The new bill simply stated:

> Provided that no existing law prevents it, students are free to dress as they please in institutions of higher education. (2547 Sayılı Yükseköğretim Kanunu.., 28.10.1990)

Although the added clause made no reference to religion, the intent of the bill was clear: to allow women to wear headscarves on university campuses. The main opposition, the Social Democratic People's Party (SHP), appealed to the TCC for an annulment. This time the Court rejected the SHP's position on the bill's constitutionality. However, after reciting its previous decision, the Court ruled that the added article placed a condition on the freedom of dress—that the manner of dress must not be against the existing laws, thus upholding the constitutional principle of secularism. In its commentary, the court reasoned that no legislation can override the principle of secularism. If the added provision had not referred to existing laws, the Court would have seen it as an attempt to override the principle of secularism and invalidate it. The Court upheld the legislation, which changed nothing in practice according to its interpretation, but its commentary restricted any future legislative attempt to free the headscarf in universities (Özbudun, 2005, p. 350). With these headscarf cases, the TCC developed a very restricted interpretation of secularism and left no room for political agents to solve the problem without changing the meaning of secularism itself.

Desperate for a solution to the headscarf ban in Turkish courts, a university student, Leyla Şahin, appealed to the ECtHR in 1998. The ECtHR decision on the Şahin case lent support to the TCC's position, claiming that the case involved separation of state and religion and that the TCC was in a better position to make a judgement on the issue. It is important to mention here that the ECtHR ruling on the Leyla Şahin case was a pious victory for Turkish secularists. As we will see in the Chapter 4, Islamists craftily used the ban to foster a hegemonic bloc among Turkish

Muslims, which radiated the effects of the ban and hampered the secular regime (Gülalp, 2019). We will also see how Islamists packed the court and redefined the very essence of the Republican regime's identity: secularism.

As it had done with the headscarf case law, the TCC, by its decision to close political parties (see Table 7), drew a bold line between the cultural and political realms of life. In her article commenting on the party closure cases, Dicle Kocaoğlu (2004) shows that the TCC distinguished between a larger cultural domain and a smaller political domain; she went on to insist that what may be permissible in the cultural domain is not necessarily acceptable in the political domain. For instance, in its rulings against Kurdish political parties, the Court acknowledged that the Kurdish language might be used in the daily lives of Kurds as a cultural practice, though it did not qualify as a national language to be used in the political sphere or in schools. Drawing heavily on the Kemalist principles of nationalism and a unitary state, and citing Mustafa Kemal Atatürk's writings and relevant constitutional provisions, the Court ruled that the political sphere includes the press and the media, meaning that prohibiting use of the Kurdish language was legitimate if it was used to foster separatism and undermine national unity (p. 447). In a similar vein, the Court for the first time heard a closure case against a major incumbent political party, the Islamist Welfare Party, which had garnered 21% of votes—the highest of all the parties that had competed in the 1995 elections. The chief public prosecutor had brought a case against the Welfare Party, claiming that it was engaged in anti-secular and therefore unconstitutional activities. In its ruling, the Court agreed with him, singling out speeches by party officials who criticized the ban on headscarves in universities and the endorsement of the sharia as a form of legal pluralism by Erbakan, leader of the Welfare Party. The Court's opinion went on to elaborate on the role of religion in

modern society, arguing that religion belongs to one's conscience and the private realm, and that the dignity of religion should be saved from the "contagion of politics." Here too, the Court cited at length Atatürk's speeches about religion (p. 451) in much the way the U.S. Supreme Court cites the "founding fathers" of the United States. In its ruling on December 16, 1998, the Court ordered the closure of the Islamist Welfare Party, a decision that was subsequently upheld by the European Court of Human Rights (ECTHR) and again later by the European Court of Justice (ECJ). The ECJ's opinion underscored its decision by asserting that the Welfare Party's support for overturning the headscarf ban in public schools and its endorsement of sharia as forms of legal pluralism posed a vital threat to democratic society (the Welfare Party and Others v. Turkey).

Table 7. Kurdish and Islamist Parties Closed by the TCC 1993-2009

Party Name	Base	Year Closed
HEP	Kurdish	1993
DEP	Kurdish	1994
REFAH	Islamist	1997
FAZİLET	Islamist	2001
HADEP	Kurdish	2003
DTP	Kurdish	2009

Source: the TCC website anayasa.gov.tr

3.5 Patterns of Constitutional Development in Turkey

So far, we have reviewed developments in Turkey's successive constitutional regimes from 1876 to the 1990s. How can we make sense of these continuities and breaks in Turkey's constitutional history? The standard account of constitutional development explains the emergence of the regimes with political entrenchment. Constitution makers "lock-in" or "entrench" certain policy preferences in institutions, and their design self-reinforces the new regime until it collapses in the

face of a new exogenous shock. As we have seen, theories of insurance and hegemonic preservation have pointed out the reasons behind constitutional entrenchment and have explained possible mechanisms. Beyond that, whether and to what extent constitutional entrenchments create path dependencies for constitutional courts are interesting questions and need to be addressed. With its seeming cycle of reform and reconfiguration, Turkish political history provides a near-ideal case for exploring factors that lead to continuities and disjunctures in the political development of constitutional regimes. Among other things, as we shall see, the weight of law and the judiciary slow down and at times even thwart the agenda of the political majorities. I think this sheds light on the continuities of law and politics, despite constant change.

Drawing on the constitutional history of Turkey, I want to explore two possible mechanisms to explain why constitutional entrenchment results in undesired consequences. First, revolutionary coalitions consist of multiple interests and constitutional visions. A successful coalition harmonizes those differences and directs them toward a single objective: eradicating the old regime. During regime transitions, different groups compete to inscribe their preferences on the new regime. The result would be a new constitution with a new set of institutions. Constitution-making after a regime breakdown aims to create an order with a set of entrenched institutions. Once the new order is created, revolutionary coalitions tend to disintegrate. Two instances from Turkish constitutional history that I have reviewed at length in this chapter are illustrative. In both 1908 and 1960, a progressive revolutionary coalition toppled the old regime. The revolutionaries of 1908 consisted of soldiers, urban bourgeoisie, and intellectuals, but they were divided along ethnic lines. Similarly, the social coalition behind the 1960 coup included young soldiers,

industrial bourgeoisie, progressive bureaucracy, and intellectuals. They were much more homogenous in terms of ethnicity. Both movements successfully eradicated the old regime and established a new constitutional order. The revolutionaries of 1908 reinstated the parliament, constrained the sultan, initiated a great purge in the imperial bureaucracy and eased restrictions on individual rights. Between 1909 and 1912, Turkey experienced a vibrant parliamentary regime and democratic elections. However, within three years, the differences between political groups diverged with respect to the future of the Empire. Turkish nationalists took control of the parliament, isolated others, and established a despotic rule. The democratic institutions created by the 1908 regime failed to serve democratic aims, and the CUP leadership instrumentalized those institutions against their rivals.

This brings us to my second point. The political process is dynamic and is embedded in a social context. Institutions try to freeze interests in time, while the political process changes as the social relations change. Political groups who formed the constitutional regime might take different directions to realign with new powers. Others who have taken control of major regime institutions might see them as entities that no longer serve their interests. Again, two examples from Turkish history are illuminative. Following the 1960 regime, increasing social mobilization altered the terms of politics in Turkey. The labor movement and student movement flourished under the liberty regime of the 1961 constitution. In the same vein, Turkish youth and universities polarized; they split into groups of leftists and rightists, and the social coalition which fortified the 1961 regime dispersed. All this happened within the first ten years of the 1961 regime. Amid such turmoil, any court would stumble on finding its footing. The newly founded TCC carved its autonomy and added new layers to the constitutional regime by generating innovative precedents like

invalidating constitutional amendments. These divisions were not present in the regime coalition at the beginning. Social polarization turned those cracks into deep fractures and haunted the second republic (1960-1980).

Secularism is another area of Turkish history where we observe new social movements causing unintended consequences. The Republican elite might have had differences of opinion on several issues, but they maintained their consensus during the 1960s about the place of religion in Turkish politics. Once again, however, this consensus later shattered with the rise of the socialist movement that pervaded the 1970s. The Turkish military considered the dysfunctional governments and the socialist movement as vital threats to the country. The generals, though they were staunch secularists, saw the Turkish-Islamic synthesis as a bulwark against socialism. As I have discussed in the previous sections of this chapter, this was an impossible formulation to sustain. It aimed to placate the working class with nationalism and religion while prohibiting the manifestation of Islam in the public sphere. The years following the 1980 coup witnessed an upswing of Islamic fundamentalism and the Kurdish national movement, which jeopardized the initial plans of the secular generals. These social movements had more complex global and domestic sources, but the 1980 coup catalyzed the progress of Islamism and Kurdish nationalism.

Despite periodic reforms and a reconfiguration of the regime, some patterns survived through the various regimes. The instrumentalization of law and the courts, for example, is a constant in Turkish history that has characterized all regimes. Students of political jurisprudence might see this as stating the obvious, since all regimes want to use law and the courts for political ends, but the modalities of instrumentalizing them vary. As this chapter has demonstrated, the Turkish political elite has effectively used law and the courts as instruments for modernizing the

Turkish state and for initiating cultural change and social control. The understanding of law as a means to an end has survived different regimes. Cyclical regime breakdowns, however, have impeded the courts from developing an institutional culture and autonomy. To be sure, the magnitude of change was not the same in all areas of law and bureaucratic administration. Areas of law which had less significance for the political elite developed without interruption and provided stability to the regime in times of upheavals. The courts continued their businesses in administering the daily lives of the people. I believe this chapter makes it clear how republicans used laws and the courts to create a modern secular nation and the TCC had a central role in defining and guarding the secular identity of the regime. The courts, particularly the high courts who had constitutional and administrative review functions, were highly valuable political assets for the various groups who took charge of the government. This might be the single most important element of the judicialization of politics in Turkish history. In Chapter 4, we will see Islamists following in the footsteps of secular republicans when they capture the state power and exploit the same tools to create an Islamic society.

3.6 Conclusion

Modern Turkish history (1908-2000) has been characterized by unstable governing coalitions, highly porous state institutions that were vulnerable to powerful societal interests, cyclical regime changes, and purges after major ruptures. Following each political rupture, a new governing coalition attempted to weaken the entrenched interests of the previous regime through legislation and by revising or replacing the constitution. The 1924 constitution survived 36 years and the 1961 constitution lasted 19 years. The 1982 constitution, though still in effect as of this writing, has

been amended extensively—in 1995, 2001, 2010 and 2017—changing substantially more than once. Almost every constitutional rupture has been accompanied by major changes in the bureaucratic structure and personnel as well as by court packing and extensive purges in the judiciary.

Secularism and national unity are the two main themes that have occupied every constitutional debate since the late nineteenth century—and intensely since the 1920s. Secularism, initially seen a means of holding a multi-religious empire together, was transformed into a civilizing imperative for the formation of a modern republic, and then almost into a civil religion. But the progressive elite's assumption that religion would fade away with modernization was not borne out, as Islamists rose up periodically to challenge the hegemony of the modernist state. In response, the progressive elite turned to various devices to limit the appeal of religion. At times, the state mobilized Sunnah Islam against non-Muslims, heterodox Islamic groups, and later, communists. Furthermore, the Kemalist national project and its successors have failed to prevent successive Kurdish revolts and various alternative claims of Islamist identity, both of which show the limits of Turkish nationalism. Under modernist leadership, the state has been consistent in its effort to prohibit overt Islamic identities and symbols in public spaces, but here too, efforts have been mixed at best.

State leaders have been consistent in turning to law and constitutionalism to pursue their objectives. Here too the results have been mixed. Although progressive governments have been successful in creating new constitutions in their image, creating new courts, packing the judiciary, and adopting laws to impose their vision on the populace. All these create resistance, loopholes, less-than-enthusiastic judges, and a host of other factors that have retarded the efficacy of their new constitutional

and legal orders, or have at least undermined it. And, as we will see, the redoubled efforts by the secularist elites have at times inspired a powerful conservative backlash that has both undermined the liberal project and fragmented politics beyond the traditional divide between secularists and traditionalist. In all this, judges and courts whose raison d'être is to be independent and interpret the law were drawn into—and occasionally jumped into the crossfire—and used by various powerful groups ~~in efforts~~ to achieve their own aims. As we have seen, at times the judges were explicitly created as pawns in this process; at other times, they were forced to bend to the political will of the regime (via purges and replacements). Yet in still other times, some of them viewed themselves as players in a fragmented polity and sought to advance one cause or another, or find ways to bridge differences

The long-standing battles between Islamists, secular political groups, and the Turkish judiciary in the late twentieth and early twenty-first centuries carries the imprint of the preceding decades, as reviewed in this chapter. The Turkish state's balancing act with religion that took place throughout the twentieth century was always fraught with instability, made all the more so by divisions within the broad coalition that embraced secularism, and for that matter, differences between various religious camps and between economic status and power. It was probably only a matter of time before the impossible formulation of a Turkish Islamic synthesis collapsed with ascendance of Islamists to power in 2002.

The ensuing three episodes of the constitutional crises in the twenty-first century focused on a major transformation, the Islamist capture of the Turkish state and the failure of Turkish constitutionalism. It also represents continuity. The same actors are engaged. The same dynamics are at play. The difference is substantial in the shifts of the relative dominance of the central actors over time. No doubt the

internationalization of law and political discourse of endogenous forces affect the struggles, but at best they operate at the margins. All politics is local.

The one overwhelming constant in this centuries long struggle is the approach to law and constitutionalism. Students of judicial politics assume that all (or much) about the judicial process is instrumental—after all, the field is known as "political jurisprudence" (Shapiro, 1963) or "judicial politics." Perhaps so. However, the long-standing association of law with religious doctrine and religious rulings, the lack of a tradition of a modern autonomous bar and law schools, the tradition of a civil-service judiciary, and the dramatic upheavals in Turkish political life in the early twentieth century, all contribute to an understanding of the naked instrumentalism of the law and courts that is more apparent in modern Turkey than in other settings. We have already explored the way political authority has used the courts to advance their agendas, but this dynamic will become even more evident in the next four chapters, which recount contemporary clashes between traditionalist and Islamists, and then various divisions within both groups. Further, we will see that, as fragmentation and political stalemate increase, judges at all levels seize opportunities to wield power independently.

CHAPTER 4

THE LAST BASTION OF THE REPUBLICAN REGIME: THREE YEARS OF DEFENSIVE ACTIVISM (2007-2010)

This chapter explores Turkish Constitutional Court between 2007 and 2010, a period of crisis for the old secular political regime that had been replaced by its pro-Islamist successor. As an organic part of the receding regime, the Turkish Constitutional Court used its considerable political capital to stave off the change and, as a consequence, played a decisive role in a crisis that culminated in the transition of power from the secular state elite to the pro-Islamist alliance. As we saw in Chapter 3, the Turkish Constitutional Court embraced a guardian role in the secular regime. During the 1990s, it justified the headscarf ban in universities on constitutional grounds and closed down Islamist and Kurdish political parties to protect the regime. After the pro-Islamist Justice and Development Party (AKP) came to power with a parliamentary majority in 2002, the terms of the relationship between Islamists and the Court changed. As the political power shifted to the pro-Islamists, institutional change lagged behind political change, as always. The AKP embarked on a path to regime change that inevitably led to a head-on clash with the secular court.

I have organized this chapter into three sections. In section 4.1, I trace the ascendance of the AKP to power and its implications on the dominant secular regime in Turkey. I explore the changing strategies of Turkish Islamists for capturing the state power, including the judiciary. Section 4.2 recounts how the Turkish Constitutional Court, anchored in the secular regime, failed in its effort to rein in the Islamists. To do this, I examine three crucial cases of political salience. In these cases, the Court halted (2007) a presidential election, invalidated (2008) the AKP's

constitutional amendment to free the headscarf in universities, and heard (2008) a closure case against the AKP. In each case, the Court ruled against the ascending Islamist party, but with each case, the Court was digging its own grave even deeper.

4.1 The Post-Islamist Challenge to the Secularist Constitutional Regime

The rise of the AKP to power in 2002 posed a major challenge to Turkey's political regime, which had consolidated its authority in the 1982 constitution. When the Turkish Constitutional Court (TCC) closed down the Islamist Welfare Party in 1998 (Öniş, 2001), it precipitated a crisis for Islamist parties, which were then on the fringes of power. After the Welfare Party was closed, a group of young Islamists came to believe that a new strategy was required to increase their support base and to avoid being shut down again. To this end, at the Virtue Party congress in 2002, the young Islamists separated from hardliners in the party (Öniş, 2004; Atacan, 2005) and established a new party, the AKP, and ushered in a new Islamist strategy. They shrewdly sought to take advantage of the Western European governments' post-September 11 promotion of moderate Islam to counter radical Islamism. In presenting itself to the world and to Turkish citizens, the AKP sought to differentiate themselves from traditional Islamic parties, adopting a discourse of moderate Islamism; and instead of being insular, they embraced globalization, the market economy, and courted Western governments. (Öniş & Keyman, 2003, p. 99; Tuğal, 2009). One distinctive signal of all this was its declared desire for Turkey to join the European Union (EU).

The time was right for such appeals. Turkey was in the midst of an economic crisis of staggering proportions. The country's GDP dropped by 9.5% in 2001, and the government, was forced to embrace a harsh austerity policy prescribed by the

IMF to bail out the economy (Yilmaz & Boratav 2003; Cizre & Yeldan 2005). The economic downturn, coupled with the harsh austerity measures, fostered widespread anger and distrust in the conventional political parties (Çarkoğlu 2007, p. 505). The newly formed AKP, which had not played any role in imposing the austerity measures, ran a successful campaign against the incumbent parties. In November 2002 general elections, the Turkish electorate penalized mainstream political parties, which resulted in a two-party parliament. With only 34% of the vote, the AKP got two-thirds of the parliamentary seats, thanks to 10% electoral thresholds—the world's highest. The Republican People's Party (CHP), the founding political party of the Turkish Republic, received 19% of the votes, ranking second after the AKP ("Islamic party wins", 2002).

The AKP presented itself as a conservative democratic party (Akdoğan, 2004; Özbudun 2006; Şimşek 2013) that represented the demands for democratization of the pious periphery and the Anatolian petty bourgeoisie against secularist bureaucracy and the military. For the first time in the Republic's history, a pro-Islamist party occupied almost two-thirds of the seats in the Grand National Assembly (Türkiye Büyük Millet Meclisi, hereafter TBMM) and established a single-party government. This created great anxiety in the military-bureaucratic elite, which had toppled Turkey's first Islamist government five years earlier (Somer, 2007).

The AKP owed its ascendance to power to its ability to perceive and take advantage of windows of opportunity. Unlike previous Islamist parties, in the 2002 elections, AKP did not run on a negative platform; it was pro-European and pro-NATO. And like the governing party it ran against, it pledged to maintain pro-market reforms and liberalize markets (Coşar & Özman, 2004; Öniş, 2004). As a

consequence, it drew support from voters who were sympathetic to these policies, and they received good press from officials in Europe and the U.S. Above all, it succeeded in consolidating the support of many voters who had previously divided their support among several smaller parties which had played minor roles in the short-lived coalition governments of the 1990s (Önis & Keyman, 2003).

For the first time in modern Turkish history, Islamists had a legislative majority that was large enough to amend the constitution, curb the power of the military, and redistribute wealth. The AKP promptly dominated the legislature and initiated democratization reforms in order to harmonize the Turkish political system with European standards and pave the way to EU membership (Müftüler-Bac 2005). One sticking point on EU membership had been the outsized role of the military in the Turkish government, so the new government set out to curb the power of the army. The legislature also changed the composition of the National Security Council, whose traditional role had been to formulate Turkey's security policies. The government increased the number of civilian members and selected a civilian public officer as its secretary. In short order, the National Security Council became little more than advisory board (Karaosmanoğlu, 2012, p. 149) to the prime minister. As a result, these reforms were welcomed by much of the republican elite and secular bourgeoisie, as well as by EU officials.

Although the AKP was reforming Turkey's political system according to the European Union framework and reaffirming its commitment to NATO, it was hardly modeling itself on any of the major political parties in Europe. Its core constituents were non-cosmopolitan, observant conservatives who had a long-standing objection to secular state institutions (Kalaycıoğlu, 2007, 2008; Çarkoğlu & Toprak, 2007). Although the AKP had forsaken the radical Islamic agenda of its

predecessors, it insisted that observant Muslims be allowed to participate in the public space with their Islamic display, long a Republican taboo (Çelik Wiltse, 2008; Azak, 2010).

Liberalizing the economy and curtailing the military had widespread support, but the issue of Islamizing the state was another matter. It went against the founding principles of Turkey as a modern and secular state, and these principles were grounded in a long-standing and well-understood constitutional tradition. Getting around or through these roadblocks was more challenging than winning elections or liberalizing the economy. The AKP controlled the legislative process, but the TCC controlled the interpretation of the Constitution. Still, the AKP had the votes, and a conservative electorate continued to flock to it. As a consequence, Islamization took on an increasingly larger role in shaping its identity and agenda. A head-on clash between party and the TCC was therefore inevitable.

4.1.1 Legal Reforms for EU Accession

From the outset, the AKP had been keen on entering the EC and had made great strides towards fulfilling the conditions for membership. In December 1999, the European Commission granted Turkey "candidate country status," a big first step toward full membership. This was followed in March 2001 by Turkey's announcement of its own National Programme for the Adoption of the EU Acqui Communiatere (Müftüler-Bac, 2002). This required a series of constitutional amendments and changes in ordinary laws to harmonize Turkey's legal framework with the European Union standards. At the time, informed observers thought these changes would involve some difficulties, but few thought they would lead to a stalemate. Legal changes other than constitutional amendments were called

harmonization packages because they involved multiple changes in different statues. The constitutional amendments and harmonization reforms were drafted by an all-party parliamentary committee that sought a political consensus in the parliament. Before the AKP came to power in 2002, the parliament included social democrats, nationalists, centralists and the Islamist Virtue Party (AKP's predecessor). It had passed 37 amendments to the constitution, the most since 1983 (Gönenç, 2004). These included the abolition of the death penalty, a broadened set of individual freedoms and liberties, civilian state security courts, and new rules for party closures, and most importantly, they changed the composition of the National Security Council (Milli Güvenlik Kurulu, the MGK) by increasing the proportion of civilians on it (Gürsoy, 2011). The parliament, the president of Republic, and Turkish civil society all supported the amendments.

Although the military grumbled about the changes to the MGK, the parliament remained steadfast and adopted the proposals unchanged. The Constitutional Court seemed happy with the general direction of the amendments, except for changes that made closing political parties difficult. However, all parties who were allowed to request a constitutional review—the president, the main opposition party, and one-fifth of the deputies—supported the amendments. The coalition government also threw its weight behind these changes, and the road looked clear for EU membership.

After assuming full control of the government in the 2002 elections, the AKP redoubled its efforts to bring the constitution in line with EU expectations. Here too, the changes they made were far-reaching, and the parliament acted with dispatch and with a large consensus. They abolished the State Security Courts, authorized the government to ensure gender equality and opened military expenditures to the

scrutiny of the Court of Accounts. Most significantly, the amendment to article 90 incorporated international agreements concerning individual rights and liberties (including constitution provisions themselves) into domestic law, so that in case of conflict, international human rights laws would take precedence over Turkish court rulings, Turkish law, and the Turkish constitution. Despite all this, these reforms were embraced by civil society groups, the CHP, and tacitly, by the military (Karaosmanoglu, 2013, p. 155).

In addition to constitutional amendments, between February 2002 and July 2004, Turkey adopted nine harmonization packages, which included several legislative changes, six of which were adopted during AKP's rule (Müftüler Baç, 2005). These reforms were made in a consensus with the opposition party. Apart from these harmonization packages the Turkish parliament radically changed several major codes of Turkey. The parliament drafted a new Civil Code, a new Criminal Code, a new Code of Criminal Process, and a new Law of Associations to bring Turkish law in line with EU guidelines. In 2004, these radical changes sailed through parliament with a broad consensus, but they did not lead to constitutional litigation. Following this flurry of legislative activity, given the significance of the changes, the number of cases brought to the Constitutional Court and the annulments remained low (see Table 8). Furthermore, there were no “big cases” that sought to undermine the development of the new Turkey. This indicates that the Europeanization of Turkey had been espoused by the AKP, the CHP, and the president of Turkey and that it was supported by a near-consensus across political lines.

Table 8. Number of Legislations and Petitions for Abstract Review

Legislative period	Number of legislations	Applications for constitutional review (abstract review)
2003-2004	255	5
2004-2005	131	6
2005-2006	97	12
2006-2007	77	9
2007-2008	116	16
2008-2009	118	22
2009-2010	93	13
2010-2011	221	14

Source: Compiled from TBMM annual reports and TCC yearbooks.

4.1.2 Relations with the Court

The first confrontation between the Court and the government came when the AKP revealed its intent to lift the headscarf ban on university campuses. This clash was all the more dramatic because of the tradition of Turkish justices communicating directly with the public and the with the government through speeches delivered on the occasion of the new judicial year or on the anniversaries of the Turkish Constitutional Court. On these occasions, justices would invite notables to the courthouses—including the president of the Republic, members of the cabinet, members of parliament, and the commander-in chief of the armed forces—and instruct them on their obligations under the Constitution. After the AKP victory in the 2002 elections, the topic of secularism began to dominate the chief justices' addresses. In 2005, on the 43rd anniversary of the creation of the Turkish Constitutional Court, Chief Justice Mustafa Bumin devoted much of his speech to criticizing the AKP government's plans to lift the headscarf ban in universities (Bumin, 2005). This issue had been a bone of contention between Islamists and the secular state elite since the founding of Republic in 1923—an issue that had assumed increasing significance for both sides since the 1980s. As economic opportunities

and education had expanded, women were still not permitted to wear Islamic headscarves in universities or-in public offices. By the 1990s, the headscarf ban was the most divisive issue in Turkish politics. When the military toppled the Islamist coalition government on February 28, 1997, universities and other public institutions started to implement the ban more strictly. Even the parents of headscarf-wearing students, for example, were not allowed to attend their children's graduation ceremonies on the university campuses.

In an address to the officials in the new AKP government, Justice Bumin complained about the plans to do away with the ban and warned that lifting the ban was unconstitutional. He reminded them of the Court's previous rulings on this matter, as well as rulings by the Supreme Administrative Court (Danıştay). He emphasized in no uncertain terms that the Turkish judiciary regarded headscarves as political-religious symbols that put pressure on women who do not cover their heads in public spaces. H also emphasized that as long as secularism remained a constitutional principle, it would be impossible for women to wear headscarves at universities and at work in public institutions (Bumin, 2005).

When Bumin's statements were related to the AKP Deputy President Bulent Arınç in a televised interview, Arınç responded that his party had the legislative majority and it could therefore eliminate or alter the jurisdiction, composition, and the powers of the court the Constitutional Court if it wished (Arınç, 2005). Although the AKP was not yet feeling fully secure in its power, party representatives began revealing plans to pack the Court. This might have been a strategy designed to deter the Court from meddling in AKP's plans, but soon after they assumed office, the AKP majority began planning radical changes for the structure of the Court. For instance, the AKP representative head of the Constitutional Committee of the

parliament announced plans to alter appointment procedures for judges to the Constitutional Court, which would bring them under the control of the new parliamentary majority ("Kökten değisim", 2003).

4.2 The Crisis Unfolds

Despite all this good will and effort by uncharacteristically united political groups, it was not enough for the EU. Examining the reforms, the EU said, in effect, "that's fine, but it's not enough." Officials then pointed to still other reforms Turkey needed to embrace before it could advance to the next step toward admission to the EU. Europe had received the Turkish efforts to date with some indifference, and changes in Europe created still more road blocks. This led many Turks to question whether full membership was ever going to be possible, or even worth it, and Europe's ambivalence dampened the public's enthusiasm for AKP's reforms. The Europeanization process, which had been the main engine of democratic reforms in Turkey, had stagnated. Changes in Europe may have been more culpable than lack of change in Turkey. By 2005, the EU began questioning its enlargement policy, and particularly its capacity to absorb Turkey as a member state. Newly-elected French prime minister Nicolas Sarkozy blocked the negotiation of three accession chapters which could lead to the full membership of Turkey. Germany's Angela Merkel suggested it might be better if the EU established a "privileged partnership" with Turkey instead of granting full membership (Öniş 2008, p. 41). The negative signals fueled frustration and Euroscepticism in Turkey (Yılmaz, 2011, p. 200). In addition, Turkey had not been very successful in realizing its newly adopted democratization reforms. Close readings of the new Turkish legislation led EU officials to question whether Turkey's new laws on minority rights, terrorism, and freedom of speech

went far enough, and discussions between EU and Turkish officials were unproductive. With stagnation and EU skepticism, popular support for the enterprise declined (Çarkoğlu & Kalaycıoğlu, 2009, p. 127).

Although the AKP had coasted to two electoral victories with the promise of reform and EU membership, Europeanization was no longer a sure-fire campaign strategy for general elections. The AKP strategists felt the party had to broaden its platform since EU membership seemed more remote than ever, and support for it was dwindling anyway. Other issues that the party had to consider had also surfaced.

Two events in 2007 and 2008 pitted the AKP squarely against the TCC. The AKP wanted the office of president of the Republic on their side as President Sezer's term ended, and the AKP wanted to replace him with a reliable Islamist figure. Tukey's presidents had always been associated with modern Turkey's secular founder, Mustafa Kemal Atatürk and was supported by an unwritten but clear norm of political life. Flouting this norm amounted to heresy in the eyes of Turkish secularists. Furthermore, the AKP embarked on legal changes to free the headscarf in universities in 2008, and this inevitably reached the Turkish Constitutional Court, who upheld the ban in the name of secularism.

In the face of this malaise and uncertainty, the issue of headscarves in public venues became a transformative one, even beyond Turkey. Whether it had suddenly boiled over spontaneously from below or was part of a socially constructed moral panic is not clear. Whatever the causes, the issue of headscarf bans loomed large in the runup to the 2007 general election. In itself, it was an important issue, but perhaps one that might have been finessed by the political parties and the TCC. Instead, it became a symbol for Islamists of all stripes, polarized public opinion, and drew in other Islamist issues so that it became a symbol of Islam versus secularism.

Once the issues arrived on the doorstep of the TCC, the battle lines were sharply drawn.

The AKP promised to bring prosperity and freedom to its religious base. To some extent, it delivered on its promise: Between 2003 and 2007 the economy grew rapidly, thanks to a massive influx of capital from global markets. This increased prosperity for some, but trade liberalization and large-scale privatizations disgruntled others, including many AKP supporters. However, the continuing headscarf ban on university campuses was the main concern for the religious middle class, whose daughters were enrolling in universities in growing numbers. More generally, religious supporters of the AKP began to demand a more robust, if moderate, Islamist policy from their Islamist party.

Still in the runup to the general election of 2007, the AKP played constitutional brinkmanship to stretch the boundaries of the secularist regime. To consolidate its electoral base and to hold onto the reins of government, the AKP supported the election of an Islamist president and promised to end the headscarf ban on university campuses. The former entailed a reconfiguration of state institutions, and the latter a fundamental redefinition of the state identity (Köker, 2010). Adopting either would have precipitated a major political controversy and constitutional crisis. Together they constituted a constitutional moment that reconstituted contemporary Turkish society.

The crisis began to unfold with the presidential elections of 2007, starting with three landmark rulings by the Constitutional Court that culminated with the packing of the judiciary in 2010. In 2007, the Court cancelled the parliament's election of a new president on grounds that were constitutionally highly dubious. The next year, in 2008, the Court invalidated a constitutional amendment initiated by the

AKP to free headscarves in universities. And, as if that was not enough, the Court accepted an indictment filed by the chief public prosecutor, seeking closure of the AKP. These rulings precipitated a crisis, which insured an epic battle between AKP and the Turkish Constitutional Court, a battle that resulted in the wholesale removal of judges throughout Turkey and the restructuring of the country's courts along Islamist lines. Below, I trace these developments and explore their implications for judicial politics in Turkey and elsewhere.

4.2.1 Court Battles: A String of Defeats

The Turkish Constitutional Court had powerful tools in its arsenal to intervene in the political process. The 1982 constitution authorized the Court to review the constitutionality of laws after their promulgation upon the referral of one of the two major parties in the parliament, one-fifth of MPs, or the president of the Republic. The Court could also review constitutionality issues that emerged from a pending case upon the referral from trial courts. In addition to its review powers, the Court was in charge of trying party closure cases. Working together with the office of the chief public prosecutor, the TCC used its power to keep Kurdish and Islamist parties away from political contestation throughout 1990s. In those cases, the Court fostered a constitutional identity that was strictly secular and unitary.

The TCC used all the powers at its disposal to prevent the Islamists from dismantling the secular constitutional regime. The Court halted the presidential elections and annulled the constitutional amendment that permitted Islamic headscarves at university campuses. And finally, the Court heard a party closure case against the AKP. In each case, the Court positioned itself against the AKP, thereby protecting the secular identity of the state. The Court was unable to find a qualified

majority to close down the party, but it made sure AKP would no longer be eligible for public financing, signaling that the party was on the brink of closure. Each of these court rulings had far-reaching implications, and together they precipitated far-reaching civic and political battles that, as of this writing, continue to unsettle both politics and civil society.

4.2.1.1 Election of the President of the Republic and the TCC

The tension between the AKP and the TCC culminated in a constitutional crisis as the time for the parliament to elect the new president of the Republic neared. The TCC cancelled the first round of presidential elections with a controversial decision (E:2007/45, K:2007/54). Before embarking on a discussion of the TCC's decision, I wish to present background information about how the president of the Republic was elected at the time.

Presidents in parliamentary systems are usually symbolic heads of state and are selected by parliament. This is in sharp contrast to the role of presidents and the manner of selecting them in "presidential systems," where presidents are powerful executives and are popularly elected. Starting with the foundation of the Republic in 1923, Turkey had a parliamentary system with a symbolic-head-of-state president who was elected by the parliament. The 1982 constitution of Turkey transformed the presidency from a symbolic post into one that enjoy vast veto and appointment powers (Tanör, 1994, pp. 120-121 The 1982 constitution also authorized the president to appoint all judges in the Constitutional Court, one-fourth of the members of the Supreme Administrative Court (Danıştay), the chief public prosecutor, and members of High Council of Judges and Prosecutors (Özbudun, 2004, p. 310). It was a convention that the president would be elected with a tacit approval of the

country's secular establishment, notably the military. But with the rise of the AKP and the new politics it generated, the presidency became a contentious position. The AKP wanted to elect a reliable Islamist figure to the presidency so as to exert control over official appointments and eliminate the president's veto power. Conquering the presidency, which had traditionally occupied by secularists, also had a symbolic meaning for Islamists: it would represent their victory over the secularists.

The term of President Ahmet Necdet Sezer, a renowned constitutional scholar who had once been chief justice of the TCC, would come to an end in May 2007. The republican elite was concerned about the presidential elections because the parliament was dominated by the AKP majority. The AKP had 357 seats in the parliament, which was 10 seats short of the required two-thirds majority. However, if the necessary 367 votes were not secured in the first two rounds of voting, a simple majority would suffice. As the elections approached, the AKP signaled that they would not seek parliamentary consensus in determining the candidate for the presidency.

The profile of the new president that AKP was looking for was described by deputy prime minister Arınç in a public speech where he indicated that they (the AKP) would elect a religious president ("Dindar cumhurbaskani sececegiz," 2007). The striking point was that the discussion of eligible candidates centered around whether the potential president's wife wore a headscarf or not. The president of the Republic had a symbolic meaning for the republicans, who associated the presidential office as a heritage of Mustafa Kemal Atatürk. The president of the Republic was the representative of the state and should represent the modern secular nature of the Turkish Republic. President Ahmet Necdet Sezer was a staunch secularist. During his term, AKP spouses who wore headscarves were not invited to

national ceremonies or celebration receptions with their member-of-parliament husbands. Needless to say, this was humiliating for the AKP and its religious electorate.

The republican elite staged a two-step strategy to prevent the AKP from electing its candidate. Retired chief public prosecutor Sabih Kanadoğlu claimed that the AKP could not elect the president unless they met the two-thirds majority to start the first round of elections ("AKP Tek Başına Seçemez", 12.26.2006.). A two-thirds majority was required to elect the president in the first round, but there was no mention of a two-thirds majority to start the session. The quorum for parliamentary sessions was a simple majority, according to the constitution. The constitution stipulated no special criteria for the session to elect the president. The CHP and republican legal academics embraced Kanadoğlu's theory as a legal invention to stop the Islamists. However, many others found that it was stretching the meaning of the constitutional text to stop the AKP (Eroğlu 2007; Gözler, 2007; Göztepe, 2007).

On April 24, 2007, the AKP nominated then-Minister of Foreign Affairs Abdullah Gül for the presidency. Gül has been a part of the Islamist movement since his undergraduate years at university. He had been a deputy of the Islamist Welfare Party, which the Turkish Constitutional Court had banned in 1998. His wife wore a headscarf. He was not a candidate secular Turks could easily embrace. In April 2007, secular civil society groups organized mass rallies in major cities against the probable Islamist president. Secularism was the dominant theme in these mass demonstrations. ("Secular rally targets Turkish PM", 2007). A high presence of retired generals and army staff gave a militaristic flavor to the rallies.

Three days after the announcement of Gül's candidacy, on April 27, 2007, the parliament convened for the first round of voting to elect the president. At the outset

of the session, a deputy of the CHP, Kemal Anadol, articulated the CHP's objections to the necessary quorum for the start of the parliamentary session. The president of the parliament, Bülent Arınç, opened Anadol's objection to a vote. The majority of the representatives voted to overrule the CHP's objection and agreed that the parliamentary session for the election of the president could start with a simple majority of the total number of representatives in the parliament. In the first round of voting, AKP candidate Abdullah Gül received 357 votes, 10 votes less than the required majority.

The CHP immediately carried the first round of the elections to the Turkish Constitutional Court (TCC). The TCC had no power to review the voting, but the CHP claimed that the voting that determined the necessary quorum to kick off the parliamentary session had changed the Rules of Procedure of the Turkish Parliament (TBMM) by legislative action; thus, they argued, the TCC could review the constitutionality of the necessary quorum that had been put to a vote in the TBMM.

On the night of the first round of the elections, the Turkish Armed Forces posted a memorandum on their website. The army stated the following:

> The problem that emerged in the presidential election process focused on arguments over secularism. The Turkish Armed Forces are concerned about the recent situation. ... The Turkish Armed Forces are an interested party in those arguments, and are absolute defenders of secularism. The Turkish Armed Forces are also opposed to those arguments and negative comments. It will display its attitude and action openly and clearly whenever it is necessary ... Those who are opposed to the Great Leader Mustafa Kemal Atatürk's understanding of [the maxim] "How happy is he who says 'I am a Turk'" are enemies of the Republic of Turkey and will remain so. The Turkish Armed Forces maintain their sound determination to carry out their duties conferred by laws to protect the unchangeable characteristics of the Republic of Turkey. Their loyalty to this determination is absolute. ("Excerpts of Turkish Army Statement", 2007)

Clearly, this was an ultimatum to the AKP to not insist on electing Gül to the presidency and a message to the TCC to annul the first round of voting. Unlike previous instances of military ultimatums in Turkey, this time the AKP stood firm

and rejected the ultimatum. The party declared that it would not withdraw its candidate and proceeded with the voting. The CHP wanted to escalate the crisis and force the AKP to withdraw its candidate and seek consensus. The CHP also tried to put pressure on the Court to cancel the election process. The leader of CHP, Deniz Baykal, stated that if the court did not cancel the election, Turkey would be dragged into domestic strife ("367 şartı geçmezse çatışma çıkar", 5.1.2007).

The Turkish Constitutional Court decided to hear the CHP's application for a review of the [un]constitutionality of the voting in such a political environment. Once again, the Turkish political elite turned to the Constitutional Court to settle their problems, which were in fact political, not legal. The Turkish Constitutional Court (TCC) had to decide first of all if it had the authority to review the application. The Court had no authority to review the election of the president by parliamentary vote. According to the Constitution, the TCC could review laws, decrees having the force of law, and the rules of procedure of the TBMM. The CHP claimed that the parliamentary vote to determine the necessary quorum for the election had made a de facto change in the Rules of Procedure of the TBMM, and that the Court could therefore review this change. The TCC had to decide if the parliamentary vote to specify a quorum for the presidential election entailed a change in the rules of procedure of the TBMM.

Four justices, including two women justices—Fulya Kantarcıoğlu and Tulay Tuğcu, both known for their secular views—voted to reject the petition due to the TCC's lack of authority on the matter. Tuğcu and Kantarcıoğlu asserted in their dissenting opinions that a parliamentary vote to ascertain a quorum was a legislative act rather than a legislation; the Court was thus not permitted to review the case, they

argued. Nevertheless, the majority of the Court decided to review the case (Dissenting opinion, Kantarcıoğlu, F, E:2007/45, K:2007/54).

The Court majority ruled that the number of required votes to elect the president in the first ballot (367) was also the necessary quorum to start the election (E:2007/45, K:2007/54). Therefore, the first round of the election was canceled because there were only 357 deputies present in the first round. The Court developed two arguments for the cancellation of the first round of presidential voting. First, it reasoned that the first clause of article 102 explained the necessary quorum and that the third clause explained the necessary majorities to elect the president. The Court reached this decision through a rather eccentric reasoning. It maintained that the Constitution stipulated that the president be elected by consensus because of the requirement for a higher majority in the first two rounds than in the third and fourth rounds. The higher quorum in the first round was to encourage deputies to reach a consensus and elect the president with the highest number of votes possible. Therefore, the 367 votes required to elect the president in the first round amounted to requiring the same quorum to kick off the voting session. Kantarcıoğlu and Tuğcu, who voted to reject the case, joined the majority for the cancellation of the first round of the elections.

Of course, judges had to take into account several non-legal considerations in deciding the case. It was no secret that the Court's majority were secularists who were suspicious of the AKP. The republican civil and legal societies, to whom judges felt sympathy, mobilized against the AKP. Judges were also concerned about a possible military intervention, which would have been devastating for the country. There were rumors that the military had told the court if they did not cancel the election they would intervene, though this has never confirmed by the court

(Interview 6, 09.03.2018). Whether it is true or not, these rumors are quite telling about the atmosphere in which the court decided to hear the case.

The AKP's response to the Court's decision was to call for snap elections and then immediately draft a constitutional amendment that would let the people elect the president of the Republic by popular vote. The AKP did not have the majority to amend the constitution in the parliament, but it could carry the amendment bill to a referendum. After the bill passed the parliament, it was sent to President Sezer for approval. Sezer could either send the amendment bill for a referandum because it had passed the parliament with less than a two-thirds majority, or he could send it back to parliament for re-negotiation. Parliament could approve the bill again; in which case the president would have no choice but to present the bill to the people in a referendum. The AKP wanted to put the bill to a vote in the general elections to reduce costs (of having two separate sets of voting) and to turn the election into a vote of confidence. But President Sezer waited until the end of the fifteenth day to send it back to parliament (Tavernise, 2007a). Sezer's move made it impossible to hold the referendum and the election together, since there needed to be a 60-day period between the decision to present the bill for a referendum and the date the referendum itself. The AKP passed the bill once again without any change, with the support of the Motherland Party. The president presented the bill for the popular vote, but he applied to the Constitutional Court to annul the second voting on the bill in the parliament on grounds that a two-thirds majority had not been met in the first round. The CHP appealed to the court for the same reason. However, this time the Court rejected the application, because a two-thirds majority was not needed in the first session of voting if the bill had received two-thirds of the votes in the final voting.

Turkey went to a snap election on July 22, 2007. The election campaign was turned into a public poll about whether the electorate should approve the Court decision. The AKP's presidential candidate, Abdullah Gül, organized rallies all over Turkey and tried to convince the electorate that a grave injustice had been done to him. The AKP emerged from the elections with a landslide victory. The party increased its share of the vote from 34% to 47%. This was a blow to the CHP, which increased its votes by less than 1% (Tavernise, 2007b). Although the AKP had increased its votes, the number of parliamentary seats it won dropped from 357 to 344 because a third party, the National Movement Party (MHP), had reached the electoral threshold and entered the TBMM. The MHP nominated its candidate and declared that they would participate in the parliamentary session to elect the president. Therefore, the necessary quorum was met in the parliament and Abdullah Gul was elected in the third round of voting as the 11th resident of Turkey.

The amendment bill presented for the referendum was approved with 69% of the votes of the Turkish electorate in October 2007 (Referandum Sonuçları 2007, 2007). The bill included provisions for electing the president by popular vote for a five-year term, reducing the term of parliamentarians from five years to four, and setting a simple majority as the quorum for all parliamentary processes. The presidential crisis further polarized Turkish politics and eroded the legitimacy of the Constitutional Court. The overlap between the military memorandum and the Court's cancellation of the elections tainted the image of the Court and fortified the idea that the military and secular judiciary were conspiring against the elected government. The AKP built up its political strategy by pitting the military-bureaucratic elite and the CHP against the will of people. The party framed all political contestation on this dichotomy (Kalaycioglu, 2012). To be sure, there was a grain of truth in it. The

military and the judiciary had been the pioneers of secularism. They were suspicious about the participation of peripheral groups in political space, each with its own distinct identity. Nevertheless, the AKP employed this populist strategy to conceal its quest to monopolize the power of the state and to eliminate the state's secular identity.

4.2.1.2 The Headscarf Issue and the TCC

Headscarves have an outsized significance in Turkey. A significant symbolism was attached to headscarves during political battles between secularist republicans and Islamists in the 1970s. Periodically, controversies over the ban have arisen as traditionalists have tried to capture a larger role in public affairs, and as more women have enrolled in universities and sought employment in public bodies. It is not surprising, then, that headscarves became a focal point in the AKP's effort to control the reins of government.

The headscarf ban became a thorny issue after 1980 as the number of women with headscarves rose among urban populations. Families migrated from conservative Anatolian provinces to the outskirts of big cities and started participating in urban life. The Islamic movement also took hold in the socio-economic strata of the cities. Islamic social networks provided social services and established religious solidarity networks in the outskirts of big cities. As the lower classes gained upward social mobility through public education, more students with headscarves entered high education. Some university administrations turned a blind eye to students with headscarves until February 28, 1997, when the military forced the Islamist Welfare Party out of the government. In the days that followed, universities began to implement the ban strictly.

In the 2002 general elections, the Turkish electorate who thought there was discrimination against women with headscarves overwhelmingly supported the AKP (Kalaycioglu, 2005, p. 242). In its first term in power, the AKP was unable to lift the ban. They did not want to provoke a crisis until they consolidated their power against the republicans. A study conducted by Çarkoglu & Toprak (2006) indicated that 43% of the electorate wanted the government to give priority to lifting the headscarf ban in the universities. The headscarf issue was placed at the center of politics soon after the AKP took power. After the 2002 elections, a discussion started about whether the AKP would elect a president of the parliament whose wife wore a headscarf. The office of the president of the Republic declared that President Ahmet Necdet Sezer would not participate in ceremonies where women with headscarves would take part (Kalaycioglu, 2005, p. 244). President Sezer, a staunch secularist himself, did not invite "covered" wives of AKP deputies to state ceremonies.

Throughout the 1990s, the rise of Islamic politics increased the pressure to free headscarves in universities. Every year more students with headscarves entered higher education. Some university administrations turned a blind eye to its students who wore headscarves, but others implemented the ban strictly. After the February 28 military intervention, the headscarf was banned in all universities. But the headscarf issue remained a burning question in Turkish politics. The struggle between the legislature and the court to free headscarves in the universities had been frozen until AKP governments arrived on the scene.

Drawing on the previous legal struggle, the AKP knew they could not free the headscarf with ordinary legislation. They wanted to settle the issue with a constitutional amendment. Probably this was a strategic fault on the part of the AKP, because the ban was based on Constitutional Court decisions. The Court could reject

or reiterate its 1991 decision to thwart the AKP's attempt. Whenever the AKP revealed its intention to free headscarves, the Constitutional Court openly stated that this would be against secularism and that any attempt to lift the ban would therefore be stopped.

On February 9, 2008, the AKP and the Nationalist Action Party (MHP) drafted a constitutional amendment to free the headscarf in the universities. The amendment introduced the following clause to article 42 of the constitution:

> Without any reason which is not written clearly in law, no one shall be deprived of enjoying their rights. (Türkiye Cumhuriyeti Anayasasinin Bazi.., 23.2.2008)

The bill also introduced "the enjoyment of every public service" to article 10, which regulated the principle of equality before the law to strengthen state institutions:

> State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in the enjoyment of every public service. (Türkiye Cumhuriyeti Anayasasinin Bazi.., 23.2.2008)

The amendment passed the parliament with 411 yes votes, with the support of the MHP. This was well beyond the required 367 votes for amending the constitution. Nevertheless, once again, the Republican People's Party (CHP) appealed to the Constitutional Court for annulment of the amendment.

The headscarf problem needed to be resolved. Turkish politics had been locked on the headscarf issue for years, and there was a growing demand for lifting the ban in universities. According to several public polls, the majority of Turks supported the use of headscarves in universities (Toprak & Çarkoğlu, 2006, pp. 95-97). The problem might have been resolved with a consensus between the CHP and the AKP, but the CHP rejected any possibility of freeing the headscarf and used the issue to consolidate secularist electorate. The AKP, on the other hand, used the ban

to galvanize its populist discourse that it was defending the rights of religious people against the secularist elite.

The Turkish Constitutional Court is allowed to review the form of the constitutional amendments, but this is limited to "consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates was complied with" (Turkish Constitution, Article 148). However, in the 1970s, the TCC had found ways to bypass article 148 and review the content of the constitutional amendments. The Court invoked its previous invention to review the 2008 amendments on substance. Article 4 of the Turkish Constitution stipulated that the first three articles "shall not be amended, nor shall their amendment be proposed" (Turkish Constitution of 1982, article 148). The Court reasoned that it would review any amendment that aimed to change or distort the principles of the Republic that were stipulated in the first three articles on substantial grounds, because these needed to be protected from any change to article 4. The constitutional review of whether a given amendment conformed to article 4, the Court ruled, was a procedural review, not a substantial one. The Court thereby turned a substantive review into a procedural review.

After deciding it had the capacity to review the constitutional amendments, the Court could either uphold the amendment with a comment or annul it. The Court chose the second option. In its decision, the Court recited its previous decisions on secularism and headscarves. But this time, the court accentuated the problems that permitting the headscarf could cause. For the first time, the court defined the headscarf as an individual choice and as an exercise of one's personal freedom. It also gave up its modernist rhetoric that made the issue a matter of modernism and civilization. The court did maintain, however, that the use of religious symbols in

classrooms had the potential to become tools of repression on people who have different life choices, political views, or beliefs. The Court saw that headscarf might jeopardize others' right to education and personal freedom.

There is truth in the Court's reasoning. Individual freedoms could indeed interfere with others' rights and freedoms. These freedoms and rights need to be balanced in proportion to each other. However, the court favored the prohibition of one set of rights and freedoms over others because of the possibility of conflict between them, without elaborating about the constitutional underpinnings of these freedoms (Kanadoğlu, 2013).

The Court used more sophisticated reasoning about the shortcomings of the amendment. For instance, it criticized the vagueness of the phrase "Without any reason which is not written clearly in law," pointing out that it was not a sufficient guarantee to protect other people's freedom, especially considering that the biggest portion of the population belonged to the same religion (E.2008/16, K.2008/116). The amendment granted a constitutional guarantee to freedom of religious dress, but it did not offer the same guarantee to those who might be affected negatively by the use of that freedom. The rights and freedoms of people who do not belong to the majority religion cannot be left to the discretion of the legislative majorities; they need to be guaranteed with constitutional norms.

4.2.1.3 The party closure case against the AKP

In March 2008, the chief public prosecutor of the Supreme Court of Appeals, Abdurrahman Yalçınkaya, filed a party closure case against the AKP (Tavernise, 2008). Within two weeks, the Constitutional Court reviewed the indictment and decided to move forward with the case. It appeared that the office of the chief public

prosecutor had been working on the indictment for months, but the headscarf amendment had catalyzed the filing of the suit. This was an indication that republicans had given up on being playing defensive. They realized that the stakes were high for the existing constitutional order, so they adopted an offensive strategy against the AKP.

This was not the first time the court had to decide on the closure of a political party. The Turkish Constitutional Court had closed 18 political parties between 1982 and 2008. Throughout the 1990s, the main political function of the court was to decide which political entities would be allowed to participate in the political contestation (Kocaoğlu, 2003). The 1982 constitution designed a two-tier governing coalition: the army and the judiciary on the one hand, elected government officials on the other. The Court's function was to guard the secular-unitary state identity against competing political identity claims. For this purpose, the Court had shut down three Kurdish parties and three Islamist parties. The Court at times banned some party officials from politics. After being closed down by the court, the closed political parties simply formed new parties under a different name.

The 1982 constitution granted wide discretion to the Turkish Constitutional Court for party closures. To curb the Court's discretionary powers, the parliament added a criterion to the 69th article of the constitution: being the center for anti-constitutional activities. This intervention did not keep the Court from closing down political parties, however. In the constitutional amendments of 2001, one proposed amendment introduced a new criterion for deciding whether a political party could be closed: being a center of anti-constitutional activities.

The 2001 amendment read as follows:

> A political party shall be deemed to become the center of such actions only when such actions are carried out intensively by the members of that party or when the situation is shared implicitly or explicitly by the grand congress, the general chairpersonship, or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Grand National Assembly of Turkey or when these activities are carried out in determination by the above-mentioned party organs directly. (Sentence added on October 3, 2001; Law No. 4709)

Most importantly, the amendment added a mid-way measure as an alternative to party closure (Paragraph added on October 3, 2001; Act No. 4709). Instead of dissolving the party permanently, as described in the above-mentioned paragraphs, the Constitutional Court could rule that the concerned party should be deprived of state financial aid wholly or in part, depending on the intensity of the actions brought before the court. In 2003, the parliament increased the number of votes required to close a political party from a simple majority to a three-fifths majority.

The indictment against the AKP was built on the statements of its party officials about secularism. For instance, the 19th of the 20 charges against Abdullah Gül was related to his statements and excerpts from his public speeches about the headscarf ban in Turkey. A statement of one of the deputies that women should be permitted to wear headscarves, not just universities but also in public service, found its way into the indictment to prove that the party had become a center for anti-secularist activities.

Chief Prosecutor Yalçınkaya stated in his indictment that there was no sign of anti-secularism in the AKP program or in official documents ("AKP iddianamesi tam metin," 2008). But considering the statements of party officials, the party constituted a grave threat to the secular character of the state. There were several faulty pieces of evidence in Yalçınkaya's indictment. Most of the evidence was collected from newspapers and sometimes stripped of the context where they occurred. The AKP officials were very careful about framing their Islamic aspirations with discourse

about rights and freedom. Their statements about headscarf freedom could be considered an exercise of free speech. However, republican secularists were suspicious about the AKP's hidden agenda, and they considered the AKP's liberal discourse as mere window dressing.

The AKP rejected all charges against it. In its defense, the party cited its Europeanization efforts, its commitment to European ideals, and to secularism. It defended the statements of its officials about headscarf ban and about secularism and freedom of speech (Çiçek, 2012). It was hard for the Court to decide on the case. The evidence for party closure consisted of public speeches, which should theoretically be considered free speech. There was no concrete evidence of anti-secularism nor was there any party action that could be considered anti-secular. Nevertheless, the political discourse had been Islamized over the last five years. Many party officials had ties with the Islamist movement. After getting the presidential power on their side, the AKP gained significant institutional power to hollow out secular institutions and Islamize the country further. Prosecutor Yalçınkaya expressed his concern that they should not wait until the AKP actualized their Islamic program.

The political context was quite different when the Turkish Constitutional Court closed down the Islamist Welfare Party 10 years earlier, in 1998. The Welfare Party was an anti-systemic party which opposed Turkey's global and regional alliances. The AKP, however, had warm relations with the EU and the U.S. It pursued a market-friendly pro-globalization economic policy which helped Turkey's big business and the emerging business powers of the Anatolia prosper (Öniş & Bayram, 2008, pp. 77-78; Yağcı, 2021). The closure case against the AKP elicited a reaction from all sides. The EU foreign policy chief, Javier Solano, said, "I hope the supreme court is sensible in its ruling because it would be a hard blow to Turkey and

a blow to Turkey's relations with us in Europe; the consequences could be very grave" (“AB Cephesinden”, 8.4.2008). The Turkey rapporteur of the European Parliament, Oomen-Ruijten, commented, "Turkey is falling behind in the Copenhagen Criteria." If the AKP is shut down, negotiations with the European Union will be suspended” (“EP’s Ruijten”, 17.4.2008). European Enlargement Commissioner Ohli Rehn called for a constitutional amendment: "This episode has revealed a system error in Turkey's constitutional framework that may need to be addressed through a constitutional amendment" (“Rehn warns”, 3.29.2008). TUSIAD (Turkish Industrialists' and Businessmen's Association), the business association that represented the secularist moguls of Turkey, stated that the closure case against the AKP was unacceptable (“Demokrasilerde Parti Kapatma”, 17.3.2008).

Closure of the AKP risked dragging Turkey into a deep crisis of legitimacy. It had the potential to trigger an economic shock as well as a social upheaval. Multiple pressures came from different fronts on the Court. In this context, the Court ascertained that there was sufficient evidence that the AKP had become a center for anti-secularist activities, with ten to one. The Court considered the recent headscarf amendment as an indication the party had begun to concertize its anti-secularist ideals. The Court also considered the party’s Europeanization efforts and pacifist tone toward the annulment of the headscarf bill. The Court noted that the party had never called on its supporters to rally against the Court decision, and it kept its supporters away from the violence. All things considered, six justices voted for closure, while five justices voted for a financial penalty (E.2008/1, K.2008.2). The party closure required a majority of seven votes, so the Court decided not to close down the party but to deprive it of financial aid for a year instead.

This was a balanced decision for the Court, although it was taken by a slim majority. The Court ascertained that the party had become a center for activities and therefore should be closed down, sending a clear message to the AKP to step back from its policies to Islamize Turkey. However, this also proved that the AKP was not going to be secure in power unless the party eliminated the republican grip on the Turkish judiciary. The AKP's response to the party closure was to broaden its political alliances with Islamic groups and liberal intellectuals to form an extensive court-packing coalition.

4.3 From Judicial Brinkmanship to Judicial Takeover

The closure case against the AKP reinvigorated the quest for a new constitution. The 1982 constitution had been extensively amended over the years as part of the project to harmonize Turkish law and institutions with European Union requirements, and for a variety of quite different reasons. But many believed that the spirit of the military regime was still intrinsic to the constitution. This crisis prompted the decision to draft a new constitution. The bone of contention was the definition of state identity and the power of the Turkish judiciary. Civil society organizations, universities, the Turkish Bar Association, and political parties had drafted constitution proposals over time, and various groups had tried to seize the right constitutional moment to create a new democratic constitution that would be shaped by and acceptable to all sides. However, instead of energizing the stalled efforts to draft a new constitution, the AKP focused its efforts on packing the Turkish judiciary, which in turn would eliminate the secular constitutional order. However, the pro-Islamist alliance was not as dexterous in constructing a new order as it had

been in challenging the old. The alliance led by the AKP was riven with cleavages, and it lacked a clear vision for a new constitutional order.

4.3.1 Formation of the Court-Packing Alliance

After the party closure case, the AKP deepened its existing allegiances with Islamic associations and an assortment of liberal intellectuals. The pro-Islamist alliance, which involved the AKP, the Gülenist Islamic network, and liberal intellectuals, took advantage of the constitutional moment to pack the courts. Some liberal intellectuals were long-standing critics of the role the military played in Turkish politics. Most of them had been involved the leftist movement that had criticized the Turkish military regime for brutally suppressing leftist students and intellectuals—some were murdered or tortured—following the 1971 and 1980 coups. And, after the fall of the Berlin Wall, many of the leftist intellectuals embraced the multi-culturalism and post-modern critiques of modernist ideologies (Zizek, 1997). A new understanding of the democratic conundrum of Turkey took hold among some Turkish intellectuals (Açıkel, 2006, p. 34-35; Dinler 2003; Aytürk, 2015). According to their reading of Turkish history, the military-bureaucratic elite had doggedly modernized country by suppressing the popular classes. In their view, the military-bureaucratic elite, with its militantly secular-nationalist ideology of Kemalism, alienated the masses and thus hindered democratization (Köker, 1995a; Köker 1995b; Insel, 1996; Insel, 2001). This reading of Turkish history was also appealing to Turkish Islamists, who also opposed the Kemalist secular modernization project (Gülalp, 1997), so when the AKP was elected to office in 2002, liberal intellectuals interpreted the development as an important step toward involving the conservative masses in the democratic revolution ("Muhafazakar Demokrat İnkilap", 2002; Aytürk, 2015). Liberals were

quick to form alliances with Islamists in their common goal to dismantle the military-bureaucratic tutelage in Turkey (Ersoy & Ustuner 2016).

A variety of Islamic groups prospered under the AKP's rule. They expanded their economic and social activities. Traditional Islamic associations which had once operated underground gained recognition and transformed into influential civil society actors (Buğra & Savaşkan 2014). The largest and most powerful of these groups was the Gülenists, led by Fethullah Gülen, a former imam who had been in self-exile in the U.S. to evade prosecution for charges against him. He was a devotee of the Islamic Nur movement, but in the 1970s, he left the Movement to develop his own network of followers. When Turkish Islamists began to form political parties and compete in elections, the Gülenists remained aloof and instead focused on developing a societal network (Mann, 1986) that quietly operated in education, the media, and finance and sought to place its members in key positions in critical state institutions.

In one of his famous recorded sermons, Fethullah Gülen advised his followers not to advance an open political challenge to the secularist state, but to quietly increase their presence in state institutions until they were power enough to assume control of them. As he once advised his followers:

> You must move in the arteries of the system without anyone noticing your existence until you reach all the power centers . . .until the conditions are ripe, they [the followers] must continue like this. If they do something prematurely, the world will crush our heads, and Muslims will suffer everywhere, like in the tragedies in Algeria, like in 1982 [in] Syria . . . You must wait until such time as you have gotten all the state power, until you have brought to your side all the power of the constitutional institutions in Turkey. . . . Until that time, any step taken would be too early — like breaking an egg without waiting the full forty days for it to hatch. It would be like killing the chick inside. The work to be done is [in] confronting the world. Now, I have expressed my feelings and thoughts to you all — in confidence . . .trusting your loyalty and secrecy. I know that when you leave here — [just] as you discard your empty juice boxes, you must discard the thoughts and the feelings that I expressed here. (Yavuz & Koç, 2018, p. 81)

In elaborating on this position, Gülen stressed the importance of the high judiciary and advised his followers in the judiciary to climb the ladder by cultivating an image of reliable legal professionals. More generally, he observed, their presence in the judiciary (adliye), the bureaucracy (mülkiye), and other vital state institutions would guarantee the Islamic future of the state (Sermon record, 1998).

In light of this open-secret strategy, the Gülenists had ambivalent relations with the state. Despite the rising profile of Islam in the official discourse, the military remained suspicious of Islamic movements, particularly the Gülenists, and viewed them as threats to the secular state. This concern grew after the 1980 coup, and in 1986, several dozen students at the nation's leading military high schools were expelled after being accused of having ties with the Fethullah Gülen circle (Çakır, 1990, p. 104). Investigations revealed that the Gülenists had pursued a conscious plan to infiltrate military schools; they recruited promising students, urged them to apply to military schools, and then sent them to prep courses offered at Gülenist study centers (Çakır, 1990, p. 104). Gülenists had similar strategies to colonize the state bureaucracy to strengthen its social and administrative powers as well. The Gülenists expanded their activities during the right-wing governments, carrying the banner of Turkish-Islamic synthesis and collecting votes from the pious electorate and Islamic groups (Cizre, 1996, p. 244). As one knowledgeable observer concluded, their efforts resulted in an "unprecedented level of penetration of the state institutions by neo-traditionalist Islamic groups" (Ayata, 1993, p. 64).

The Gülenist network expanded during the AKP era. It expanded its operations overseas, opening schools, charities, and businesses in the U.S., Europe, Africa, and Central Asia. According to U.S. court reports, Gülen-affiliated business networks were worth 20 to 50 billion dollars worldwide. According to Sharon

Higgins, founder of Parents Across America, there are at least 135 Gülen-inspired charter schools that enroll some 45,000 students in the United States (Berlinski 2012).

When the AKP came to power in 2002, a symbiotic relationship between the Gülenists and the AKP emerged. They had similar visions for Turkey, and both wanted to expand market opportunities for traditionalist Anatolian businesses so that they could compete with secular businesses. They also wanted break the back of the secular establishment that controlled the state bureaucracy and the military (Yavuz 1999). Thanks to their preparedness, Gülenists succeeded in obtaining positions at state institutions during the AKP rule, especially in the police and the lower ranks of the judiciary. A good deal of their success was the ability to attract support from disparate groups. Gülenists were adept at using the liberal discourse of multi-culturalism and democracy in explaining the nature and purpose of their movement to Western journalists and intellectuals (Berlinski, 2012).

The party closure case against the AKP further strengthened the alliance of the AKP, the Gülenists, and their liberal supporters. One important demonstration of this was that when the AKP attempted to pack the courts, the alliance was enthusiastic and provided logistic, communicative, and intellectual support.

Since the AKP lacked the parliamentary majority needed to amend the constitution, it decided to pursue an amendment through a constitutional referendum. This required a sustained campaign to mobilize the electorate; it needed to garner the support of more than half of those voting. This meant legitimizing the idea of the court-packing plan and getting supporters out to vote.

The AKP employed two strategies to increase public support for the amendment. Five articles of the 25-article bill were directly related to packing the

Turkish Constitutional Court and the High Council of Judges and Prosecutors. The remaining 20 articles involved a variety of other provisions that had strong popular appeal, including the protection of personal data, freedom to travel abroad, the right to collective bargaining for public employees. Perhaps the most salient feature of the amendment was the abolishment of article 15 of the 1982 constitution, which protected participants in the military1980 coup d'état, a largely symbolic provision, but one that nevertheless resonated with the public. Another popular provision in the proposed amendment allowed individuals to submit complaints to the Constitutional Court, which would expand protection to individuals whose rights and liberties were being violated by the government. In short, the court-packing articles were nested among a large number of liberal reforms that appealed to Turkish liberals and government workers (Arato, 2010, pp. 476-477; Sevinç 2010). When introducing the plan to the parliament, which had to authorize the referendum, the AKP added a provision that required the amendment be voted on as a whole, rather than allowing the electorate to vote on each set of items separately. The main opposition party objected to this provision, but AKP's leader, Recep Tayyip Erdoğan, was able to maneuver the bill through parliament with this provision intact.

The referendum bill (Türkiye Cumhuriyeti Anayasasinin Bazi.., 13.5.2010) increased the number of justices in the Constitutional Court 11 to 17. The president of the Republic would appoint five justices from among candidates nominated by the civil and administrative supreme courts, two justices from among candidates nominated by the military supreme courts. The president would also appoint three justices from among candidates nominated by the High Education Council and four justices from among lawyers, Constitutional Court rapporteurs, and high public

administrators. The remaining three appointments, one justice was nominated by bar associations and two by the Court of Accounts, would be decided by the parliament.

Other provisions proposed a sea change in the Supreme Council of Judges and Prosecutors (HSYK), whose primary duty had been to make decisions about and to carry out the procedures for acceptance into the legal profession, appointments, promotions and disciplinary actions with respect to judges and public prosecutors in the ordinary and administrative judiciary districts and first instance courts. According to the 1982 constitution, the HSYK was composed of seven members, including the minister of justice and the undersecretary of the ministry of justice. The president of Republic appointed five members nominated by the Court of Cassations and the Council of the State. In turn, HSYK appointed all members of the Court of Cassations and the Council of the State. As a result of this circular mechanism, the Council of Judges and Prosecutors and the high courts were insulated from the influence of bench judges and the parliament. This paved the way for a hierarchical structure and allowed ideological homogeneity at the helm of the judiciary. A study conducted by Sancar & Atılgan (2009) on how Turkish judges perceived their role confirmed that many judges prioritized "state interests" over individual interests when they believed the interests of the state were in danger. In my own interviews, I found that judges and law academics frequently described the Turkish judiciary as ideologically "state-centric" and "hegemonic." One judge mentioned that Turkish judges favor citizens' economic rights against the state, but when it came to political matters, judges tend to prioritize the so-called 'state interests' (Interview 2, 17.07.2018). Furthermore, in both liberal and Islamic circles, it was widely held that the high judiciary was highly biased toward Kemalism, as Kemalism is seen as the only legitimate political ideology (Interview 1, 11.07.2018; Interview 6, 09.03.2019).

The 2010 amendment bill (Türkiye Cumhuriyeti Anayasasinin Bazi, 05.13.2010) intended to dismantle the corporatist structure of the Council. First, it increased the number of Council members from 7 to 22 and expanded the number of sources from which appointees were drawn to include universities, ordinary courts, and bar associations. First-class judges from ordinary and administrative courts elected 10 members to the Council. The Court of Cassations elected three members, and the Council of State elected two members to the Council. The president appointed four members from among academicians and lawyers. The Academy of Justice elected one member. The ministry of justice and the undersecretary remained natural members of the Board (article 22).

Because the bill received less than the required two-thirds majority in the TBMM, the president had no choice but to send it out for a referendum. Opposition parties called on President Gül to present the various items of the bill separately for referendum. This would have allowed Turkish citizens to approve some of the proposed changes and reject others—court packing, for instance. However, President Gül, who was an Islamist and one of the founders of the AKP, sent the bill to the referendum to be voted on as a whole ("3 maddeyi ayırsın pakete oy verelim", 2010).

The amendment bill was supported by 58% of the voters, much more than the simple majority required for its adoption (Arsu & Bilefsky, 2010). Although this referendum was crucial, it was only the first step toward packing the judiciary. Four substitute judges, three of whom were appointed by President Gül, became regular members of the Court. The following year, President Gül appointed three more judges to the Court. The AKP-dominated parliament also sent two justices to the Court. Thus in 2010, within a year after the adoption of constitutional amendment,

the balance of power in the Turkish Constitutional Court had shifted overwhelmingly toward the AKP. The court packing plan had succeeded.

4.4. Conclusion

For almost 50 years, from 1962 to 2010, the role of the TCC in the wider governmental structure was stable and well understood. Virtually all entities—the constitution, legislation, government officials, legislators, political parties, and the Turkish media—agreed on its role. Even during coups and upheavals, when the Court issued significant rulings that were heavily criticized, nothing significant occurred to alter the basic structure and role of this Court. With the rise of the AKP, the consensus on the function of the TCC was destroyed. As we have seen, the AKP-led government eventually sought to redefine the secular–religious divide in public life, and as a result, precipitated a head-on collision with the TCC, the foundational symbol and protector of the secular state. The three cases presented in this chapter recount the confrontations between the Court and the government, and while they show that the Court occasionally won some battles, the section 4.3 shows just how completely it lost the war.

From its foundation in 1962 to 2010, the Turkish Constitutional Court had fostered a constitutional vision. The corporatist structure of the Court allowed it to sustain an ideological homogeneity despite changing political and social circumstances. With increasing assertiveness between 2006 and 2010, the Court showed that its willingness to defend that vision was not solely dependent on weak governments or a fragmentation of the political system. The Court strove to protect the constitutional regime against pro-Islamist forces whose aim was to eradicate the constitutional vision that the Court had fostered over time.

The polarizing political atmosphere and the republican mobilization against Islamists fueled the intensity of judicial battles. Republican mobilization— which ranged from street protests to a military memorandum against the AKP's quest for presidential power—failed to stop the Islamists. It did, however, make them switch to survival mode. As republicans turned to the courts to stop the Islamists, the Islamists fought tooth and nail to dismantle the secularist constitutional order. The TCC justices, whose republican values reflected those of the mobilized masses, undertook the responsibility of protecting the republic rather than deferring to the Islamist government which had monopolized legislative and executive power in the last elections.

This chapter also shows that abusive constitutionalism is an effective strategy for revisionist political parties who want to transform or dismantle an existing constitutional regime. More radical agendas, such as those that would bring back the sharia and abolish secularism (which previous Islamist parties had subscribed to during 1980s and 1990s), did not appeal to Turkish electorate. Rather, radical Islamists failed to occupy the political center and got marginalized. The AKP, on the other hand, played within the constitutional bounds, formed a broad alliance, and used constitutional channels to dismantle the secularist constitutional regime. Despite the Turkish Constitutional Court's efforts to stop the regime change, the episode of constitutional contestation resulted in court packing, which shows the limits of judicial power.

Courts are like sand castles. Their resilience is dependent on the support structure that they rely on and on the potency of political currents. The TCC had been considered one the most powerful constitutional courts in the world with its judicial review powers and authority to close down political parties. The TCC closely

observed the political system and decided who would be allowed to join the game during 1990s, thanks to intra-court unity and a fragmented polity system that impeded a unified action against the court. However, one of the powerful constitutional courts in the world was unable to stand against the Islamist wave when the Islamists occupied the government and formed a broad alliance with other political groups to pack the Court.

CHAPTER 5

THE PACKED COURT:

A COURT IN SERVICE OF THE NEW REGIME (2010–2014)

For the first two years after the amendment went into effect, the Court's composition, along with its understanding of secularism and separation of powers, changed radically. The Court embarked on redefining secularism[1],Turkey's ambivalent but well-established constitutional identity. The Court also aided the government in its plans and helped its Islamist partners capture the high courts by endorsing their abusive legalism in regulating judicial affairs.

This chapter is organized into three sections. Section 5.1 describes the structure of the packed Court and the role of the new chief justice, Haşim Kılıç, in its making. Section 5.2 reviews the Court's two landmark decisions that terminated the secular constitutional order in Turkey. The first involved a legislation that aimed to Islamize Turkish education. In the other, it dealt with the Islamist capture of the Yargıtay (the Supreme Court of Appeal) and the Danıştay (the Supreme Administrative Court). Section 5.3 explores which of several concepts—judicial restraint, deference, or activism— is most useful in characterizing judicial behavior of the TCC judicial between 2011 and 2013.

5.1 A Brand-New Court

The 2010 constitutional amendments that dealt with the judiciary completely remade the TCC. They expanded the court from 11 to 17 judges, thus allowing the AKP to fill six new seats with loyalists. According to the 1982 constitution, the president of

[1] Current Chief Justice Zühtü Arslan defined the education reform act decision of the TCC as an attempt to change Turkey's secularist constitutional identity (Arslan, 2015).

the Republic selected all judges on the Court: seven judges, each one from a list of three candidates nominated by high courts, one judge from among university professors nominated by the Higher Education Council, and three judges from lawyers and high-level executives. The 2010 amendment, however, curbed the weight of the high judiciary in the Constitutional Court from 7 of 11 to 9 of 17, and allowed the president to appoint seven judges of his own choice outside the judicial bureaucracy. The 2010 amendment also authorized the parliament to select two judges from among nominations made by the Court of Accounts and one judge from among lawyers nominated by the bar.

Within six months after the court-packing amendment went into effect, the number of judges appointed by the AKP president and the AKP-dominated parliament was eight of the seventeen-member court. Chief Justice Haşim Kılıç and Justice Sacit Adalı had been appointed to the Court in the 1990s by the conservative President Turgut Özal, who had been sympathetic to the Islamists. Adalı and Kılıç opposed the closure of pro-Islamist parties in the 1990s and endorsed the AKP's attempts to allow female students to wear headscarves in the universities. With the new appointments to the Court, the balance of power shifted to 10 of 17 in favor of the pro-Islamists less than a year after the court-packing (see Appendix D).

5.1.1 Chief Justice Kılıç's Court

Chief justices can be and often are consequential leaders in mobilizing their courts to pursue social change. In the United States Supreme Court, particular eras are often referred to by the name of the chief justice of the time, e.g. the Marshall Court, the Tanny Court, and the Warren Court, the Roberts Court. Similarly, in India, Chief Justice Bhagwati presided over the "the Bhagwati Court," known for its liberal

activism, and in Israel, Justice Aharon Barak, led " the Barak Court" in effecting a constitutional revolution. The leadership styles and personalities of all these justices have been studied thoroughly (Fortas 1975, Abeyratne, 2021; Harel, 2021). Some chief justices played vanguard roles in transforming their courts. As Castellejos-Aragon (2013) has shown, the transformation of the Mexican Supreme Court would have been impossible without the leadership of Justice Juventino Castro y Castro.

The Kılıç Court (so named for Justice Haşim Kılıç, the chief justice on the newly packed Court), follows this tradition. The Court elected Kılıç as chief justice in 2007, soon after the AKP's landslide victory and election of Abdullah Gül as president. His appointment as chief justice was widely seen as a gesture by the judiciary to the AKP to try to repair damaged relations. He was masterful in this role. After the Islamists packed the Court in 2010, in a series of important decisions, the new Court helped institutionalize the new regime under Kılıç's leadership. In this section, I examine Justice Kılıç's speeches as chief justice and his dissenting opinions under the secular court in order to trace the changing nature of the Court activism and its emerging institutional identity in the years immediately after the successful packing of the Court.

Chief Justice Kılıç was appointed to the Constitutional Court by the conservative-liberal President Turgut Özal in 1990. He was not a lawyer, but an economist who, prior to this appointment, had served five years as a judge on the Court of Accounts (see Kılıç's biography on the TCC website, 2021), which is in charge of auditing the expenditures and assets of public administrations that are financed by the central government. From his earliest judicial days, he was different; he had no ties to the bar, nor did he socialize with lawyers like most other judges did. He did not hide his religious identity while sitting as a judge, but during his nearly 17

years on the Constitutional Court, he had a reputation as a liberal activist in a jurisprudence that appealed to both secular liberals and religious traditionalists. He supported expanding human rights (Gülener, 2015) and religious freedom, at times in the face of an authoritarian and militantly secularist state (Akyol, 2015, p. 40). It was in this way that Chief Justice Kılıç retained the respect of former Chief Justices Ahmet Necdet Sezer and Tülay Tuğcu (Öktem, 2015, p. 16), both principled secularists. The secularist court majority elected Kılıç as Deputy Justice in 1999 and 2003.

Before the Islamists packed the Court in 2010, Kılıç had criticized the Court's secularist activism, arguing that it abused its judicial role and violated the separation of power and popular sovereignty and, in short, was anti-democratic (Kılıç dissenting opinions, E.2008/16; K:2008/116; Kılıç's inaugural address, 2008). This is not surprising, because Kılıç dissented in several court cases where the court adopted a wide margin in interpreting the constitution's principles. For instance, he defended the cancellation of the presidential election on the grounds that the required quorum (two-thirds of the parliamentary majority) had not been reached, which allowed the minority to dominate over the majority will (E:2007/45, K:2007/54). Kılıç also criticized the Court's use of the irrevocable articles of the constitution to strike down constitutional amendments, which the constitution clearly prohibited. Kılıç maintained that protecting irrevocable articles was not the task of the Court. The Turkish people, he argued, and the parliament as a representative body of the people, had the capacity to defend the constitution's principles. Kılıç saw the review of the constitutional amendment that would free headscarves as an act that subjected political process to judicial tutelage (E:2008/16, K:2008/116). Kılıç therefore

advocated for judicial restraint when the secularist court majority united against pro-Islamic provisions.

Kılıç expanded his criticism to entire Turkish judiciary when secularist high court judges resisted the capture of the appellate courts after the court-packing amendment went into effect in 2010 ("Yargıtay ve Danıştay'dan Haşim Kılıç'a yanıt", 2011). Kılıç complained that Turkish judges had a localist mentality. He thought Turkish judges had given priority to local norms and concerns over international agreements and universal principles of law. He criticized the former secularist TCC for using domestic circumstances and Turkey's domestic interests in interpreting the constitution's principles. Kılıç stated that the Court should not rely on national benchmarks in deciding cases. The Court, he asserted, had to consider universal principles and standards (Kılıç, 2014).

These criticisms that Kılıç raised against the secular court constituted the pillars of the Turkish Constitutional Court after 2010. Kılıç defined the new institutional identity as a protector of human rights. He had advocated for the introduction of individual complaints to the amendment bill[2]. The influence of natural law is apparent in his understanding of law. He stated that the TCC's main task is to protect the rights and freedoms that individuals have naturally (Kılıç, 2010). Kılıç invited Ronald Dworkin, a renowned philosopher of law who advocated rights based judicial activism, to the Annual Constitutional Symposium of the TCC in 2011. He emphasized that there must not be a Turkey-specific constitutional model and that Turkey should learn from other countries' experiences and design a constitution in line with universal principles (Kılıç, 2014). In his addresses, Kılıç criticized the former Constitutional Court and the Turkish high judiciary for

[2] The TCC had been advocating for the introduction of individual complaints since the 1990s.

functioning as guardians of status quo. He stated that nobody had the right to convert judicial independence into judicial tutelage (Kılıç, 2011). He responded to criticism about the court-packing, saying that the predicament of the Turkish judiciary had been veiled with judicial independence for years. Nevertheless, he suggested, "those arrogant members of the status quo who had not responded to [Turkish] society's search for freedom and democracy are now demolishing it" (Kılıç, 2011).

Kılıç's well-crafted cosmopolitan discourse aimed to convince some of the sceptics of court-packing that it was with good intentions. It seemed that the new justices of the packed Court had also adopted Kılıç's vision as well. In my interviews, justices stated that they saw their primary duty as protecting human rights. Interestingly, one justice commented that they feel more comfortable challenging the government in individual application cases than challenging a law endorsed by the government in constitutional review cases (Interview 10, 09.07.2019). When I asked another judge why that was the case, he replied that they apply a foreign law [referring to the European Convention of Human Rights] in human rights cases, so no one can blame them about disrespecting the legislative supremacy. But in constitutional review, they care more about respecting legislative supremacy (Interview 9, 09.07.2019).

Despite all the public relations efforts, the fact remained that pro-Islamists had packed the TCC for a reason. The new regime wanted to eradicate the secularist hold on state institutions and to mobilize courts to achieve this aim. The Court's conundrum was how to meet the regime's expectations while fostering institutional credibility and prestige. When the two goals inevitably conflicted, the Court framed the regime's interests in a liberal discourse. Kılıç was masterful in accommodating these opposing goals. However, as we shall see in the section 5.2 with respect to

education reforms and high court cases, what emerged from this dilemma was legal opportunism, which was reflected in the Court's oscillation between self-restraint and judicial activism.

5.2. Consolidating Islamist Success in the Courts: Two Cases

The two cases I examine below illustrate how the packed court facilitated institutionalization of the pro-Islamic new regime. In the first case, the Turkish Constitutional Court endorsed the AKP's Education Reform Act (İlköğretim Ve Eğitim Kanunu.., 11.4.2012), which aimed to Islamize the Turkish education system. In its ruling, the Court did more than uphold the constitutionality of the act, it overturned the long-established understanding of secularism, which had been seen as the very identity of the Turkish state. The second case involved two laws related to court-packing. In both cases, the TCC played a more modest role by turning blind eye to claims of unconstitutionality, but the consequences of doing so were grave. The government's plan to capture the Court resulted in the parcellation of the high judiciary, which created competing Islamist factions that ended up in a judicial tug of war in 2014.

5.2.1. Islamizing Turkish Education

On February 20, 2012, the AKP government submitted a bill to the parliament that aimed to radically transform the Turkish education system. The Education Reform Act was far-reaching and revolutionary, designed to bolster Islamic schools and constrain secular education. The bill spurred a public outcry and further polarized Turkish society. Secular Turks, nearly half of the population, rallied to oppose the bill. They held rallies and protested in front of buildings that were going to be turned

into religious schools ("Yurtta 4+4+4 direnişi!", 2012). To no avail, three weeks later, on March 11, the AKP-dominated parliament passed the bill, virtually without debate ("4+4+4 kavga dövüş geçti", 2012).

The Education Reform Act was comprehensive. It redesigned public education from pre-school to college. It aimed to Islamize education by expanding the religious schools and Islamizing the curriculum of regular schools by introducing three elective Islamic courses. Islamist had increasingly used the religious schools (IHLs), which were originally founded to train imams, to cultivate an Islamist generation after the 1980s. In 1997, the government shut down the middle school sections of those schools restricting religious education to high school. With the Education Reform Act, the AKP re-opened the middle school sections of religious schools by turning several public schools into religious schools. The Act also introduced three new elective religion courses into the curriculum: The Holy Quran (reading the Quran in the Arabic script), The Life of Our Prophet Mohammad, and Basic Religious Knowledge. The courses were elective but, in many schools, they were by default mandatory, since some school administrations provided no other elective options (Temel Eğitimin Kademelendirilmesi, 2014, p. 49).

Following passage of the new law, the CHP, the main opposition party, filed a suit in the Constitutional Court challenging its constitutionality. The CHP's challenge to the Education Act was based on the constitution's principles of secularism and equality before law (Excerpts from the CHP's petition, E:2012/65, K:2012/128). It claimed that the introduction of elective classes on Islam violated the principle of secularism and freedom of thought, conscience, and religion by fusing the state with Islam, thereby violating the neutrality of the state toward different

religions and religious beliefs. Their brief went on to elaborate on these and other points in the light of Turkey's history of secularism.

In responding to the CHP claims, the Court delivered an opinion that began with a sociological elaboration of state–religion relations and the principle of secularism (Altiparmak, 2013). The Court held that the existing [secularist] view of state secularism required the state to take a negative stance toward religion, and then offered a new interpretation of state neutrality that could accommodate a degree of connection between state and religion. The Court embraced a view that it called "liberal" or "flexible" secularism, reasoning that religion has a social dimension and is a part of collective identity and is thereby subject to enhancement by the state. Although religion may be a matter of individual conscience, and the state must abstain from imposing religious beliefs on citizens and interfering with religious freedoms, the Court concluded that the state was obliged to maintain conditions that would allow people to enjoy and exercise their religious freedoms, and at the minimum, this included facilitating religion instruction.

It is ironic that the Court's sociological vision of secularism was not extended to deliberate the rights of non-believers, people from heterodox Islamic persuasions, and Muslims who did not want the state to indoctrinate a particular understanding of Islam to their children. Although the Court strove to justify its decision on liberal grounds, it based its reasoning on group rights rather than individual rights and freedoms. The TCC eschewed the elephant in the room, Alevi Muslims, who had complained for years about religion classes that aimed to impose sunnah Islam on their children (Özenç, 2008). Christians and Jews were exempt from religion classes in Turkey, but the same privilege was not extended to Alevi Muslims, who did not belong to dominant [sunnah] sect of Islam. Rather, with the Education Reform Act,

the AKP introduced three elective Islamic courses intended to advance a particular religion without elaborating on possible conflicts that this regulation would bring to the freedom of conscience of non-believers, people of other religions, or Muslims who did not share the same interpretation of religion as that of the state.

In its ruling, the TCC said that it had used the systematic method of constitutional interpretation, which requires relating the dispute to the broader constitutional context and related constitutional articles. If that had indeed been the case, the Court should have considered article 10 of the Turkish Constitution, which stipulates that "no privilege shall be granted any individual, family group or class." The third clause of article 24 stipulates that "no one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions." Invoking these clauses would have entailed an elaborate discussion of how religious freedoms interact with other freedoms and what the limits of the state's responsibilities were toward religious citizens. To abstain from discussing the negative ramifications of the act on freedom of conscious and religion, the court used constitutional articles selectively and focused on one aspect of secularism.

Perhaps, the most important dimension of secularism was its aim to protect freedom of thought, conscience and religion against the dominant religious beliefs. One of the major concerns of Turkish seculars was that religion courses would become compulsory, either due to lack of other options or because electing to take those courses would lead to children and their families being stigmatized. In a country where the majority of the population belongs to the same religion, protecting non-believers and religious minorities must be given the utmost importance. Religion courses posed problems for Muslim people as well. Islam has several interpretations,

like any other religion. Secular Turks were afraid of imposing Islamist ideologies as "the proper" interpretation of Islam to their children.

The TCC also used the ECtHR's 2008 Zengin vs Turkey (1448/04) decision on compulsory religion classes to justify its decision. However, the TCC's use of the ECtHR decision was a perfect example of abusive judicial review. In the same way it had made selective use of constitutional articles, the TCC cherry-picked parts of ECtHR decisions to come up with a reasoning that produced the exact opposite of the original ECtHR decision (Gülfidan, 2014, p. 100-101). The TCC cited §63 of the ECtHR decision that the priority given to Islam in compulsory religion classes did not violate the principle of pluralism. However, in the ensuing paragraph, the ECtHR stated that compulsory religion classes did not take into account the religious diversity in Turkey (§67) and ruled that "religious culture and morals" courses could not be considered as meeting the criteria of objectivity and pluralism (§70). If the Court had cited the §70 of the ECtHR decision, it would have had to deal with the issue of whether elective religion courses violated the constitution's principles of pluralism and religious diversity. The ECtHR fostered the principle of pluralism, but the TCC's decision favored the dominant religion over individual freedom and rights.

The Turkish Constitutional Court used the Education Reform Act as an opportunity to overrule its existing case law on secularism. The Court changed the popular meaning of secularism from "separation between religion and state" to "the state in the service of the dominant religion." Needless to say, Chief Justice Kılıç, who had criticized republican secularism for years, played a major role in crafting the new understanding of secularism,. The Court upheld the decision with a sweeping majority of 15 out of 17 votes. The two dissenters were justices who had

been appointed to the Court before it was packed and who were known for their secularist views.

The immediate impact of this decision was the Islamization of public education in Turkey. Within a period of six years (2012–2018), the number of religious schools (IHLs) more than doubled, from 537 to 1,149. During this same period, the number of students enrolled in IHLs grew from 268,000 to 677,000 (Eğitim Sen, 2016). Research conducted by the Education Reform Initiative (2014) showed that in some secondary and high schools, elective religion courses were in fact compulsory because students were not offered any other options, which by law they are required to do (p. 49).

5.2.2 The Islamist Capture of the High Judiciary

The court packing could not have been successful unless the composition of the Supreme Court of Appeal (Yargıtay) and the Supreme Administrative Court (Danıştay) had changed. These high courts were organized into chambers that specialized in different legal issues and specific councils that were in charge of case law disputes between chambers. They also had a general assembly which consisted of chamber presidents. The general assembly had a critical role in specifying the duties of chambers and deciding which judges would sit in those chambers. To reduce the clout of secular judges in the chambers and general assemblies, the government had to create new vacancies for judges who would be loyal.

The ministry of justice drafted a bill to increase the number of chambers in the high courts. The reason it gave for the increase was the courts' heavy workload (Bazi Kanunlarda Değişiklik Yapilmasina.., 14.2.2011). The bill proposed increasing the number of chambers from 13 to 15 and the number of judges from 95 to 156 in

the Danıştay. As for the Yargıtay, the number of chambers there increased from 32 to 38, and the number of judges increased from 250 to 387. In this way, 198 new positions would be created in the high courts ("Yargıtay ve Danıştay'da daire ve üye sayısı arttı", 2011). During the parliamentary deliberations, the opposition claimed that the bill was designed to pack the high courts (TBMM minutes of 61st session, 02.08.2011). We learned from the parliamentary negotiations that the high courts had asked the parliament in 2007 to increase the number of chambers in the courts to ease the workload. However, the AKP objected to their request, saying they were planning to introduce district appeal courts to ease the workload of the high courts. If they had increased the number of chambers in 2017, the secular High Council of Judges and Prosecutors (HSYK) would have filled the new vacancies. After the packing of the HSYK, the AKP supported an increase in the number of chambers in the high courts (Ali Rıza Özturk, 8.2.2011, minutes of the 61st session).

Despite the objections of the opposition, the AKP majority swept the bill into law. As soon as the law was enacted, the CHP, the main opposition party, filed a challenge to it in the Constitutional Court. Before the Court heard the case, Chief Justice Haşim Kılıç criticized the high courts for having objected to the bill and the CHP for judicializing political matters ("Yargıtay ve Danıştay'dan Haşim Kılıç'a yanıt", 2011). Kılıç's comments were considered a violation of the impartiality principle that prohibited justices from making comments about cases that were being tried. The CHP demanded that Chief Justice Kılıç be recused, but the Court majority declined.

In its petition to the TCC, the CHP (E:2011/29, K:2012/49) claimed that the law aimed to create loyal courts, that it trespassed on the separation of power and violated the rule of law and the judicial independence guaranteed by the constitution.

The constitution sketched out the main framework of the Yargıtay and Danıştay but left many procedural details about their functioning and organization to the legislature. It did emphasize, however, that the legislature should regulate the functioning and organization of high courts in a way that ensured judicial independence and the tenure of judges. The TCC had to evaluate whether the AKP's new law jeopardized judicial independence by interpreting the shaky principle of the rule of law. The intention of the law was a topic the TCC did not want broach. The secular Court would possibly have struck down the law by elaborating on the intention of the law and meaning of the judicial independence. The new Court, however, found the CHP's objection about the rule of law and judicial independence irrelevant. Only one judge, Osman Feyyaz Paksüt, dissented. Eleven days after the law was enacted, on February 25, 2011, the High Council of Judges and Prosecutors (HSYK) elected 160 new members to the Yargıtay and 51 new members to the Danıştay ("HSYK Yargıtay ve Danıştay'a 211 üye seçti", 2011). The term of the Danıştay and Yargıtay presidents were set to expire in May and January 2011, respectively. Both high courts held elections to choose new presidents. In these elections, the newly appointed judges voted unanimously to get their candidates elected. Not surprisingly, the candidates who were supported by the government made their way to the court presidency.

Most of the judges who were elected to the high courts had joined the judiciary during the AKP rule. They did not have necessary seniority for chairmanship in chambers and panels. The AKP overcame this hurdle with an executive decree, a method it had never before employed for regulating the high courts. The decree changed the necessary "years of experience" to become president in both the Yargıtay and Danıştay chambers (Bazi Kanunlarda Değişiklik

Yapilmasina.., 14.2.2011). Before the changes went into effect, judges had needed eight years of experience to become court president and six years' experience to become a chamber president—both in the Yargıtay and the Danıştay. The executive decree dropped the eight-year requirement to four years, and the six-year requirement to three. The underlying aim was to have loyalist judges (even though they did not meet the previous required years of experience) as court and chamber presidents. Make such a change in the regulation of high courts with an executive decree was highly unusual. The CHP challenged the decree at the TCC, saying that the government had usurped legislative function by changing the structure of Danıştay and Yargıtay with an executive decree. The law on issuing executive decrees did not specifically authorize the government to regulate the judiciary. As one judge noted in her dissenting opinion, the decree was contrary to the principles of separation of powers and judicial independence that were enshrined in the constitution (Kantarcıoğlu, Dissenting opinion). The AKP could have made this change with ordinary legislation, but they did not want to lose time in assigning pro-Islamist judges to high court chambers. The decree also increased the age limit for private lawyers who wished to apply for judgeship from 35 to 45. This was yet another point in the decree that the three dissenting judges found contrary to the constitution. The right to join the civil service was regulated by article 70 of the constitution, and it was impossible to change the terms of this right with an executive decree. The Constitutional Court majority, however, upheld the executive decree, despite six dissenting judges (E:2011/113, K:2012/108). The Court's decision not only facilitated the capture of the high judiciary, it also set a precedent for the government to govern many issues by executive decree, bypassing the legislature.

Years later, some HSYK members who benefited from the effective remorse law after prosecutions related to the July 15 coup attempt described the extra-legal secret process behind the judicial elections. According to the testimony of a former HSYK member, after two months of negotiations with the ministry of justice, the Gülenists succeeded in filling 120 of the Yargıtay 160 vacancies with Gülenist judges ("FETÖ'nün Belirlediği 107 Aday Yargıtay Üyesi Seçildi", 2016). His testimony revealed the cooperation between Gülenists and the ministry of justice in the Yargıtay elections. He mentioned that during the negotiations, Gülenists insisted on increasing their share in the Yargıtay after a phone call with Fethullah Gülen. After that, he consulted with other HSYK members and with the undersecretary of the ministry of justice about the Gülenists' demands. He stated that the undersecretary had told them they had four years to work together and that they should not risk breaking the cooperation with Gülenists. He also urged them to came to terms with Gülen ("HSYK eski Başkanvekili'nden FETÖ itirafları", 2016). Another HSYK member stated in his testimony that the undersecretary had conveyed the demands of the Gülenists to Prime Minister Erdoğan and got his approval ("Müsteşar liste nurlu oldu demiş", 2017). After the Yargıtay elections, Gülenist judges were allocated strategically to critical penal chambers to ensure a Gülenist majority. The dossiers of salient political trials such as known as Balyoz, Şike, and Hipnoz were then assigned to those chambers ("HSYK eski üyesi", 2016).

Between 2010 and 2012, the Gülenists successfully instrumentalized the HSYK and the justice bureaucracy to increase their sway over the judicial system. We understand from the testimonies of former judges that right-leaning judges gathered around the Gülenist network to form a center of gravity in the judiciary against secularist hegemony. Beyond ideological affinity, being part of an evolving

patronage network might have motivated judges from a wide ideological spectrum (Interview 1, 07.11.2011; Interview 2, 17.07.2018).

5.3 Activism through Deference

How can we make sense of the TCC's role in the making of the new regime? The secular TCC had been criticized for being militantly activist in invalidating laws and constitutional amendments, thus infringing on legislative sovereignty (Özbudun, 2007; Hakyemez, 2009). As we saw in Chapter 3, starting as far back as the 1960s, the TCC had used its powers aggressively when it came to protecting the unitary state and secularism, at times justifying its decisions without solid legal reasoning. Liberal critics of the republican court expected that a packed court would show judicial restraint and respect legislative sovereignty.

However, what we see when we examine the TCC after 2010 is still an activist court that aided the new regime using judicial authority to eradicate the remnants of the old regime and to foster a new constitutional regime as envisaged by the pro-Islamist alliance. The TCC went beyond what would have been sufficient to endorse the education reform, but it changed the meaning of secularism by interpreting that concept broadly.

Judicial deference is thought to be the opposite of judicial activism, where a court assertively invalidates legislative actions. In this sense, the TCC was an activist court before 2010; it invalidated attempts by several governments to reform the constitutional order. Unlike the secular Court, the packed Constitutional Court refrained from challenging the government in constitutional review cases, which is not to say that the court used judicial restraint or passivity. Rather, the packed court endorsed sweeping legislations pertaining to secularism and judicial independence

that radically changed the established constitutional norms—legislations that might have been invalidated by the secular Court. The new TCC showed that judicial deference was still a form of power that it exerted through endorsement. The TCC provided the new regime with a justification and the legal discourse for Islamizing public education and for capturing the high courts.

The two case studies described above illustrate how the TCC facilitated political change by upholding abusive laws, making and justifying them on the basis of constitution. In effect, it created a constitutional vacuum that all but explicitly invited the Islamist government to fill with substance of its own choosing. Reading this language, one cannot but help conclude that these decisions were not acts of restraint or deference, but actions of a judiciary that was walking arm in arm with the new political regime.

This new-found "deference" of the TCC is seen elsewhere. If one looks at less salient but nevertheless significant cases that raise constitutional questions, one also finds a new pattern of "judicial deference." From 2003 until the end of 2017, the TCC heard 270 constitutional cases. Recall that the new amendments were adopted in 2010, and consider that new amendments should probably have generated constitutional litigation, as the Court is typically asked to clarify its scope. One might therefore expect to see at least some increase in the number of decisions that *limited* the scope of these new, untested provisions. However, before 2011, the Court heard 97 constitutional cases and annulled or partially annulled 61 or 63 % of them. By contrast, from 2011 through 2017, the Court heard 163 constitutional cases and annulled or partially annulled 75 or 46 % of them (see Table 9). In reviewing laws during a period when one would normally expect the annulment rate to increase, it decreased by 17%. Partial annulments usually involve only minor issues that, with

technical corrections, the law can pass constitutional muster. If partial annulments are dropped from the analysis and only those cases that resulted in a complete annulment or a rejection are considered, the pattern is much more dramatic. The old Court annulled 39% of the big cases (i.e. those excluding partial annulments); the packed court annulled only 4.4% (see Table 10).

The pattern is even more dramatic when we take into consideration that between 2011 and 2014, the court made an effort to reduce its long backlog that had been clogging its docket for years. Setting those cases aside, we see that the Court did not annul any cases between 2014 through 2017[3].

So, not only did the newly packed Court align itself with the government in the highest profile, high-stake cases, it did so in virtually all cases. In fact, it appears that the packed TCC annulled *sub silento* at least one important constitutional provision—the provision that obligates it to exercise the power of judicial review.

Table 9. Annulled and Rejected Abstract Review Cases

	Annulments	Rejections	Total
Before (2003-10)	61 (63%)	36 (37%)	97
After (2011-17)	75 (46%)	88 (54%)	163

Source: anayasa.gov.tr, also see Appendix E

Table 10. Annulled and Rejected Abstract Review Cases, Excluding Partial Annulments

	Annulments	Rejections	Total
Before (2003-10)	23 (39%)	36 (61%)	59
After (2011-17)	4 (4.4%)	88 (95.6%)	92

Source: anyasa.gov.tr, also see Appendix E

[3] To illustrate, the Court made 28 annulment decisions in 2012, but 21 of them had been brought to the Court before 2010.

5.4 Conclusion

This chapter tells the story of a packed court that accommodated the constitutional perspective of the regime. The TCC enjoyed favorable political conditions. It was installed by a cohesive governing alliance of pro-Islamist forces that controlled the executive and the legislature and had clear expectations of the judiciary.

All of this appears to be a too-perfect a fairy tale or perhaps a simplified textbook hypothetical account of regime politics and the consolidation and co-optation and control of an "independent" judiciary. Indeed, it was too elegant to last. My next chapter examines what happens when a regime consensus collapses and is followed by intense conflicts within the dominant ruling coalition, when members of the Islamic alliance were at each other's throats. This civil war-like atmosphere within the ruling political regime precipitated similar conflicts among its agents on the TCC. But at the same time, it allowed the TCC to do what all courts do when operating in environments where politics and government are fragmented. When the TCC became beholden to a single political group, it exercised power on its own, and in some areas, it began to creatively chart its own independent path. In doing so, it engaged in its own internal struggles—which replicated the political struggle at large. However, the TCC was small enough to remain a collegial body, and the justices were concerned enough about the court to navigate the crisis and to cope with pressures created by high levels of political uncertainty in ways that preserved its own legitimacy.

CHAPTER 6

THE COLLAPSE OF THE ISLAMIST ALLIANCE (2013–2016): A RECIPE FOR RIGHTS ACTIVISM

In 2013, the Turkish Constitutional Court started to litigate individual applications in human rights cases, which prompted the Court to challenge the government on rights violation issues. Furthermore, the uneasy coalition between an assortment of Islamists and liberals that had united around the court-packing plan was unable to coalesce around a common constitutional vision, an institutional power-sharing arrangement, or a degree of political liberalization; they soon turned at each other's throats. With its political creators preoccupied with divisions among themselves, the Constitutional Court took this situation as an opportunity to circumspectly burnish its own new institutional prestige and legitimacy. How did the court fare in the absence of clear signals from the major political actors in the unstable regime? Courts, we are told, are agents of a ruling regime. But how do courts act when they confront incoherence, fragmentation, and deep division that borders on open defiance within that regime?

In section 6.1, we explore the collapse of the Islamist alliance after it had succeeded in dismantling the 50-year secularist domination of the judiciary. In section 6.2, we review four landmark court decisions where the TCC challenged the government amid a crisis in the pro-Islamist alliance between the AKP, Gülenists, and liberals. All four decisions related to the tug of war between Gülenists and the AKP, and each fueled Erdoğan's resentment and rage toward the Court. The first case I take up concerns the Court's response to the government's bid to eradicate the Gülenist hold on the HSYK with apparently unconstitutional legislation (Özbudun,

2015). I then examine freedom-of-expression cases about bans on Twitter and YouTube. The third case I review examines how the TCC invalidated a law to close down Gülenist education institutions. Finally, I review a freedom-of-press and due-process case that caused irreversible damage to the relationship between the Court and Erdoğan.

6.1 Disintegration of the Pro-Islamist Alliance

The pro-Islamist coalition between the AKP, Gülenists, and liberals was based on common interests rather than a common vision and shared principles. The common interest that held the alliance together was their mission to eradicate the republicans' grip on the state. Once this goal was achieved, the alliance fell apart. Liberals no longer had leverage over the AKP. With their common enemy defeated, the AKP and the Gülenists resumed their struggle over the distribution of power and positions. With that coalition teetering, the Court, which now was fully staffed, was left to fend for itself and took the opportunity to try to repair the damage that such a naked political intervention had done to its reputation, not to mention the self-image of the judges themselves. The Court strove to construct a new identity and constitutional order after the court-packing amendment of 2010. It had a hard time protecting its autonomy and legitimacy under the pressure of conflicting interests, but the fragmentation of the governing coalition and the conflict between state institutions made it possible for the court to assert itself in defending the new constitutional order. Below I explain why the pro-Islamist alliance disintegrated, and then in the section 6.2 we will review four landmark decisions where the court strove to assert itself and keep the constitutional regime in place.

The capture of the Turkish judiciary, the rising tide of Islamization, and the AKP's unwillingness to revive the democratization process frustrated Turkish liberals. On the other hand, the AKP no longer needed the support of liberals. The AKP's provincial chairman for Istanbul, Aziz Babuşçu, subtly alluded to the AKP's take on liberals:

> Those who allied with us in the first 10 years in power will not be with us in the coming 10 years. They were with us during the period of purge and discourse of redefinition, liberty, law, justice. For instance, liberals, although they haven't ever liked us, allied with us in this [purge] process, but the coming period is a period of construction. The construction period won't be like they want it to be. So they won't be with us… Because the country that will be built and the future that will be exalted won't be a future and period that they can accept." (Babuşçu'dan ilginç değerlendirme, 2013)

The final blow to the liberal-Islamist alliance was a popular uprising that swept Turkey in June 2013 (Arango et al., 2013). In June 2013, Turkish youth, mostly from middle-class families with a secular lifestyle, started a protest after the government announced its plan to build a shopping mall in Istanbul's Gezi Park, one of the green places in the city center. The government suppressed the protests brutally, which resulted in the death of seven young protesters. The government's response to the Gezi protests accelerated the departure of liberals from the pro-Islamist alliance.

The Gezi protests also sparked a rift between President Gül and Prime Minister Erdoğan. Gül advocated for a softer approach to handling the protesters ("Gezi Parkı: Gül ve Erdoğan'dan farklı yorumlar", 2013). The government's violent response sparked reactions from the EU and the U.S. President Gül, unlike Erdoğan, wanted to preserve Turkey's warm relations with the West, and expressed discomfort with the harsh responses of the Erdoğan government and Erdoğan's increasingly anti-Western rhetoric.

Still, the more important political battles between 2013 and 2016 were the continuing tug of war between the AKP and the Gülenists, whose differences about

the new Turkey were irreconcilable. The Gülenists were critical of the rapprochement between Turkey and Iran, which they saw as antithetical to their self-representations as moderate Islamists. The Gülenists presented themselves to the global society as a liberal variant of Islamism and a remedy to Islamic radicalism. The Gülenists were also worried about deteriorating relations with the U.S. and Israel (Gürsel, 2014); they had invested heavily in the U.S., and did not want to jeopardize their relations with the Israel lobby in the U.S. They opposed the Kurdish peace process that had been initiated by the AKP government ("AKP-Cemaat gerilimi: Barış süreci nasıl etkilenecek", 2013). Furthermore, the Gülenists were not pleased about the activities of National Intelligence Agency (MIT), and particularly the MIT chief, Hakan Fidan, whom they viewed as the mastermind behind the government's policies toward Iran and the Kurds ("Hakan Fidan, İsrail ve Cemaat kıskacında mı", 2013). More generally, the Gülenists lacked influence in MIT and wanted to replace Fidan with someone more to their liking.

Any of these disagreements between the Gülenists and AKP might have been overcome and a workable arrangement for power sharing achieved, but the long list of disagreements cut so deeply that reconciliation was impossible. In February 2012, disagreements turned to open conflict when an alleged Gülenist prosecutor summoned chief spymaster Hakan Fidan to his office to be interrogated in connected with an investigation into the ongoing Kurdish peace process ("Oslo için ifade çağrısı", 2012). After meeting with President Gül and Prime Minister Erdoğan, Fidan declined the summon on the grounds that the prime minister had to grant permission for such a meeting and that such permission had not been requested. The prosecutor then asked the chief prosecutor of the Republic in Ankara to take Fidan's testimony. Fidan refused to appear, whereupon the prosecutor issued an arrest warrant for

Hakan Fidan and four former MIT officials, whereupon the AKP-dominated parliament hurriedly adopted a law to protect Fidan ("4 MİT'çinin yakalama kararı kalktı", 2012). All the while, the Gülenist daily newspaper *Zaman* and other media outlets sided with the prosecutors and criticized the government and Fidan for disrespecting the rule of law. The end result of all these differences, combined with the immediacy of MİT crisis, precipitated an open conflict between the Gülenists and Erdoğan, a split that has only grown larger and more intense over time.

The crisis reached its tipping point in December 17, 2013, when the chief public prosecutor in Istanbul, who had been affiliated with the Gülenists, ordered several people detained. These included the sons of three ministers in Erdoğan's cabinet, the general manager of the state-owned Halkbank, Süleyman Aslan, business mogul Ahmet Ağaoğlu, and an Iranian-born businessman, Reza Zarrab—all on corruption charges that included collusive tendering, bribery, misfeasance in public office, and smuggling (Letsch, 2017). The police detained 89 people who were known to have close ties with the AKP government. Twenty-six suspects—including the sons of the ministers, Süleyman Aslan, and Reza Zarrab—were arrested. On the same day, many recordings of conversations between the suspects, Erdoğan, and his ministers were posted on YouTube ("Turkey prosecutors tapped thousands of phones", 2014). Prime Minister Erdoğan stated that the Gülenist "parallel structure" that aimed to capture the state had carried out those operations (Lowen, 2014). The Gülenist media and Gülenist public figures supported the operations. The Gülenist media also praised the prosecutors in charge of the investigations.

The day after the corruption probe was launched, the government made several moves to stop the probe. On December 18, it replaced five department chiefs in the police service. The following day, the police commissioner in Istanbul,

Hüseyin Çapkın, was replaced ("Turkey corruption raids", 2013). On December 25, Prosecutor Muammer Aktaş started the second phase of the operations. Aktaş prepared a list of 41 suspects to be detained that included the son of the Prime Minister Erdoğan. However, the Ankara police did not carry out Aktaş's order ("Turkish corruption scandal", 2014). The government extended the scope of the purge. New chief police commissioners were appointed in 24 cities, and 470 commissioners were reshuffled in the Ankara police ("10 soruda: 17–25 Aralık operasyonları", 2014).

This chaos and fragmentation thrust the Turkish Constitutional Court into the midst of a battle from which it could not always escape, even if the judges had wanted to. The Court cases described below provide an overview of the fate and, at times, the decisive actions of the court during this particularly disruptive period.

6.2 The Turkish Constitutional Court in the Midst of a Tug of War

The Turkish Constitutional Court was reluctantly dragged into the war between the Gülenists and Erdoğan. The Gülenist judges and prosecutors, equipped with judicial power, challenged Erdoğan, his immediate family and his ministers. Erdoğan, on the other side, mobilized his legislative and executive powers to counteract and dismantle the sources of Gülenist power in the state. Erdoğan's war against the Gülenists violated constitutional rights and rules, which called for the involvement of the Constitutional Court. An unpredictable political situation and the fragmentation of the dominant regime coalition compelled the Court to be forceful in protecting its autonomy and the constitutional order that the 2010 amendments had promised. Furthermore, President Gül's dissatisfaction with the way Prime Minister Erdoğan

had handled this crisis made the TCC more willing to challenge the Erdoğan government.

In what follows, I examine several court cases that illustrate the rising activism of the packed court. All of them are more or less related to the tug of war between the Gülenists and Erdoğan. One case involved the Erdoğan government's attempt to re-pact the High Council of Judges and Prosecutors (HSYK), which had been handed over to the Gülenist network by the court packing constitutional amendment in 2010. The TCC struck down several provisions of the court-packing laws. The HSYK case is important because it revealed the first traces of an emerging cleavage within the Court that continues in the Court we have today. Then, I discuss two individual application cases about the government's blocking access to YouTube and Twitter after several posts had appeared on those platforms about the corruption scandal. In these cases, the TCC used its newly acquired powers to assert its autonomy and bolster its emerging institutional identity as a human rights court. I discuss yet another case that highlights the governments bid to close down private exam preparation courses that were known to be Gülenist strongholds. The last case I examine in this chapter is about freedom-of-the-press and pre-trial detentions. It involves the detention of the editor-in-chief of an opposition newspaper that exposed a shipment of weapons to Syria by Turkish secret services. In each of these cases that I review, the TCC ruled against the government, each one incurring the wrath of Erdoğan.

6.2.1 Protecting Judicial Autonomy

As a result of the government's indignation, the High Council of Judges and Prosecutors (HSYK) replaced the prosecutors who had started the graft probe ("17-

25 Aralık Operasyonları'nın savcıları görevden uzaklaştırıldı," 2018). On December 26, Chief Prosecutor Turan Çolakkadı took the investigation file from the prosecutor who had initiated the investigation, Muammer Aktaş. On January 29, the December 17 investigation file was taken from the prosecutors of the investigation, Celal Kara and Mehmet Yüzgeç. They were appointed to the Istanbul 45th First Instance Criminal Court and the Istanbul 1st Juvenile Court, respectively ("17 Aralık dosyası 2 savcıdan alındı", 2014). The government had also changed the Judicial Police regulation on December 21. According to a new decree, judicial police had to immediately report any requests from the judiciary to civil administrators (governors, district governors, deputy governors) ("Adli Kolluk Yönetmeliği'nde 17 Aralık değişikliği", 2014). The Union of Turkish Bar Associations carried the regulation to Danıştay (the highest administrative court in Turkey) for a stay of execution. On December 26, the HSYK released a statement that criticized the judicial police regulation. The statement underlined that the regulation was a clear violation of the rule of law and the principle of the separation of power ("İşte HSYK'nın yaptığı açıklamanın tam metni", 2013). Erdoğan responded that the HSYK was breaching the law by making a statement about an issue, which had been brought to the court. He asked, "Who will judge the HSYK?" and then added, "If I had the authority, I would, but the nation will do it." He also stated that they had made a mistake in 2010 by strengthening the authority of the HSYK and weakening the role of the ministry of justice in the HSYK ("Erdoğan: HSYK için suç duyurusunda bulunuyorum", 2013). The Danıştay suspended the execution of the regulation on December 27, 2013.

The AKP government drafted a constitutional amendment bill to once again pack the HSYK, but as it turned out, the party was not able to secure the necessary

three-fifths vote in the parliament because the opposition parties had declared they would not support any amendment by the governing party. Then 78 AKP members of the parliament prepared a bill to change the law on the HSYK. The bill aimed to weaken the powers of the Council's plenary and strengthened the authority of the ministry of justice. Powers that had previously been accorded to the HSYK plenary were transferred the ministry of justice (Özbudun, 2015). For instance, the bill gave the ministry of justice the authority to organize the chambers of HSYK. The ministry of justice had previously been in charge of appointments, relocations, and promoting judges and prosecutors. The bill intended to remove all administrative staff of the HSYK and empower the ministry of justice to appoint new staff. Perhaps most importantly, the bill gave the inspection function of the HSYK to the justice ministry. The bill equipped the ministry of justice with full authority to appoint members of the inspection board. Those changes were crucial for the government, as they could eliminate corruption and graft and penalize the judges who had carried out the investigation.

The legislative bill elicited enormous criticism from opposition parties, judge associations, law academics, international institutions, and the HSYK itself. The HSYK made a statement declaring that the bill was against the constitutional principles of the rule of law and judicial independence ("HSYK Başkan Vekili: Düzenlemeler anayasaya aykırı", 2014). Despite wide opposition and the obvious unconstitutionality of many articles, the bill passed on February 15, 2014. Although President Gül promulgated the law on February 26, he stated the following:

> I had the bill examined and saw that 15 points in 12 articles were clearly unconstitutional, and I warned the Minister of Justice. In the Justice Committee and the Plenary, these warnings were taken into consideration, and certain changes were made. I finally signed the law, thinking it would be more appropriate for the Constitutional Court to rule on the remaining controversial points. ("Gül'den HSYK Yasası'na onay", 2014)

The President had the power to veto the bill, but the parliament could override the veto with a simple majority. Gül did not want a confrontation with Prime Minister Erdoğan and deepen the cleavages within his former party. Instead, he designated the Constitutional Court, where the majority of justices he had appointed himself, as an arbitrator.

A group of MPs carried the bill to the TCC for it be annulled and requesting a stay order. The Constitutional Court gave priority to the case although others had been waiting in the docket for a long time. On April 10, 2014, the Court found the provisions that transferred the powers of the HSYK plenary to the minister of justice unconstitutional (E:2014/57, K: 2014/81). The court ruled that the provisions were contrary to article 159 of the constitution, which stipulated that "a High Council of Judges and Public Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges." The court reasoned that the transfer of powers from the plenary of the court to the ministry of justice jeopardized judicial independence. Although the Court's decision was a victory for judicial independence, it was unable to reverse the changes that the government had made, since decisions of the Constitutional Court are not retroactive. The AKP had made two crucial changes to the HSYK ("Cumhurbaşkanı onayladı, bin kişi görevden alındı", 2014). One of those changes was that they appointed pro-government figures to the first chamber, which was in charge of appointments and the transfer of judges and prosecutors, whereupon the first chamber transferred judges and prosecutors who were in charge of a corruption probe to politically less sensitive posts and appointed pro-government figures to take care of the investigation. The second crucial change came when the AKP removed the general secretary and vice chairs, the chairman of the board of inspectors and the

board's inspectors, investigation judges, and all administrative staff from their offices and appointed new ones.

6.2.2 Freedom of Speech Cases (Twitter and YouTube)

Although Erdoğan had tightened his grip on the HSYK and repelled judicial actions against his family, several recordings of conversations involving Erdoğan and his family were posted on social media. To deal with these leaks, Erdoğan banned Twitter and YouTube in Turkey. Thanks to the individual application mechanism which had gone into effect in 2013, the TCC rapidly took action and lifted the ban. With the Twitter and YouTube cases, the TCC activated its newly acquired powers, gained the respect of opposition, but soured its relations with Erdoğan.

Erdoğan increased his grip on conventional media outlets between 2007 and 2012. Turkey's media moguls were forced to sell their companies to Erdoğan's cronies or were threatened with heavy penalties to make them submissive to the government (Yeşil 2016). The Turkish media's handling of the Gezi protests in June 2013 illustrates the plight of press freedom in Turkey. As millions of youths poured into the streets across the country to protest the government's creeping authoritarianism, TV channels turned a blind eye to the protests, instead broadcasting documentaries about penguins or else broadcasted Erdoğan's accusations about the protesters. A wiretap revealed a conversation—allegedly between Erdoğan and a secular media mogul—where the media owner cries as Erdoğan insults him ("Erdoğan Fırçaladı, Demirören Ağladı", 2014). Another wiretap allegedly in a conversation where Erdoğan lambasted a TV channel for broadcasting footage of the protests ("Erdoğan'dan Alo Fatih'e fırça iddiası", 2014). Turkey had to follow the events of the Gezi protests on social media or on international television broadcasts.

The corruption probe started by Gülenist prosecutors against Erdoğan and his family sparked fury on social media as the mainstream news outlets paid no attention to the historic scandal. The Gülenists used social media effectively to spread information about the investigation, including the tapescripts of wiretapped conversations and their audio files. Several audio and video recordings of government officials, including the prime minister and his family, were uploaded on YouTube. And posted on Twitter (Arango, 2014). On March 18, 2014, a criminal court ordered the ban of certain Twitter accounts because some government officials had complained to the court (McCoy, 2014). The government asked Twitter to suspend those accounts, but Twitter denied their request. Two days later, Prime Minister Erdoğan lambasted Twitter in a public rally, stating that they would get rid of Twitter in Turkey. On the evening of the same day, March 20, 2013, the Information and Communication Technologies Authority (TIB) banned access to Twitter in Turkey (McCoy 2014). The Turkish Bar Association appealed to the15th Administrative Court in Ankara to repeal the administrative act of the TIB. The Court repealed the ban, but at the same time it ordered that certain individual accounts be suspended. However, TIB resisted the Court's decision and did not restore access to Twitter— but then people simply turned to VPN services to access Twitter. Interestingly, President Abdullah Gül, probably by using a VPN, Tweeted that he disapproved of the ban and hoped the ban would be lifted soon. The TIB then banned access to VPN service providers as well.

On March 24, two prominent human rights lawyers lodged individual complaints to the Turkish Constitutional Court, claiming that their freedom of speech had been violated by the Twitter ban (Application number: 2014/3986). After the first review of the case, the second chamber of the Court decided to hear the case

immediately. This was a difficult choice for the Court because the plaintiffs had not exhausted all other judicial remedies before appealing to the Constitutional Court. The plaintiffs argued that appealing to ordinary administrative courts was not an effective remedy because the TİB had refused to apply the Court's decisions. The normal procedures required the court to wait 30 days for the defendant's (the government) defense. But the Court invoked article 71 of its internal statute that stipulated that if there was an urgency in protecting rights, the Court was obliged to hear a case without the plaintiff exhausting all legal remedies and to start hearing a case without waiting for the government's defense. The Court could have rejected the application on procedural grounds or postponed hearing the case to avoid a confrontation with the government, but it reasoned that the social media ban restricted the right to freedom of speech of millions of social media users and ordered that the ban be lifted immediately since the delay of the repeal order further violated social media users' right to express their views about events as they happened. The Court cited previous ECtHR case laws on freedom of speech that said any restriction on basic freedoms should be proportionate and justified by a necessity to protect democratic social order. The Twitter ban did not pass the test. The Second Chamber of the Turkish Constitutional Court ruled in favor of the plaintiff and ordered that Twitter be re-opened immediately (Yaman Akdeniz ve digerleri, 2014/3986).

On March 27, Gülenists posted on YouTube a wiretapped audio file of a meeting between the minister of foreign affairs, the commander-in-chief, and a master spy (Letsch & Rushe, 2014). The TİB banned access to YouTube upon a decision of the court. The Turkish Bar Association appealed to the court to limit the ban order to only 15 videos because a total ban would have violated freedom of

speech. The court reconsidered its decision and noticed the TİB to lift the ban on YouTube except for access to 15 videos. Nevertheless, the TİB did not comply with the court decision.

President Gül protested the ban by accessing YouTube via VPN and uploading a video where he criticized the release of recordings of such a critical meeting ("Twitter Ban: Turkey's President Gül Challenges PM's Move", 2014). The YouTube corporation and human rights lawyers once again lodged complaints with the Constitutional Court. The Court decided to hear the case immediately without waiting for other remedies to be exhausted or for the government to prepare its defense. This time, the case was heard by the General Plenary of the Court. The Court ruled with a vote of 15 to 2 that the freedom of speech of Turkish citizens had been violated (YouTube corp.ve diğerleri, 2014/4705).

The Twitter and YouTube bans exposed the cleavage between Prime Minister Erdoğan and President Abdullah Gül. Erdoğan lambasted Twitter and said they would root it out from Turkey. After the Court's ruling, Erdoğan stated in a press conference that he did not respect the Court's decision but would nevertheless abide by it. He criticized the Court of bypassing the provision that stipulated that other legal remedies had to be exhausted, indicating that the bypass disregarded the local court's rulings. He said, "We abided by the ruling on [Twitter], but I say again, I don't respect it." Regarding the Constitutional Court's YouTube decision, he accused it of not being "unpatriotic" ("Erdoğan eyes Twitter taxes", 2014). President Gül, on the other hand, welcomed the Court's decision. In an interview, he stated that he was proud of the Constitutional Court, noting that 10 of the 17 justices he had appointed had taken their decision according to universal human rights law ("Gül, Anayasa Mahkemesi'ni övdü", 2014).

The Court's decisions on Twitter and YouTube strained its relationship with the government. Several government officials assailed the Court for not taking a nationalist stance. The government-controlled media started a smear campaign against the Court. In the 52nd Inauguration of the Court, Chief Justice Haşim Kılıç responded to the criticisms. In the audience were President Gül and Prime Minister Erdoğan. Kılıç's speech was full of indirect criticisms of the government. He stated that the 2010 amendments had ceased the tutelage on the judiciary but that the power vacuum left by former tutelary forces had been filled by new tutelary forces that aimed to control judicial power. He also mentioned that no one can save face in the making of the new tutelage, hinting at the government's role in Islamists' capturing the judiciary. Kılıç also mentioned criticisms of the Court's decisions were shallow and baseless (the 52nd Anniversary Speech, 2014). While he was giving his speech, cameras captured President Gül in a cynical smile, suggesting he was annoyed by Kılıç's criticism.

6.2.3 The Case of Private Exam Preparation Courses

The judicial war between Gülenists and Erdoğan spread to other areas. The Gülen movement owed their power to decades-long investments in education and human capital. Gülen owned thousands of private courses, schools, universities and dorms across Turkey. The Gülenists used their education institutions to recruit adherents from among the youth, whom they would steer to careers in line with Gülen's long-term plans. They provided top-quality education in their schools and private courses. Students who prepared for university entrance exams in the Gülen private courses had gotten the highest scores for decades. Gülen explained his long-term plan in one of his sermons back in the 1980s:

> To be successful, dormitories for secondary and university students should be opened, students who are educated in those dorms should bear fruit, books and journals in line with our ideas should be printed, especially teachers should work in our direction. ("Gülen darbenin tarihini vermiş!" 2016)

According to the national education ministry, Gülen had 1,439 schools and private courses across Turkey by 2014. The number of students who were educated in Gülen's schools were estimated at 203,000 (Cantürk, 2014). It is impossible know the exact number of Gülenist education places, because there were thousands of informal student houses known as Işık Evleri (light houses). Education was not only a fertile ground for recruiting members, it also provided enormous revenues for the Gülenist network.

To eradicate the Gülenist grip on education, the AKP government drafted a bill that proposed to close down private exam preparation courses. It would, however, allowed them to be converted to high schools on condition that they get licensed by the ministry of education. The AKP majority passed the bill into law in the parliament in March 2014 (Official Gazette, 03.14.2014). The law was a major blow to the education industry. In normal times, a constitutional review of such a law would not attract much attention. The war between the Gülenists and Erdoğan, however, elevated the political salience of the law to an issue of high politics. Turkey was in the runup to general elections. The corruption scandal and the war between the AKP and Gülenists had increased the expectations of the opposition that the AKP would be defeated. Given the political ambiguities, the Court waited until after the general election to hear the case. On June 7, 2015, the AKP lost its parliamentary majority, which meant it was unable to form a single-party government. The court heard the case on July 13, 2015 and struck down the law with a vote of 12 to 5, finding it in conflict with article 42 (Right and Duty of Education) and article 48

(Freedom of Work and Contract) of the constitution (E.2014/88, K.2015/68, 13/07/2015).

There was a stark difference between how the law was portrayed in the Turkish media and the parliament and how it was deliberated in the plenary of the Court. Everybody knew the ulterior motive of the law was intended to punish the Gülenists. The private exam preparation courses were not a matter of political debate until the alliance between the Gülenists and Erdoğan collapsed. The government justified the law on the grounds that private exam preparation courses had started to distort public education by providing a substitute for public education and by fortifying inequalities between students. Of course, weaknesses in Turkish public education and in the university entrance system had made it easy for the private courses to emerge. Public schools were unable to provide the training that was needed for students to compete successfully in the nationwide university exams. The nature of the university entrance system encouraged students to leave their high school courses aside and to focus solely on the entrance exam. However, the problems of Turkish education system were a moot point for political reasons. The AKP justified the law, stating that it was in the public interest, and the court deliberated the case as if the case was indeed about concerns for the public interest.

Although the Constitutional Court's decision seemed to upset the AKP's fight with Gülenist education network, the party had several legal options for bypassing the annulment decision ("Dershaneler için MEB'den yeni yol haritası", 2015). Instead of closing down the private exam preparation courses, the government created a new type of institutional status: private study centers. These would function in the same way the preparation courses did. The ministry of education set standards for those institutions to get licensed. Because the new regulation had terminated all

existing licenses, the ministry of education did not grant new licenses to Gülenists for a variety of procedural reasons ("MEB kapatmıyor ama süründürüyor", 2015).

6.2.4. The Right to a Fair Trail (the Dündar & Gül Case)

Can Dündar, editor-in-chief of the *Cumhuriyet* newspaper and Erdem Gül, Ankara correspondent for the same paper, were arrested on November 27, 2015 because of news reports they had made about the National Intelligence Agency's (MİT) clandestine activities related to the conflict in Syria ("Can Dündar ve Erdem Gül tutuklandı", 2015). The incident had taken place in January 2014 at the height of the corruption scandal. A public prosecutor who allegedly belonged to the Gülenist network stopped a truck convoy in the southeastern city of Hatay on its way to Syria. The intelligences arrived to the public prosecutor claimed that the convoy was carrying weapons to Islamic terrorists in Syria. The personnel in the convoy stated that they were working for the intelligence agency. The convoy continued on its way after the governor of Adana informed the public prosecutor that the convoy belonged to the National Intelligence Agency. Two weeks later, another truck convoy was stopped, this time in Adana, by the order of the public prosecutor of Adana. An inspection of the trucks revealed six boxes of weapons and explosives hidden inside medical cargo. Eight of the personnel in the trucks were arrested. The governor of Adana released the arrested personnel and trucks, stating that the convoy was carrying out routine MİT activities ("MİT tırları soruşturması: Neler olmuştu?", 2015).

Prime Minister Erdoğan strongly denied that there were any weapons in the trucks, but that they were instead carrying humanitarian assistance to Turkomans in Syria. On May 29, 2015 *Cumhuriyet* published the inspection pictures of the trucks,

showing the boxes of weapons and ammunition ("Cumhurbaşkanı Erdoğan'dan 'MİT TIR'ları açıklaması", 2015). Editor-in-chief Can Dündar and correspondent Erdem Gül were detained on charges of revealing secret documents of the state, for political and military espionage, and for helping terrorist organizations despite not being members of those organizations.

The TCC's decision on Erdem Gül and Can Dündar case (2015/18567, 2.25.2016) had political salience because the news reports were bringing into question the legitimacy of Erdoğan's regime. Although the Gülenists tried hard to destroy Erdoğan's domestic legitimacy, he won the presidential election and eliminated Gülenists from the HSYK in 2014. To increase international pressure on Erdoğan, the Gülenists tried to associate Erdoğan with jihadist terror organizations in Syria. They leaked the pictures of weapons first to the *Aydınlık* newspaper and then to *Cumhuriyet*, figuring if they revealed the pictures on their own media outlets, they would not have the same impact. In a TV interview, Erdoğan vowed to make Can Dündar pay the price for publishing the pictures of MİT trucks ("Erdoğan canlı yayında..", 2015). The issue was also related to Turkey's cross-border activities, which made it a national security issue for the military establishment.

The TCC ruled that the arrest of Gül and Dündar violated their right to personal security and freedom, freedom of expression, and freedom of the press (Erdem Gül ve Can Dündar [GK], B. No: 2015/18567, 25/2/2016). Right to fair trial cases are borderline cases which cut across the jurisdictions of local courts and the Constitutional Court. Since local courts have a better grasp of the substance and evidence for the case, the Constitutional Court is not allowed to review the case on its merit[4]. The TCC has nevertheless developed a precedent that requires the local

[4] The strained the relations between the TCC and local courts (Interview 11, 9.7.2019)

court to convincingly show that arrest measures meet the legality test. The Court reviewed the Gül and Dündar case for the legality of the arrest and the impact of the arrest order on individual rights. Lawful arrest of suspected offenders requires a strong suspicion of crime and existence of conditions that make it necessary to arrest the suspect. Those conditions might be falsification of evidence, for instance, or being an escape risk. The news about the MİT trucks had already been published in another newspaper a year before Gül and Dündar reported them on *Cumhuriyet* (§77-78). The prime minister and the minister of internal affairs made comments on the incident and denied claims that the trucks were carrying weapons to jihadists. Gül and Dündar did not reveal any secret document or information that was unknown before then. The court also reasoned that, although the investigation started on the same day the news was published in *Cumhuriyet* (May 5, 2015), Gül and Dündar were not detained until six months later (§80). When the AKP lost its parliamentary majority in the June elections, President Erdoğan prevented political parties from forming a coalition government and took Turkey to another general election in November 2015. This time the AKP emerged with landslide victory. Political crises in the aftermath of the June elections and the rising Kurdish insurgency in southeastern Turkey compelled the electorate who quitted the AKP on June 7 elections to come back in November. It appears that the chief public prosecutor was unable to find compelling evidence for arresting Gül and Dündar. The Court also noted that the office of the public prosecutor had no evidence other than the news report that would indicate that the suspects had engaged in espionage and helped terror organizations (§80). Regardless, after Erdoğan's victory in November, the public prosecutor requested that Gül and Dündar be detained.

After reviewing the indictment and the reasoned judgment of the local court, the TCC concluded that the arrest of Gül and Dündar had not been justified in terms of necessity and proportionality of the arrest. When the Court announced its decision, Erdoğan once again blasted the Court, saying, “I neither accept nor respect the Court’s decision (“Anayasa Mahkemesinin Kararına Saygı Duymuyorum,” 2016).

6.3 Theoretical Implications of This Chapter

The events that occurred in Turkey from 2013 to 2016 in Turkey illustrate how courts can respond to changes in the configuration of political power. Scholarship on comparative courts has convincingly demonstrated that courts are receptive to changes in the political environment, especially if political power is split between different branches of a government (Ramseyer, 1994; Ginsburg 2003). The division of government between executives and legislatures that are controlled by different political parties enables courts to assert their autonomy over governments. A vertical division of power between central and local governments has the same effect (Chavez, 2003). The Turkish case builds on and expands the political fragmentation literature. The Turkish case shows that courts are susceptible to cleavages in an informal governing coalition and to fragmentation of power in formal government institutions. Rifts between Prime Minister Erdoğan and President Gül, Erdoğan’s government, and Gülenist judges from 2013 onward provided a judicial opportunity structure for the TCC to exercise its independence.

The alliance that carried out the court-packing in 2010 had different visions about what the post-secularist regime should look like. Differing visions and disagreements on power-sharing soon turned into open strife and chaos. The new TCC reflected the disharmony of the court-packing coalition and had a hard time

constructing its new institutional identity. Once the alliance was able to unify on eradicating the remnants of the old regime, the Court facilitated the transition from the secular regime by endorsing a new understanding of secularism and helping the regime eradicate the last vestiges of the secular regime in the high courts. However, once the secular regime had been eliminated, the regime coalition was thrust into internal strife. In the midst of chaos and disruption, the Court stuck to its new task of receiving individual rights applications to project its new identity and to keep the regime from falling apart.

This chapter also showed the impact of undesired consequences of institutional design, and historic contingencies account for the autonomous court behavior. The real reason the TCC was authorized to receive individual complaints about rights violations was to reduce the number of applications to the European Court of Human Rights (ECtHR) and to prevent the internationalization of domestic disputes. The rights violation cases that came before the ECtHR were painful for the government. The AKP wanted to decrease the number of cases that went to the ECtHR and avoid the significant amounts of financial compensation that had to be paid to the injured parties. However, the individual complaint system provided a new avenue for the TCC to exercise its powers.

Courts are creatures of regimes, but they are not mere regime instruments. In times of crisis, courts can adopt a variety of strategies to withstand the storm. Courts try to preserve their institutional autonomy either by restraint, as in the case of the Chilean Constitutional Tribunal (Couso, 2004; Hilbink, 2007), or by assertiveness like the TCC did in the episodes of 2007–2010 and 2013–2016. As Hilbink showed in the Chilean case, it was the conservative legal identity of the court that underlined the judicial deference in times of political crisis. In the Turkish case, however, the

packed court looked for ways to foster a new institutional identity and to establish its credibility amid political turmoil. With the emerging cleavage between Prime Minister Erdoğan and President Gül the court to take on a new role in regime politics. Since the Court was required to apply the European Convention of Human Rights in individual applications, the ECtHR had become an ally in the Court's defending its autonomy against the government. The court positioned itself as a human rights court to regain its credibility and fend off criticism from the government.

6.4 Conclusion

The discussion above has outlined the continuing crises of the "victors" in the constitutional battle against the secular republicans. It reveals the age-old observation that it is easier to make a revolution than to keep it. After briefly celebrating their joint success, the court packing alliance immediately turned on each other, both weakening themselves and their collective project. Within three years, they were totally at odds with each another. Meanwhile, all the wheels in the machinery of government were operating at top speed. New laws were passed. New officials were appointed. Long-standing bureaucracies were upended, and, as we have seen, the entire judicial system was remade in line with the vision of the religious conservatives. However, while new judges were selected for their willingness to support the Islamic turn, they were also "judges," for the most part people trained in the law who maintained considerable fidelity to traditional legal values and the autonomy of the law. Furthermore, they increasingly operated in a chaotic environment, in which their one-time sponsors were at each other's throats.

This episode of internal strife and fragmentation tragically ended with an aborted coup on July 15, 2016. The government forces quelled the putsch, declared a state of emergency, formed a new alliance with ultranationalists, and consolidated its power on the whole state machinery. Chapter 7 will narrate how the Turkish Constitutional Court navigated the rapidly changing political and constitutional upheaval.

CHAPTER 7

THE EMERGENCY REGIME:

SELF-ABANDONMENT OF THE COURT (2016-2018) (2016-2018)

On July 15, 2016, opponents of the Erdoğan regime attempted a coup to topple his government. It was an amateur effort that resulted in total failure. However, the effort marked a new era in Turkish politics. Following the coup attempt, the government declared a state of emergency, reasserted control of the machinery of government, and reorganized all major governmental institutions, installing stalwart supporters in all key positions in the process. In so doing, it radically transformed the face of government, particularly in those units that were most able to challenge the government—the courts, the military, and the police. Around 4,000 judges and prosecutors, including two justices of the Turkish Constitutional Court (TCC) were purged (Gall, 2019). Tens of thousands of police and military personnel were imprisoned (Hansen, 2017). The public rallied around Prime Minister Erdoğan and as a result, he was able to strengthen his control over his fractious coalition. In April 2017, nine months after the failed coup, the AKP formed a new and stronger coalition with the ultra-nationalist MHP to amend the Constitution, replacing the system of parliamentary democracy with a presidential system that placed immense power in the hands of the president. Taken together, these responses to the failed coup transformed the nature of the Turkish state.

This chapter explores how the Turkish Constitutional Court responded to this state of emergency and adapted to the changes in its basic structure and in its personnel. It reveals a radically transformed Court, one whose composition was changed, one that was now subject to close political scrutiny, and one whose

priorities had changed. The result was that a once-robust, self-confident set of judges turned inward and became deferential to the regime. For a decade, the Islamist regime had changed the rules and pressed the Court to become more restrained. In the aftermath of the coup, the Court became a pale reflection of what it had once been.

This chapter is organized into three sections. Section 7.1 describes the realignment of the regime's coalition and state restructuring following the, aborted coup. Section 7.2 traces the self-abandonment of the Constitutional Court in the aftermath of the coup attempt by examining three court cases. In the first case, the court deliberated whether it had the competence to review the constitutionality of emergency decrees. The other two involved high-stake politically salient individual application cases about the unlawful pre-trial detention of opposition leader Selahattin Demirtaş and businessman Osman Kavala. Those cases are significant because, when they were brought to the ECtHR, that court decided that in both cases, the Turkish courts had ruled on political considerations. Part three of this chapter speculates about the possible future direction of the Turkish Constitutional Court by examining the changing composition of the Court and tracing the emerging cleavage among court justices.

7.1 The Coup Attempt and Its Aftermath

The battle between different factions within the Turkish state wound up in a coup attempt on July 15, 2016. A faction of the Turkish Armed Forces consisting mainly officers of the navy and air force launched a putsch against the government. The putschers blocked the bridges across Bosporus Strait, thereby disconnecting Istanbul from the Anatolian heartland; occupied the state television; and ran tanks through the

streets in many cities. Fighter jets controlled by putschers bombed the headquarters of the special forces in Ankara, killing 42 agents. The putschers successfully occupied the army headquarters and took the commander-in-chief hostage, along with many other high-ranking officers who refused to join the coup ("How the Turkish Government Took Back Control after a Failed Military Coup", 2016). The putschers had aimed to kidnap or kill Prime Minister Erdoğan. An elite unit of the Turkish marine corps ambushed the residence of Erdoğan in Muğla, but they were too late; Erdoğan had left the residence before they arrived. Having taken refuge in a safer place, Erdoğan phoned in to CNN Turk and stated that Gülenist officers were launching an uprising against his government and called on his supporters to take to the streets. The flood of Erdoğan supporters pouring into the streets marked a turning point in the coup attempt. The resistance of people in the streets, combined with a lack of popular support, kept other factions of the Turkish military from joining the coup. The putschers used extreme violence to stop the resistance. Nevertheless, people rallied around the Grand National Assembly to protect deputies. Helicopters bombed the areas around the parliament, killing many and wounding others. In many places, clashes broke out between police forces loyal to Erdoğan and the putschers; these lasted through the night. Around 6 a.m. the morning after, the putsch attempt was finally quelled.

All political parties, civil society organizations, and public figures condemned the putsch attempt. Almost everyone believed Gülen-affiliated army officers were behind the effort. Opposition to the Gülenists had been growing for years. When the alliance between Gülenists and the AKP collapsed in early 2013, almost all the Islamists and nationalists sided with Erdoğan. Kemalist army officers who had been forced out of their positions in sham trials that had been plotted and

presided over by a network of Gülenist judges a few years ago (Yeginsu, 2014) refused to join in the effort organized by Gülenist officers. Indeed, Kemalist officers played a decisive role in suppressing the coup attempt and safeguarding Erdoğan's position.

Another reason for the failure of the putsch was that Gülenists had brought the date of the putsch forward. Erdoğan had purged prominent Gülenist judges in June 2015. Knowing that they were likely to be the next victims of Erdoğan's purges, Gülenist military officers hastily laid plans to effect a coup before the Supreme Military Council held its annual meeting in August (Şık, 2016). As haphazard as the attempt was, the coup might have succeeded if Erdoğan had not been tipped off in advance; the Gülenists had to commence their operations earlier than planned, leaving them without enough time to develop successful countermeasures.

In retrospect, the failed coup provided Erdoğan with opportunities he could never have dreamed of. Public opinion mobilized to support him and to condemn the Gülenist military officers. He had popular support for having declared a state of emergency and then moving swiftly and decisively to purge Gülenists—not just from the military, but also from the judiciary, education, and the private sector. The opposition argued that Erdoğan had been informed about the coup preparations a few hours before the putsch started and had devised a game plan to eradicate Gülenists and declare a state of emergency (Hurriyet Daily News, 2017). To be sure, he could never have achieved such deep and far-reaching changes without the support he garnered in the aftermath of the attempted coup.

7.1.1 Emergency Rule and the Great Purge

The day after the coup attempt, the High Council of Judges and Prosecutors (HSYK) convened to deal with an urgent matter: an arrest warrant had been issued by the Office of Chief Public Prosecutor in Ankara for the arrest of about five members of the Supreme Board and many other judges and prosecutors. The Supreme Board immediately dismissed five members and laid off 2,745 judges and prosecutors (Keller et al., 2016). The dismissed judges and prosecutors were accused of being members of the Gülenist terror organization. The pace of the dismissals revealed that the office of the chief prosecutor had carried out the investigation clandestinely and that the list of judges to be arrested had been prepared before the putsch began. Among the dismissed judges were the former undersecretary of the ministry of justice, former members of the HSYK, and many judges and prosecutors who had carried out a corruption probe three years prior.

An report drafted by the Republican People's Party (CHP) about the parliamentary investigation commission into the failed coup attempt indicates that 35% of the dismissed judges and prosecutors had been appointed during the AKP rule. The appointment of alleged Gülenist judges increased after the court-packing amendment in 2010. Between 2010 and 2013, 2,876 judges were appointed; 41% of them—1,192 judges and prosecutors—were dismissed the day after the failed coup attempt ("CHP sayılarla ortaya koydu", 2017).

The same day, two justices of the Turkish Constitutional Court were arrested on charges of being members of the Gülenist organization. To prosecute judges or prosecutors, special procedures were required. Justices who were accused of having committed an offense cannot be interrogated, arrested, or tried unless general council

of the HSYK agrees; the same was true for Constitutional Court justices, that is, the general council of the Turkish Constitutional Court had to consent.

The government declared a state of emergency on July 21, 2016 to overcome the legal obstacles for eliminating Gülenists from state institutions (Morris et al., 2016). The emergency rule, which lasted two years, provided a legal shield for breaches of individual rights and created an opportunity to silence opposition in redressing the Turkish state. The AKP governed Turkey by emergency decree during this period. The government issued 36 emergency decrees between 2016 and 2018. Although emergency powers were granted for the specific purpose of dealing with the putschers, the decrees came to regulate every aspect of social life. The government changed the procedures for trials and suspended constitutional rights and liberties. It even used an emergency decree to change the regulations for using winter tires.

The first emergency decree (Decree no: 667, 07.23.2016) authorized the General Council of the TCC to dismiss its members who were considered to have relations, connections, or contacts with the Gülenist network. The vaguely defined criteria for establishing association with the Gülenist network raised suspicions about the measures. Public authorities used an array of criteria for establishing a connection: having a bank deposit in a Gülenist bank, for example, or subscribing to a Gülenist newspaper or periodical, holding membership in Gülenist trade unions or NGOs, or staying in Gülen-affiliated dormitories in the university—all were considered evidence of association with the Gülenist network. Most of the information about Gülenist connections were sourced from secret service reports, social media accounts, website browser histories, neighbors, and colleagues (Venice Commission, Opinion No. 865 / 2016, para. 135-136). The irony was that Turkish

authorities had legitimized and promoted Gülen-affiliated institutions for years. Gülenist trade unions were seen as a path to promotion in the public sector. Gülenist business associations were conduits for accessing state resources before the Islamist alliance collapsed (Buğra and Savaşkan, 2012).

Another problem with the emergency purge was determining the moment when the Gülenist network would be regarded as a terrorist organization. The AKP and the Gülenists established close connections during their alliance between 2002 and 2013. The AKP supported Gülenists with all of the powers of the state. An informal ballot list drafted in the ministry of justice placed Gülenists into the HSYK in the 2010 judicial elections. The prime minister himself appointed several Gülenist officials who were charged with terrorism at the time. During the Supreme Military Council, which met annually, Prime Minister Erdoğan and President Gül vetoed the dismissal army officials on charges of anti-secularist activities, some of whom turned out to be members of the Gülenist network (Şık, 2016). In the early stages of a quarrel between Gülen and Erdoğan, Erdoğan posed a rhetorical question to Gülen in a public rally: "What have you asked for that we haven't given you?" ("Ne istediler de vermedik", 2014). Not surprisingly, the December 2013 corruption probe into the Erdoğan government was regarded as the point at which the Gülenist network was designated as a terrorist organization.

There were numerous complaints about leftist or republican dissenters being put on dismissal lists. According to the reports from DISK, Turkey's largest trade union confederation, 2,661 DISK members who worked in municipalities were dismissed during the state of emergency (DISK Raporu, 2018). Article 3 of the first emergency decree directed the plenaries of the Supreme Court of Appeals and the

HSYK to dismiss judges and prosecutors who had ties with the Gülenist network. Over 4,000 judges were dismissed without trial.

On August 4, 2016, the plenary of the TCC dismissed the two members who had been appointed by President Gül. In its decision, the Court stated that article 3 rendered a suspicion (not a certainty) about a link or connection to terror organizations as sufficient for dismissal. The plenary deemed that two votes was sufficient for dismissing those members ("15 Temmuz darbe girişimi", 2016). In my interviews, I asked justices if they had any suspicion about those dismissed justices before the coup attempt. One told me that the intel provided by the National Intelligence Agency *after* the coup convinced them about connections of two former justices to Gülenists (Interview 3, 08.11.2018). Needless to say, the Court had no choice but to accede to the intel provided by the intelligence service. On August 30, the Court dismissed five law clerks and 36 administrative staff, based on allegations of their having a Gülenist connection.

During the state of emergency, 4,238 judges and prosecutors were sacked, almost 20% of the Turkish judiciary. The purge was not limited to the judiciary. Emergency degrees also ordered the dismissal of 32,093 personnel from the police, 34,393 personnel from the ministry of education, and 5,904 academics (Eğitimde ve Yüksek Öğretimde OHAL, 2018).

7.1.2 Realignment and Restructuring: Transition to a Hyper-Presidential System

The process of regime realignment had started well before the coup attempt. The ruling party, AKP, had severed its ties with liberal democrats and moderates and aligned with nationalists. After the June 2015 elections, Erdoğan halted the peace process that had taken place between the government and the PKK, a Kurdish

insurgent group which had been designated as a terrorist organization by the EU and the U.S. For the first time in 2015, the AKP lost its parliamentary majority and therefore the ability to form a single-party government. The Nationalist Movement Party (MHP) had increased its votes to 17% from 13%, gaining most of its new votes from the AKP ("7 Haziran seçiminin 8 sonucu", 2015). The elections revealed that the peace process had not brought the expected electoral windfall to the AKP. In fact, it had alienated the nationalist voters, and the result of relaxing the decades-long clampdown on Kurdish politics steered Kurdish voters to the People's Democratic Party (HDP). For the first time, a Kurdish political party passed the 10% electoral threshold in general elections. The HDP's electoral success was the primary reason for the AKP's losing its parliamentary majority in the July 7, 2015 elections.

The AKP's electoral losses motivated the PKK to start waging urban warfare in southeast Turkey with the aim of forming autonomous local self-governing entities (Yeginsu, 2015). The PKK's urban warfare mobilized all nationalist factions in the Turkish state and society, rallying them in a common cause. After the elections, President Erdoğan forbid his party to form a coalition government with opposition parties. He refused to let the main opposition party lead coalition talks that he feared might end up excluding his party from the government. By delaying the formation of a government, Erdoğan dragged Turkey to another general election in November 2015 (Letsch, 2016). Opposition parties prepared for the election under de facto emergency conditions. Any criticism of the government was silenced by nationalist security discourse, and the opposition was denied equal resources and opportunities to compete with the governing party. The Kurdish HDP in particular was demonized and was accused of being responsible for the bloodshed in the southeastern cities. The atmosphere of fear and insecurity allowed the AKP to regain its lost electoral

majority four months later in the redo elections on November 1, 2015 (Arango & Yeginsu, 2015).

The second inflection point for regime realignment was the July 15 failed coup attempt. On that night, nationalists and Islamists poured into the streets to resist the putschers. The ultra-nationalist Nationalist Movement Party (MHP) and secular nationalist soldiers sided with Erdoğan against the putschers. Nationalist republican soldiers who were targeted by the Gülenist judiciary played a critical role in suppressing the uprising and ridding the army of Gülenist officers. In the aftermath of the coup attempt, Erdoğan invested heavily in symbolic politics to rally nationalists and Islamists under his leadership. The coup plot was framed as a foreign conspiracy against Turkey and thus against Islam. Erdoğan also organized mass rallies to keep stoking nationalist and Islamic sentiments. In those rallies, imams read Quranic verses and prayed for people the putschers had killed.

There would be multiple paths for Turkey's constitutional regime to take in the aftermath of the coup attempt. The Turkish state had become a battleground between different factions of Islamic forces over the last decade, which ended up with a bloody putsch. The coup attempt might have facilitated the secularization of the Turkish state and bureaucracy. Or it might have alienated the AKP and urged them to seek compromise with secular Turks, Kurds, and the European Union. Turkey could have exited from the political quagmire with more democratization, so the aborted putsch might have led to a turn toward democracy for Turkey. Having said that, all these scenarios would have weakened Erdoğan's hold on power.

Instead, the coup attempt pushed the alliance between Erdoğan and the ultra-nationalists to a new level. Erdoğan relied on nationalists to execute the post-coup policies and restructure the state. Nationalists had had a significant presence in the

police and armed forces since the 1980s. Nationalist judges and prosecutors supported the government in the 2014 judicial elections to eliminate Gülenists (Interview 4, 27.11.2018). Their presence in the judiciary was apparent. It was easy to spot them in courthouses, with their crescent-shaped mustaches and big rings with nationalist symbols decorating their right hand.

7.1.3 Entrenching the New Alliance: Transition to a Presidential System

A presidential system had been on Erdoğan's agenda for a long time. The constitutional amendments of 2007 that allowed the president of Turkey to be elected by direct popular vote instead of by the parliament subverted Turkish parliamentarism. After Erdoğan was elected president in 2014, he governed the country as if there was already a presidential system; he bypassed the prime minister and the cabinet. He repeatedly stated his wish to change the Turkish political system to a presidential system. Changing the political system change became the main issue of Turkish politics on the eve of the 2015 June elections. Kurds built up their electoral strategy not to allow Erdoğan to become president. Though they were about to achieve their goal after the June 7 elections, AKP's regaining power in the November 1 elections made the prospects for regime change a more real possibility than ever before.

In the aftermath of the coup attempt, political parties met to discuss a constitutional amendment to restructure the judiciary and military, but prospects for a multi-party consensus faded after the state of emergency was declared in August. In November, the AKP shared its proposed amendment package with the MHP. It provided for a transition to a hyper-presidential system, which could be characterized as fusion of political power under an omnipotent presidency (Gurses, 2016). Under

emergency rule, Turkey was not able to discuss such a radical constitutional change in a free and open way. International observers, including the OSCE (2018), documented the irregularities and inequalities during the constitutional referendum. Public talks and rallies against the proposal were limited. It was a time when thousands of people were being purged and detained on charges of association with Gülenists. On the other hand, the AKP-MHP alliance mobilized all the state resources to make sure the proposed changes to the constitution were approved by the parliament. Indeed, they were, which meant the package was put to a referendum. On the way to what became a historic referendum in November 2016, 12 Kurdish MPs—including the co-presidents of HDP, Selahattin Demirtaş and Figen Yüksekdağ—were arrested on charges that dated as far back as 2012.

The 2017 changes to the constitution, having been approved by the votes in the referendum, were textbook examples of abusive constitutionalism (Landau, 2013, Gözler, 2017). They blended parliamentarism and presidential systems to create a system of unified powers (Gözler, 2017; Gözptepe, 2017). The new system abandoned the checks and balances associated with parliamentarism—censure and votes of non-confidence, for example—but did not substitute them with checks that are commonly found in presidential systems, such as requiring senate confirmation for certain appointments. Unlike other presidential systems, the new Turkish presidential system authorized the president to dissolve the parliament whenever he wanted, but only on the condition that the president's term would be ended at the same time (Gözler, 2017, p. 15). The AKP responded to criticism of the president having power to dissolve the parliament, they said they also granted the same power to the legislature as well. However, to unseat the president, the parliament would need a three-fifths majority (360/600), which was a highly unlikely possibility. It is

as difficult as amending the constitution for the legislature to unseat the president while the president has unfettered power in deciding to dissolve the parliament. Under the new government system, the presidential and parliamentary elections were to be held on the same day to ensure the political party of the president would dominate the parliament. The Turkish party system is highly hierarchical, and party leaders have absolute authority over their parties. This feature of the Turkish party system made it easier to unify the president and the legislature when both powers are dominated by the same party. In this system, the legislature is subsumed to the executive.

The changes to the constitution also granted the president unlimited and unchecked powers to appoint all high-ranking public administrators. The amended article 104 states: "the president shall appoint and dismiss high-ranking executives, and shall regulate the procedure and principles governing the appointment thereof by presidential decree." For instance, the president can appoint anybody as an ambassador without confirmation of the legislature. The eligibility criteria for to be ambassador appointments would be determined by the president himself.

The changes to the constitution also redesigned the Turkish judiciary to ensure the president had absolute control of over the judicial system. The main administrative body of the judiciary is in charge of promotions, allocations, inspections, and recruitment of judges and prosecutors is the Board of Judges and Prosecutors consists of thirteen members. The minister of justice is the chair of the Board while his undersecretary is an ex-officio member. The president appoints four members, and the remaining seven members are appointed by the parliament, which is designed to make sure the parliamentary majority is from the same party as the president (Gözler, 2017, p. 93). In practice, the president was allowed to appoint all

members of the Board. There is no confirmation mechanism in appointments as exists in the U.S. system, nor a nomination system, which was the case in Turkey before 2017 amendments.

The 2017 changes to the constitution recalibrated the Turkish state with the main tenets of the 1982 regime. As we saw in Chapter 2, the 1982 constitution aimed to strengthen the executive, curb bureaucratic autonomy, control judicial independence, and promote an Islamic-Turkish nationalist synthesis as a legitimate state ideology. The 1995 and 2001 amendments aimed to expand individual rights and democratize the regime. The 2010 amendments pluralized the judicial elections and introduced individual complaints to the TCC. Contrary to this trend, the 2017 regime-changing amendment reinvigorated the 1982 regime in its perfect form.

7.2 Three Cases of Court Deference

Having explored the post-coup regime restructuring, I now examine three cases that illustrate how the TCC adapted these extraordinary circumstances. In the first case, the Court deliberated whether it could review emergency decrees issued by president Erdoğan. The importance of this case was that, by denying its capacity to review emergency decrees, the Court essentially went into seclusion during the state of emergency, thereby allowing the constitution to be suspended. The others cases were individual applications regarding due process, filed by opposition leader Selahattin Demirtaş and liberal philanthropist Osman Kavala. The Court ruled against both applicants, whereupon they petitioned the ECtHR. For the first time, the ECtHR invoked article 18 of the European Convention of Human Rights against Turkey, ruling that decisions of Turkish courts were motivated by political considerations.

7.2.1 The Capacity to Review Emergency Decrees

The only hope for the Court to rein in the AKP during the state of emergency was judicial review of emergency decrees. However, the TCC unanimously declined to review emergency decrees. Ece Göztepe, a renowned Turkish professor of public law, accurately described the Court's decision as self-abandonment, given that the TCC had rendered itself dysfunctional during the emergency rule (Göztepe, 2018).

An emergency rule is a constitutional regime that aims to preserve constitutional order at times of gross social events such as natural disasters, severe economic crises, or widespread social violence (Turkish Constitution, articles 119-120). According to the Turkish constitution before the transition to the presidential system, a state of emergency had to be declared by the Council of Ministers, which was chaired by the president of the Republic, and it had to be approved immediately by the parliament (aticle 121§1). During an emergency rule, fundamental rights and liberties of individuals can be partially or entirely suspended, but restriction or suspension of rights and liberties must be proportionate, and obligations under international law must be met (Article 15 §1). Even under emergency rule, the inviolable rights of individuals— the right to life, integrity of material and spiritual integrity, freedom of consciousness, thought, and opinion—are protected (Article 15§2). However, as the Turkish constitution of 1982 clearly expressed, a state of emergency is still a rule-bound regime.

Article 148 of the constitution said that "presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance." This left a loophole in the constitutional system in times of emergency rule. To take advantage of this gap, the Turkish Constitutional Court found in a 1990 ruling a creative way to review

emergency decrees. In its progressive reading of the constitution, the Court powerfully asserted that emergency rule must respect the rule of law and the constitutional limits placed on this extraordinary regime. The Court reasoned that if an emergency decree violated the scope, timing, and place of the emergency rule, it could no longer be regarded as an emergency decree, meaning the TCC could review it (E:1990/25 K:1991/1). The Court also asserted that emergency decrees could be issued about matters pertaining to the particular state of emergency rule. So, if a state of emergency was declared because of a national disaster, for example, the emergency decree could address only issues that were related to the national disaster. The Court continued to develop its case law on emergency decrees in its 1991 and 2003 decisions (E: 1991/6, E:2003/28).

Emergency decrees issued after the July 15 coup attempt went well beyond the scope of the emergency rule. The government regulated almost every aspect of public life with emergency decrees, bypassing the legislature and disallowing public discussion. With the decrees, Erdoğan did not stop at administrative actions; he also made changes in existing laws. For instance, the government had dismissed thousands of public servants in a decree to which was attached a list that named the targeted individuals. By attaching specific names to the decree, the dismissed parties became part of the decree, which meant they would not be able to challenge this administrative action in the administrative courts (Günday, 2017). Another example is the foundation of a Turkish Sovereign Wealth Fund with an emergency decree (Srivastava, 2017).

According to article 121 of the constitution, emergency decrees had to be submitted to the parliament for legislative approval on the day the decree was issued. Then, according to the parliament's rules of procedure, the parliament must approve

emergency decrees within thirty days. Upon their approval, emergency decrees turned into ordinary law, and these could be reviewed by the Constitutional Court. The AKP-dominated parliament postponed the approval of several emergency decrees, some of them for as long as one and half years, despite the clear procedural rules. The emergency decrees issued in the aftermath of the aborted coup made extensive changes in the ordinary laws, whose temporal effects extended beyond the emergency rule. Amending ordinary laws by emergency decree is legally problematic. In a civil law system, there is a strict hierarchy between legal norms, by which a lower rule like an executive decree cannot amend or revoke higher rules like legislations. Changing ordinary laws by emergency decree was a way to escape from constitutional review. If those changes had been made by the legislature, there would have been no question about the Court's capacity to review them.

The main opposition party, CHP, contested the constitutionality of the emergency decrees before the Constitutional Court, invoking the court's previous case law on emergency decrees. The CHP claimed that the decrees involved issues that were not within the scope of the state of emergency. Nevertheless, in its decision, the Court unanimously overturned its well-established case law and refused to review emergency decrees (E.2016/166, K.2016/159, 12/10/2016). As it had done in its previous rulings about the state of emergency, the Court stated that emergency rule was not an arbitrary regime. It was, they said, bounded by constitutional limits and checked by the legislature and the judiciary (§ 4). The Court also stated that the rule of law requires judicial oversight of all proceedings and actions of the administration, including emergency powers, but article 148 of the constitution excluded emergency decrees from the jurisdiction of the Constitutional Court. So, the Court reasoned, fixing the constitutional loophole fell to the parliament.

The Court's departure from its progressive case law and its deference to the government during the emergency rule made sense from a political perspective. Two months after the bloody putsch and the arrest of two of their colleagues without due process or robust evidence about their alleged offense, the Court was under enormous political pressure. If it struck down emergency decrees following its previous case law, its decision would have backfired. The Court opted to hunker down instead of following its well-established emergency rule precedent. The Court justified its decision on purely positivist grounds—that the constitutional text did not permit the court to review the decrees. However, as Scheppele (2014) noted, "During a constitutional coup, a flat-footed positivist court will lose the rationale for its existence, which is to keep the government within the boundaries of the constitution" (p. 52). Thus, the Court's decision with respect to emergency decrees resulted in the suspension of basic rights and freedoms and normalized the arbitrary use of decree powers. When I talked with court justices two years later about their decision, they seemed uncomfortable with my questions. One justice told me they might have not wanted to tie the hands of the government in its fight against the Gülenists (Interview 10, 09.07.2019). Another justice hinted that his decision would not be the same if he had been able to foresee what would happen, alluding to human rights abuses during the emergency rule (Interview 3, 08.11.2018).

7.2.2 The Selahattin Demirtaş Case

The Selahattin Demirtaş case was emblematic of the Court's avoidance strategy. The Court ducked the case for months until the Council of Europe and the ECtHR signaled they would question the effectiveness of the TCC if applications of deputies

and journalists, who had been under pre-trial detention for months, were not dealt with.

Selahattin Demirtaş was co-chair of the pro-Kurdish People's Democratic Party (Halkların Demokratik Partisi, hereafter HDP), which was the second-biggest opposition party in the parliament. The government's post-coup persecution extended to HDP members and dissenting journalists (Yeginsu & Timur, 2016). The Kurdish opposition was a real hurdle for the Islamic-nationalist alliance's post-coup state restructuring plans. With 59 seats, the HDP was the third-largest party in the parliament. They also had very firm local support in southeastern Turkey, where they governed almost all municipalities. The HDP mounted the strongest opposition to the AKP's plans to change the regime change.

The quarrel between the AKP and the Kurdish opposition had started before the emergency regime. The AKP-MHP dominated parliament had stripped HDP lawmakers of their immunity in May 2016. A provisional article introduced to the constitution removed the immunity of lawmakers who were facing investigations for criminal charges (Yeginsu, 2016). The prosecutor general had already submitted over a hundred investigation reports to the parliament against HDP lawmakers. Opposition parties and international observers alike criticized the constitutional amendment that stripped the immunity of certain lawmakers. The Venice Commission of the Council of Europe (Opinion No. 858 / 2016 § 80) characterized the amendment as an "ad hoc, one-shot ad hominem measure directed against 139 individual deputies for cases that were already pending before the Assembly."

The main opposition party, the CHP, declared that the amendment bill to strip the HDP lawmakers' immunity was unconstitutional, but the CHP stated that they would nevertheless support the bill. The CHP was afraid of being castigated for

saving Kurdish deputies who were accused of having ties with PKK. Most republican MPs did not participate in the voting—or else voted to reject the bill, but at least 17 of them voted in favor of it. According to the Venice Commission's report on parliamentary inviolabilities (Opinion No. 858 / 2016§35), there were 562 reports submitted to the parliament about investigations of 139 lawmakers when the amendment bill was submitted to the parliament on April 12. The number of reports increased to 800 by the time the amendment bill passed the legislature. Of the 510 investigation reports, 55 were against HDP deputies, whose total number was 59. Once the bill came into force, some deputies were summoned and questioned by prosecutors. The HDP deputies refused the summons, challenging the legality of the amendment. Twenty-six HDP deputies were arrested for declining to answer the summons; 14 of them were detained after November 4, 2016, including the two co-chairs of the party (Yeginsu, 2016).

There were 96 investigation reports against Selahattin Demirtaş, the co-chair of the HDP. Forty-six of them had been prepared over the previous ten months, and 15 had been prepared during parliamentary talks for lifting immunity. Charges against Demirtaş and Yüksekdağ were based on several of their public speeches and tweets about the Kurdish issue. Some of the speeches had been delivered four years before the investigations started ("Demirtaş'a ilk ceza veren hakim FETÖ'den ihraç edilmiş", 2017). But the majority of the charges were related to protests that took place in Kobani, a Kurdish enclave in northern Syria adjacent to the Turkish border, where in 2014, 55 people died and many more were wounded. In October 2014, ISIS had started a campaign against Kobani. HDP called for protests via its Twitter account to stop ISIS violence, which could end up in a genocide. Protests turned violent in Kurdish-populated cities in southeastern Turkey (Mackey, 2014). Local

governors declared regional curfews, and security forces suppressed the riots after two days of violence. The HDP's calls for protest were preceded by calls from the PKK for resistance in Turkey against the ISIS onslaught on Kobani. The indictment against the HDP claimed that the joint calls for protests were evidence of ties between the HDP and PKK.

The HDP deputies protested the lifting of immunity and ignored the public prosecutor's summons. In November 2016, the chief public prosecutor issued an arrest warrant for nine HDP deputies, including the co-chairs of the party Selahattin Demirtaş and Figen Yüksekdağ. On November 4, 2016, those nine deputies were taken from their homes by the police and arrested (Yeginsu, 2016).

After the local court rejected the appeal against Demirtaş's arrest, his attorneys appealed to the Turkish Constitutional Court, citing a his right to liberty and security, his right to a fair trial, his freedom of expression, and his right to free elections on November 17 had been violated. Because there was no indication that the TCC intended to hear the case any time soon, the lawyers carried the case to the ECtHR on February 20, 2017.

The TCC's avoidance strategy had its limits. Turkey had accepted an individual's right to apply to the European Court of Human Rights in 1987 and had recognized in 1990 the jurisdiction of the ECtHR in all matters concerning the European Convention of Human Rights. After the introduction of individual applications to the TCC on matters concerning the European Convention on Human Rights, the ECtHR expected that Turkish applicants would exhaust the TCC route before bringing their cases to ECtHR. If the ECtHR agreed to hear cases that had not been heard by the TCC, the TCC would not only lose face, but it would also suffer a serious blow to its prestige. Bypassing the TCC would also make individual

complaints pointless, thereby undermining the system altogether. To be considered an effective domestic remedy, the TCC had to proceed with rights violation cases in a reasonable time. Its avoidance strategy had the potential to jeopardize the TCC status as an effective court in the eyes of the ECtHR.

Signals that the TCC's status as a domestic remedy was in jeopardy came from Thorbjørn Jagland, general secretary of the Council of Europe, after a meeting with the Turkish minister of justice on March 1, 2017. Jagland stated:

> The European Court of Human Rights will decide if it gets complaints, whether this has been a proper domestic remedy. The cases of journalists and parliamentarians who are in pre-trial detention will be dealt with in ordinary Turkish courts. But these people also have the right to complain to the European Court. It will look into whether the Turkish courts have ruled based on the ECtHR. (Press Statement, 1.3.2017)

On May 22, 2017, the ECtHR declared that it had amended the priority policy it had applied since 2009. The ECtHR gave priority to cases where "the applicant is deprived of liberty as a direct consequence of an alleged violation of his or her Convention rights" or applications that raise the question about "the effectiveness of the Convention system" (ECtHR statement, 05.22.2017). After this policy change, the ECtHR began to proceed with applications of arrested journalists and HDP deputies in June 2017. The ECtHR gave the government until October 2017 to submit its defense. Despite the looming ECtHR ruling, the TCC did not hear the Demirtaş case until the ECtHR signaled that they would hear the case soon. The TCC deliberated the application of HDP co-president Selahattin Demirtaş on December 21, 2017.

In his application to the TCC, Demirtaş contested the lawfulness of his pre-trial detention (Selahattin Demirtaş [GK], B. No: 2016/25189, 21/12/2017). He contended that the local court had not provided reasonable evidence to justify his pre-trial detention; instead, it had relied on the evidence the public prosecutor had

collected to build his indictment to start a trial. The TCC rejected Demirtaş's application, finding that his pre-trial detention was lawful. The Court first depicted the political-social context where the alleged offenses were carried out. It noted that, at the time of the Kobani events, the conflict in Syria was threatening Turkey's national security. The calls for protests by PKK leaders and the central executive board of the HDP resulted in heavy clashes between security forces and protestors and left many dead. The Court also cited Demirtaş's statements about the PKK and the founding leader of the PKK, Abdullah Öcalan, back in 2012. In those statements, Demirtaş praised Öcalan and stated that the Kurdish people owed their existence to armed resistance, referring to the first PKK terror attacks in Turkey. After referring to the socio-political context and Demirtaş's previous statements, the Court established a causal link between the call for protests and the violence that erupted during the protests (§ 150). The ECtHR underlined that, even if one concedes that Demirtaş had possibly acted in response to instructions from PKK leaders, the reasons for the initial pre-trial detention and extension of the detention required different justifications. The TCC endorsed the lower court's reasoning that the severity of the alleged crime and Demirtaş's refusal to obey the subpoena established a reasonable suspicion that there was a risk of his absconding (Selahattin Demirtaş v. Turkey (No.2), Application no. 14305/17§165-167)

However, as noted by the ECtHR and by Engin Yıldırım, the only dissenting TCC justice (Dissenting opinion§13-14), the lower court failed to provide concrete evidence that would justify the prolonged pre-trial detention of Demirtaş. Judge Yıldırım convincingly demonstrated that both the Turkish Constitution and ECtHR case law stipulated that the aim of detaining an individual before that person is tried must be to " prevent escape, or prevent the destruction or alteration of evidence, as

well as in other circumstances prescribed by law and necessitating detention" (Turkish Constitution, 19 § 2); it also states that the measures taken to reach this end must be proportionate. Then, Yıldırım questioned whether the lower court had provided any concrete evidence that Demirtaş might abscond, and whether that evidence was reasonable enough to justify detention. Yıldırım (Dissenting opinion §16) noted that after Demirtaş's immunity was lifted, he fled Turkey, going abroad several times and then returning to Turkey. The Courts had to convincingly demonstrate why non-custodial measures (such as judicial supervision) were not sufficient. Yıldırım also mentioned the probable repercussions of the detaining Demirtaş, considering his status as a co-president of a political party that was the third-largest party in the parliament, having won 5,148,084 votes in the previous election (§21).

Upon the TCC's rejection of their application, Demirtaş's attorneys appealed to the ECtHR again on February 20, 2018. The ECtHR deliberated the Demirtaş case on November 20, 2018. The European Court ruled that Demirtaş's right to liberty and security and his right to free elections had been violated by Turkey. (Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17). The striking point in the ECtHR ruling was that, for the first time, the Court established that Turkey had violated article 18 of the European Convention of Human Rights, which is related to abuse of political power in trials. The Court first noted that pre-trial detention of Demirtaş preceded a significant constitutional referendum to transition to the presidential system and a presidential election in which Demirtaş competed as a candidate (§260). Then, the Court referred to reports of the Commissioner for Human Rights, the Venice Commission, and Amnesty International to substantiate that the pre-trial detention was politically motivated, i.e., it aimed to keep an

important opposition leader out the democratic process. The Court further noted that reports of international observers emphasized that national laws had been used to silence political dissent—particularly leading figures, mayors, and deputies of the HDP who had been put in pre-trial detention because of their political speeches (§264). Based on these observations, the Court concluded that it was

> beyond a reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society. (§ 273)

The ECtHR decision provoked outrage in Turkey. Erdoğan and several government officials declared that they did not recognize the ECtHR ruling and condemned Demirtaş as a terrorist ("Erdoğan attack the European court's order for Demirtas's release", 2020).

Despite the ECtHR's ruling in favor of Demirtaş, the judicial travesty was yet to end. Two weeks after the ECtHR ruling, on December 4, 2018, Turkey's Supreme Court of Appeal (Yargıtay) upheld an appeal regarding a four-year prison sentence for Demirtaş issued by the Istanbul High Criminal Court; he had been charged with disseminating propaganda for terrorist organizations on September 7, 2018 ("Demirtaş ve Önder'in cezası onandı", 2018). This was widely interpreted as a tactical move to keep Demirtaş in prison in case the ECtHR ruled that Demirtaş must be released. Nevertheless, the Ankara High Criminal Court, which heard the case that Demirtaş carried to the ECtHR, ignored the ECtHR ruling and did not release Demirtaş. Once again, Demirtaş's attorneys petitioned the ECtHR in February 2019. After the ECtHR declared it would hear the case in its Grand Chamber on September 18, 2019, the Ankara High Criminal Court, which had previously rejected the ECtHR decision, acquitted Demirtaş on September 2, 2019. His acquittal did not end with his

release, however, because he had sentenced to prison by the Istanbul High Criminal Court (Deutsche Welle, 2019). Demirtaş's attorneys petitioned the Istanbul Court to deduct the time Demirtaş had spent in detention in the case for which he had been acquitted. The Istanbul High Criminal Court could do nothing except to accept the request on September 20, 2019. However, on the same day, the Ankara Public Prosecutor's office applied to the Ankara Magistrate's Court to place a new pre-trial detention for Demirtaş and his co-chair Figen Yüksekdağ regarding a proceeding that had been initiated in 2014 about Kobani incidences ("Demirtaş'a denetimli serbestlik..", 2019). The Magistrate Court accepted the application of the public prosecutor, and a new round of pre-trial detention started for Demirtaş. It was for Demirtaş's involvement in the same offense for which he had already been acquitted.

Meanwhile, Demirtaş's lawyers submitted five different petitions to the TCC between November 2017 and December 2018 regarding his detention. On June 9, 2020, the TCC decided that Demirtaş's right to liberty and security had been violated because the trial courts had not assessed the applicants' objections about the reasonableness of his detainment, considering his status as a member of parliament and co-chair of a political party (Selahattin Demirtaş (3), B. No: 2017/38610, 9/6/2020). The TCC decided that Demirtaş must be compensated, but it rejected his request to be released because he was in pre-trial detention for another case. But while the Court was hearing the case, Demirtaş had already petitioned the TCC for his pre-trial detention in November 2019, which was still pending before the court as of September 2021. The TCC's decision was a face-saving move on the part of the TCC; the goal was to subdue rising criticism from the EU. In its decisions, the TCC did not address the ECtHR decision on the Demirtaş case, nor its ruling regarding violation of article 18.

The Grand Chamber of the ECtHR reiterated that it had found no reasonable suspicion in Demirtaş's pre-trial detainment (Selahattin Demirtaş v. Turkey (No. 2), 22.12.2020). The Court noted that the TBMM did not take action on charges against Demirtaş until the AKP lost its parliamentary majority as a result of the HDP's electoral success in the 2015 elections:

> Several criminal investigations with respect to the applicant had been ongoing for years, but no significant steps had been taken until the end of the "solution process" to initiate a procedure to lift his parliamentary immunity. In this connection, the Court observes that although the investigation with respect to the applicant was not initiated in response to the speeches by the president of Turkey, it was at least accelerated after he gave those speeches and stated that "the deputies of that party [the HDP] must pay the price" (see paragraph 29 above). On 16 March 2016, the president accused the HDP members of parliament, including the applicant, of having caused the death of 52 people. (§ 426)

The ECtHR noted that the government had fallen short in substantiating its claim that lifting the immunity of deputies did not specifically target the Kurdish deputies, given that no deputy from any other political party had been convicted or deprived of their liberty (§ 427). The ECtHR stated that the timing of the detention of Demirtaş preceded the historical referendum that amounted to regime change and presidential elections in which Demirtaş himself was running as a candidate (§ 429-430). It also noted that Demirtaş's second pre-trial detention happened after President Erdoğan named him as the "killer" of 53 people and he [Demirtaş] doesn't let him go (§. 432). Considering all these factors, the court concluded the following:

> Having regard to the foregoing, the ECtHR finds that it has been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society. (§437)

7.2.3 The Osman Kavala Case

In Kafka's novel *The Trial*, Joseph K. found himself out of the blue in the middle of a legal spiral and labyrinth. "Joseph K. was living in a state of law...all law was robust and in effect." In our concrete case, the applicant's two acquittals and three arrests from the accusations based on almost the same facts and without providing pieces of evidence to support a strong suspicion, is reminiscent of a Kafkaesque legal spiral. (from the TCC Justice Engin Yıldırım's dissenting opinion in the Kavala case)

Osman Kavala is a Turkish businessman, a civil society leader and philanthropist who worked for years fostering Turkey's relations with the EU. He was a board member of the Open Society Institute of George Soros, which operated in Turkey between 2001 and 2018. Kavala advocated for Turkey's EU membership and sponsored several joint initiatives with European institutions and NGOs. With his Anadolu [Anatolian] Culture enterprise, he endorsed numerous projects to increase civilian dialogue and cooperation between Armenian, Greek, and Turkish societies. He had no difficulty dealing with Erdoğan governments during Turkey's courtship with the EU. However, once Erdoğan gave up on Turkey's European integration process and allied with ultra-nationalists, liberal NGOs became his arch-enemy. Kavala was one of the few businessmen who continued to support the Turkish civil society and Europeanization project.

Osman Kavala was arrested on October 18, 2017 by officers from the Istanbul Police Directorate and arraigned on November 1, 2017 at the Istanbul First Magistrate's Court; the prosecutor did not take his testimony ("Court arrests Turkish activist Osman Kavala over the failed coup attempt", 2017). He was informed he was being accused of seeking to overthrow the constitutional order and the government by force. The Magistrate's Court also blocked Kavala's and his lawyers' access to the investigation file, which included scripts of several wire-tapped phone calls that Kavala had made in 2013. After his arrest, Erdoğan called Kavala "Turkey's Soros" (alluding to the latter's Hungarian-American Jewish heritage) ("Kavala'nın arkasında

Macar".., 2021). In Kavala's interrogation, Istanbul police accused him of acting on behalf of George Soros, whom the Turkish authorities believed financed mass protests against Erdoğan in June 2013, when the government decided to build a shopping mall in Istanbul's Gezi Park.

In his interrogation by the police, Kavala was asked about the intent of his phone calls with several representatives of foreign countries—EU parliamentarians, and NGO representatives as well as journalists, academics and, artists—during the Gezi Park protests. Some of those conversations involved exchanges of opinion about the protests and their probable impact on local elections; some related to funding an exhibition in the EU on the Gezi protests and an event to be organized for the victims of the Armenian genocide in 1915.

Kavala was also questioned about one of his acquaintances, Henry Barkey, a Turkey expert and director of the Wilson Center in the U.S. The prosecutor believed Barkey had been involved in organizing the aborted coup of July 15, 2015—he was staying in an Istanbul hotel on the night the putsch took place. The police and the prosecutor connected Osman Kavala to Henry Barkey only because their cell phone signals had intersected on the same wireless tower in Istanbul's Galata neighborhood three days after the aborted coup. The prosecutor's office was convinced that Kavala's "intensive and unusual contacts with foreign nationals," particularly with Henry Barkey, related Kavala to the coup attempt. The Magistrate's Court endorsed the prosecutor's submission that there existed strong evidence that Kavala had been an instigator of the Gezi Protests, which the court believed numerous terrorist organizations had supported, and he had made contact with Barkey, who the Court regarded as one of the instigators of the aborted coup.

Kavala's lawyers applied to the TCC on December 29, 2017 to challenge his pre-trial detention. The TCC decided the hear the case on May 22, 2019. As in the Demirtaş case, the TCC delayed Kavala's hearing for almost one and half years. Amid mounting criticism from the EU and the U.S., the TCC decided to hear the case about Kavala's pre-trial detention (Council of Europe, 2019). Another similarity to the Demirtaş case was that Erdoğan personally followed the judicial process and repeatedly accused Kavala of being a terrorist and warned that he would pay the price ("Erdoğan'dan Osman Kavala açıklaması", 26.02.2020). Unlike the Demirtaş case, when the TCC heard the Kavala case, the state of emergency had ended.

On May 22, 2019, the TCC determined that Osman Kavala's pre-trial detention was lawful, although the five dissenting justices included Chief Justice Zühtü Arslan. In its decision, the Court took for granted that the Gezi protests were unlawful events aimed to overthrow the government. The Court presented several pieces of evidence provided by the prosecutor's office—photographs found in Kavala's cell phone taken around Gezi Park, phone conversations about the course of events, meetings he attended in Turkey and abroad about the protests, and so forth. As Justices Arslan, Yıldırım, Gökcan, Kuz, and Hakyemez showed in their dissenting opinions, both the indictment and the TCC failed to relate that patchwork of findings to the alleged offense, but the Court majority reasoned that there were enough findings for strong suspicion. Moreover, Chief Justice Arslan revealed that some quotes from the wiretaps had been taken out of context and used in a way that distorted their intended meanings. For instance, a line of conversation placed to the TCC's decision, Kavala seems to endorse the idea put forward by the person he was speaking with about spreading the protests to Anatolia (Decision § 20). However, those lines were picked from a longer conversation where Kavala said, "our dream is

actually to see a more transparent, more participatory model of local government emerge following the Gezi events; that is, the energy that has emerged from this [the events in Gezi Park] should continue to be an element of democratic opposition or to function as a means of democratic pressure." All dissenting justices pointed out other distortions in the indictment and concluded that there was no clue that supported the prosecutor's argument that Kavala intended to overthrow the government.

Meanwhile, the ECtHR decided to hear Kavala's application on December 10, 2019. The ECtHR held, unanimously, that there had been a violation of the European Convention of Human Rights on account of the lack of reasonable suspicion that the applicant had committed an offense, the lack of a speedy judicial review by the Constitutional Court. It also held, by six votes to one, that there had been a violation of article 18. The ECtHR found accusations regarding the Gezi Park protests and the July 15 coup attempt unfounded (Kavala v. Turkey, application no. 28749/18). The European court also stated that "the prosecutor's office led it to list several acts allegedly committed by this "sui generis structure" and to attach them, in an unverifiable manner, to a criminal aim, namely an attempt to overthrow the government through force and violence" (§146). Other activities Osman Kavala was charged with were "either legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were related to the exercise of a Convention right. In any event, they were non-violent activities." (§145). The ECtHR concluded that "in the absence of facts, information or evidence showing that he had been involved in criminal activity – that the applicant could not reasonably be suspected of having committed the offense of attempting to overthrow the government" (§ 153).

With respect to the amount of time between Kavala's petition to the TCC and its decision, the ECtHR ruled that the lack of a speedy judicial review by the Constitutional Court violated the European Convention (§196). In its previous decisions, the ECtHR recognized Turkey's objection that because of the vast number of cases that followed the July 15 coup attempt, the TCC was unable to proceed with all applications speedily. It stated that this "did not mean that the Constitutional Court has carte blanche when dealing with any similar complaints raised under Article 5 § 4 of the Convention. It suffices to note in this connection that the length of the procedure in the present case exceeds all of the periods observed in the above-cited cases" (§ 191). The ECtHR noted the following: "In addition, following the applicant's lodging of his application on 29 December 2017 the Constitutional Court remained inactive for about ten months until 5 November 2018 – the date on which the Court asked the Government to submit its observations on the case – despite the applicant's request to obtain priority processing of his case" (§ 190).

As in the Demirtaş case, the ECtHR found that Turkey had violated Article 18 of the Convention in that the ulterior motive for Kavala's detention was political. The ECtHR noted that the bill of indictment accused Kavala of "leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government" (§223). However, the Court stated that the 657-page indictment did not establish facts or actions that convincingly related Kavala to the alleged offenses. Rather, the indictment referred to various actions of Kavala as an NGO member and human rights defender, such as participating in a meeting with EU officials to organize a visit for an international delegation to conduct a campaign to prohibit the exportation of tear gas to Turkey. The Court stated that these flaws

damaged the credibility of the indictment (§224). The Court also noted that criticism directed by President Erdoğan in his public speeches of Osman Kavala after his arrest found their place later in the public prosecutor's indictment. All things considered, the ECtHR established that Osman Kavala's "initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender" (§ 230). It determined that the government must take every measure to put an end to the applicant's detention and secure his immediate release (§ 240).

Despite the ECtHR's final decision, the Istanbul 20th High Criminal Court resisted the ruling and decided on December 24, 2019 to extend Kavala's detention (Kücükgöçmen, 2019). But on February 18, 2020, something strange happened. The Istanbul 30th High Criminal Court ordered that Osman Kavala be acquitted of charges related to the Gezi trial. On the same day, however, it turned out that this was a tactical move, because the office of the public prosecutor issued a new arrest warrant on Kavala for an investigation related to the July 15, 2015 coup attempt ("Osman Kavala: Turkey "re-arrests" activist hours after acquittal", 2020). He was charged with attempting to overthrow the constitutional order, for which Kavala was acquitted on October 11, 2019. In this way, the Court fulfilled the ECtHR decision by acquitting Kavala in the Gezi case, but the prosecutor invented a new investigation to keep Kavala in prison. The prosecutor brought new charges against Kavala that involved espionage, for which he had not previously been investigated ("Osman Kavala: Turkey "re-arrests" activist hours after acquittal", 2020). Another reason for the new charges was that the two-year maximum detention time was about to expire, so the prosecutor had to invent something new to keep Kavala in prison. The point is that the espionage charges against Kavala were generated from the same investigation file that the prosecutor had once prepared for the Gezi case. So the

same investigation file whose credibility the ECtHR had questioned and had said it failed to provide any substantial evidence to make its case was used to generate new charges against Kavala.

Kavala's lawyers once again petitioned the TCC on May 4, 2020. On December 29, 2020, the TCC heard the case. The Court noted that the ECtHR had ruled that Kavala should be released immediately because he had been detained without substantiated charges in both the Gezi Park and the July 15 events. However, the TCC ruled with a slim majority (8 to 7) that there were strong suspicions about Kavala having committed the alleged crimes, for which reason his pre-trial detention was not unlawful (Mehmet Osman Kavala [GK], B. No: 2018/1073, 22/5/2019). It is important to note here that since the first case against Kavala was heard by the TCC, Erdoğan had appointed two loyalist judges to the Court that tilted the balance in his favor.

7.3 The Turkish Constitutional Court: Quo Vadis?

Alexander Bickel once argued that the U.S. Supreme Court should avoid divisive cases by using doctrinal tools such as standing, ripeness and political question. In doing so, the Court could preserve its reputation and use it when needed for more essential cases. Avoiding bold decisions in divisive cases and deciding on narrower grounds if possible—that is, by adopting judicial minimalism—might have been a good way for courts to enhance their reputation and increase their power in the long run. However, as Bachrach & Baratz (1963) noted, non-decision is a decision, and avoidance is still a power projection. During the state of emergency, which lasted from 2016 to 2018, the TCC opted to hunker down until the dust settled by avoiding politically risky cases. The TCC's choice amounted to self-abandonment, which

rendered it dysfunctional and unleashed a tyrannical emergency regime. Passive virtues would work in normal times, where powerful political actors abide by the rules of the game; in such cases, democracy is self-enforcing. However, as the Turkish case revealed, in times of grave regime crisis, courts cannot pretend to be neutral or prudent; their decisions eventually project political power, either on the powerful or the weak.

Because Erdoğan's emergency regime created more rights violations, the TCC and the ECtHR found themselves deluged by a flood of individual applications. The TCC's reluctance to hear those cases encouraged the ECtHR to proceed with applications from Turkey without waiting for the TCC to pronounce its final word. The cases of Demirtaş and Kavala revealed that the TCC was no longer able to follow the European human rights jurisprudence due to increasing pressures on it, and in the end, Turkey lost her hard-gained credibility vis-à-vis the ECtHR.

In the last five years that followed the coup attempt, Erdoğan cemented his base in the TCC with his partisan appointments. With his appointments between 2014-2021, he had tilted the balance in the court further to the right. Erdoğan selected those judges from among candidates who had institutional ties with his party (see Table 11). Justice Yıldız Seferinoğlu, for instance, was a former AKP legislator who had worked in the local organizations of the party for years. Justices Selahattin Menteş and Basri Bağcı had both served as deputy ministers in the ministry of justice in Erdoğan's government; they had played a critical role in the restructuring of the Turkish judiciary in the post-coup period. Justice İrfan Fidan, whom we know him from the Demirtaş and Kavala cases, served as a chief public prosecutor who carried out post-coup investigations in the Kavala and Demirtaş cases.

Table 11. Judges Appointed by Erdoğan 2014–2021

Name of Judge	Former Position	Appointment
Kadir Özkaya	Judge	01.18.2014
Recai Akyel	Governor	08.16.2016
Yusuf Şevki	Academic	08.16.2016
Yıldız Seferinoğlu	Member of Parliament	01.25.2019
Selahattin Menteş	Deputy Minister	07.06.2019
Basri Bağcı	Deputy Minister	04.02.2020
İrfan Fidan	Public Prosecutor	01.23.2021

Source: TCC website, anayasa.gov.tr

The Court's two recent decisions show that there is a delicate balance in the Court. Let me remind you that the 2017 amendments reduced the number of judges in the Court to 15. Sitting judges were not forced to retire, but vacancies created by judges who retired were not filled later. For this reason, the court worked with 16 judges for some time. In case of a tied vote, the vote of the chief judge counted as two votes.

Two recent decisions of the TCC illustrate the balance of power in the court. The TCC heard the petition of the Academics for Peace with 16 judges; with the vote of the chief judge breaking the tie, the court ruled in favor of the applicants. Another significant decision of the Court was to curb the scope of presidential decrees that had been issued with a tie vote. However, with judges retiring and with Erdoğan's new appointees, the balance soon shifted further toward the Court's conservative majority in the second Kavala case: it ruled against Kavala with a vote of 8 to 7. These changes pointed to a gloomy outlook for constitutional review and rights litigation in Turkey.

CHAPTER 8

CONCLUSION

Constitutional courts are created for tough times, but when confronted by revisionist political powers that threaten the very foundations of the constitutional regime, they are limited in the ways they can respond. This thesis has explained how constitutional courts handle political conflict by examining the actions of the Turkish Constitutional Court in a series political crises that occurred over an extended period. At the outset, I established that two variables account for the way constitutional courts cope with political upheaval: the willingness of judges to confront revisionist governments, and the likelihood of government backlash. Because courts are embedded in a political regime, the preferences of individual justices are politically structured. A court should resolve any coordination problems among its members before taking an action; and, it should be prepared to thwart any reprisals on the part of the government. Drawing on studies of political jurisprudence, I argued that the distribution of political power, the composition of the court, and the judicial support structure affect the court behavior. Depending on those political factors, courts have several options for preserving their autonomy. They can either fight off the challenging party, defer to its anti-constitutional policies, or adopt midway strategies. In what follows, I summarize my research and then discuss its theoretical implications.

Political regimes are dynamic orders. The legacy of the past and the struggles of the present sculpt political institutions. To understand the patterns of legal politics that inform today's political contestations, I explored a sweep of Turkish constitutional history in Chapter 3. Turkish history has been marked by military

coups—in 1908, 1960, 1971, 1982—each of which was followed by the creation of a new constitutional regime. Despite the constitutional ruptures, two themes underlaid each regime. The first is secularism, which has long been an organizing principle of state-society relations in Turkey, was entrenched in the constitutions of 1924, 1961, and 1982. I suggested that Turkish secularism meant state control of Islam rather than a strict separation of the state and religion. The second theme is the Turkish state's use of the law and the courts as an instrument of social control. Related to this, I suggested that from the early years of the Republic, Turkish judges and lawyers were trained to internalize the state ideology, which conferred on them the role of guardian of the regime. Because the judiciary has lacked institutional autonomy but is instead embedded in the political regime, governments have seen the judiciary as a political bounty to be seized. However, with the 1961 constitution, the Turkish Constitutional Court emerged very powerful and expanded its powers throughout the 1960s and 1970s against the legislature and the executive branches. From its inception, the TCC fostered a constitutional vision and exercised its powers to defend the Republican regime. The 1980 military regime consolidated the role of the army in politics, strengthened the presidency, and created a corporatist appointment mechanism that was designed to ensure the domination of like-minded judges at the top of the Turkish judiciary.

Against this historical backdrop, I analyzed three successive episodes of political upheavals that have taken place since 2007. Chapter 4 concentrated on the episode between 2007 and 2010, when the Turkish Constitutional Court fought off the pro-Islamist AKP government to safeguard the secular constitutional regime. Relying on its parliamentary majority, the Islamist government employed abusive constitutional strategies to erode the secular regime. The TCC responded with

defensive activism to stop the Islamists, at times stretching its powers and the conventional understanding of constitutional norms. I suggested that the 1982 constitutional regime helped republicans maintain their majority in the Constitutional Court. The Court had fostered a secularist constitutional identity over the years, which protected it against alternative views about the role of religion in Turkey's public realm. That episode was also characterized by intra-regime fractionization between the army, the president of the Republic, and the pro-Islamist government, which controlled both the legislature and the cabinet. In its fight against the Islamists, the Court found secularist groups in the bureaucracy and civil society on its side. Their support bolstered the Court's determination to challenge the Islamist government, but the chasm between the military, the bureaucracy, and the government prevented the government from taking radical actions against the Court.

That episode ended in 2010, when the AKP successfully forged a pro-Islamist coalition of an assortment of traditional religious groups and anti-militarist liberals and packed the Turkish Constitutional Court. An amendment expanded the number of judges, allowing the AKP-dominated parliament and President Abdullah Gül, a founder of the AKP, to fill the new posts. Chapter 5 demonstrated that the new TCC, which was told to replace secular activism of the old TCC with judicial restraint, deferred to the pro-Islamist government's regime-changing legislative actions. Between 2010 and 2014, judicial restraint turned into very active involvement in transforming the regime by justifying and legitimizing its authoritarian legalism. The TCC enjoyed the full support of the legislature, the cabinet, and the president, while the secular opposition was being torn apart by electoral losses and their weakening grip on the bureaucracy.

As the TCC settled into the new regime, a tug of war broke out between the pro-Islamist coalition at the end of 2013. Disagreements between Prime Minister Erdoğan and the Gülenist Islamic network about the distribution of power ended up in an intra-alliance civil war. A rift also occurred between Erdoğan and President Gül because of their differences of opinion about how to handle the crisis. The judicial tug of war between Islamists also coincided with the provision that allowed individuals to apply to the TCC for cases of human rights violations. The government used the introduction of individual complaints to the TCC to legitimize its court-packing amendment in the eyes of Turkish liberals and the European Union. However, as I documented in Chapter 6, when it came to regime fragmentation, uncertainty, and deep political polarization, the TCC took advantage of its new powers to forge a new identity as a defender of individual rights. Since the Court became a part of the European rights litigation system with the introduction of individual complaints, it used this international linkage to leverage against the governments in politically salient cases of the time.

The episode of regime fragmentation provided a political opportunity for the TCC to assert its powers, which resulted in a bloody coup attempt staged by Gülenist army officers on July 15, 2015. The AKP government foiled the putsch and jailed thousands of army and police officers in the aftermath. The government also purged and imprisoned thousands of judges, including two members of the TCC who were thought to be affiliated with the Gülenist network. President Erdoğan declared a state of emergency and gathered all state power in his hands. As Chapter 7 shows, the TCC departed from its earlier precedents on emergency rule and refused to review the constitutionality of emergency decrees. Between 2016 and 2018, the TCC grew dysfunctional in terms of its ability to be meaningful check on governmental power

and the protection of rights. The Court opted to hole up until the storm passed. The TCC thus embraced an avoidance strategy and abstained from its constitutional responsibilities.

8.1 Modes of Court Behavior

Constitutional courts consist of a number of justices who take decisions by majority vote. What is called judicial strategy is an aggregation of individual judgments, rather than a unified institutional strategy. However, because justices are constrained by institutional and political factors, I refer to it as a "mode of court behavior" rather than a strategy. Courts can adopt different and sometimes contradictory positions in different issue areas, so the mode of judicial behavior can vary across issue areas. Because my aim was to understand how courts behave in times of political upheavals, I abstracted court behaviors on issues that defined the political upheaval of each period. As summarized in Table 12, the Turkish Constitutional Court adopted different modes of judicial behavior to cope with political challenges over the 15 years between 2006 and 2019. The table shows that throughout this period, the Turkish political system was dominated by the AKP, despite the fact that the political fragmentation and the composition of the court changed in each period. The Court fought off Islamist challenges when it had a secularist majority and when the Islamist government and secularist bureaucracy were at odds. I labeled the dominant court behavior during between 2006-2010 as "defensive activism." The term judicial activism is used two ways. The broad use of the term refers to a court behavior in a situation where a court challenges a prominent government policy. The second and more recent usage of the term applies to the individual rights-based activism of the courts, where courts broaden or protect individual rights. In defensive activism, the

court strives to fortify the regime against revisionist political forces that aim to destroy or radically revise the existing constitutional regime. The dominant judicial behavior of the TCC can be described as defensive activism because the Court strove to defend the secularist constitutional regime against revisionist Islamic forces.

Table 12. Modes of Court Behavior per Episode

	2006-2010	2011-2013	2014-2016	2016-2019
Composition of the Court	Secularist majority	Conservative majority	Conservative majority	Divided between conservative liberals and nationalists
Political System	Parliamentary-Dominant party	Parliamentary-Dominant party	Parliamentary-Dominant party	Presidentialism-legislative coalition with ultra-nationalists
Structure of the Governing Coalition	Secularist judiciary-military-pro-Islamist	Stable alliance of pro-Islamists	Fragmented alliance, informal factions	Stable alliance between pro-Islamists and ultra-nationalists
Judicial Support Structure	CHP, High Courts, President	Pro Islamist Government	ECtHR	Isolated-no allies
Mode of Judicial behavior	Defensive activism	Activist in favor of Islamists	Selective rights activism	Avoidance and Deference
Dominant factors shaping court behavior	Corporatist court structure, secularist Islamist divide	Court packing/new court majority	Informal fragmentation	Emergency regime

The Court majority shifted in favor of conservative liberals in 2011 as a result of new appointments. The regime coalition was characterized by a cohesive governing alliance between different pro-Islamist groups, while the liberals quietly retreated from the court-packing coalition of 2010. After 2010, the dominant mode of judicial behavior of the TCC can be described as deference, given that the court aligned with the will of the dominant governing majority. However, judicial deference is not the same as judicial restraint, which refers to ruling on a narrow

margin or binding itself with the well-established meaning of constitutional norms. Deference does not exclude judicial activism, therefore. The new TCC actively used its review power to carry out constitutional change. It redefined secularism, the very constitutional identity of Turkey. The Court gave a carte blanche to the AKP to construct the new regime, so it actively participated in the Islamists' efforts to eradicate the last remnants of the secular regime.

During the emergency rule (2016-2018), the TCC abandoned its powers and reversed its well-established precedent about reviewing emergency decrees. During the emergency rule, the Court deferred the new nationalist-Islamist alliance by adopting a Schmidtian understanding of unrestricted sovereign power. It avoided a confrontation with the government by evading politically salient cases. At times, the chief justice used his powers to postpone a politically salient case on the court's docket. But because the TCC was obligated to implement the European Convention on Human Rights, its avoidance strategy had its limits. When the Court reluctantly heard a case and decided in favor of the defendant due to the pressure of its European counterparts, it decided on a narrow margin, allowing the prosecutor general or the lower courts to evade the effects of its decisions.

8.2 Political Jurisprudence: Toward a Synthesis

In 1963, Martin Shapiro ushered in the birth of political jurisprudence, a scholarly effort to synthesize sociological jurisprudence, legal realism, and political science to understand the role of courts and judges in U.S. politics. The central contention of political jurisprudence is that courts are political institutions, so they should be examined like many other institutions of the government. Eighteen years later,

Shapiro (1981) extended the scope of political jurisprudence to other countries with his book *Courts: A Comparative and Political Analysis.*

Political jurisprudence evolved in two directions. On the one hand, regime theory (Gillman, 2006) remained local and examined the US federal judiciary. On the other, another group of researchers followed the lead in *Courts* and created an empirically rich and theoretically sophisticated scholarship on comparative judicial politics (Ginsburg, 2003; Hirschl, 2004; Helmke, 2009; Kapiszewski, 2012). While regime theory is sophisticated in terms of its historical approach, the comparativists embraced a strategic revolution in comparative politics. A blend of commitment theory, rational choice institutionalism, and game theory informed their models. Despite their differences in geographic focus and method, both the regime theory and the comparative courts scholarship confirmed Shapiro's initial claim that courts are creatures of the prevailing regime and that they have a political function.

Like all areas of research, political jurisprudence has concerned itself with both theoretical and practical problems. It was the expansion of the U.S. administrative state and the active exercise of judicial policymaking that gave rise to the emergence of political jurisprudence research program 60 years ago. The expansion also resulted in the spread of constitutional judicial review in a great many new constitutions, leading political jurisprudence to acquire a comparative character. Now the problem is, I think, how constitutional courts perform under stress and how they survive populist backlash against constitutionalism.

The contemporary challenge that political jurisprudence has faced requires a reassessment of the existing literature and demands a flexible theory of courts during a political crisis. To this end, I employed theories of comparative constitutionalism and political jurisprudence to explain the relationship between the Turkish

Constitutional Court and successive political regimes over an extended period of time. I now provide a synthesis of two schools of political jurisprudence.

The regime theory of courts and strategic theories of comparative judicial politics are often portrayed as rival theories (Roux, 2018, p. 33). The regime theory leaves little room for independent court action, while strategic theories of judicial behavior maintain that courts are strategic actors and that they seek to expand their powers (Hirschl, 2008, p. 133) under favorable political conditions. This seeming contradiction fades when it comes to explaining the origins of constitutional review. Both theories confirm that courts are creatures of regimes and that they serve particular political functions. According to strategic theory, during regime transitions, insecure incumbents, concerned about losing their power, establish constitutional courts to protect themselves from their rivals (Ginsburg, 2003). Or else they want to entrench their policy choices in institutions like constitutional courts to perpetuate their hegemony (Hirschl, 2004). Similarly, regime theory suggests that judicial review exists because political actors believe their interests and policy goals will best be served by giving the constitutional courts the final say on what the constitution means (Graber, 2016). For instance, Lovell (2003) contends that legislators empower the judiciary to decide on controversial cases to avoid accountability, preferring to shift any blame to unelected branches. Similarly, Whittington (2005) showed that judicial activism in the courts is welcomed by elected officials when the judiciary removes obstacles created by the political system. Hence, an active exercise of judicial review does not always indicate an unruly court; rather it may be a result of the cooperation between different institutions to further their common objectives.

Although strategic theories and regime theory both do a great job in explaining the genesis of constitutional review, we cannot extrapolate their models to explain future trajectories of courts. They eloquently explain the logic of political entrenchment that paved the way for constitutional review. As I explained in Chapter 3, constitutional entrenchment is unlikely to create path dependency in terms of judicial review for two reasons. One reason is that constitution-makers represent a coalition of interests that can diverge on policy issues or the proper meaning of constitutional norms after a new constitutional regime is established. Another reason is that political processes are dynamic. Entrenchment aims to fix constitutional time with institutions; however, political time is shaped by a political and social process. Social movements and political struggles prompt institutions to reorient their policies.

In my view, what appears on the surface to be a contradiction between the regime theory and strategic theory is a matter of research design and methodological choice. As Mark Graber (2016) suggested, the regime theory of constitutional review was modeled on episodes of U.S. history that were characterized by stability and consensus on major constitutional issues. Therefore, the regime theory to depicted courts as passive agents of the dominant governing coalition. The same is true for strategic theories of political jurisprudence. Modeling on one or a few cases that fit the assumption of a theory is misleading. In this dissertation, I opted for an alternative research design where I examined a constitutional court over a long period of time during which there were successive episodes of political upheavals. This was a difficult task, since one set of variables that explain the judicial politics of an episode do not explain the successive episode. However, it allowed me to evaluate

different theories of political jurisprudence across time and under different constitutional regimes to come up with a broader set of variables.

I show that, in times of political upheaval, courts might play more active roles in protecting or transforming the constitutional regime—sometimes fighting with dominant regime coalitions, sometimes quietly endorsing and legitimizing the regime change. Despite the changing governing majorities at the helm of the government, over decades the Turkish Constitutional Court defended its constitutional vision until it was packed in 2010. I also show that the corporatist structure of the Turkish judiciary enabled secular republicans to maintain their control of the high courts, making it possible for secularist justices in the TCC to embark on defensive activism against the pro-Islamist government between 2007 and 2010. During that episode, we also saw how a republican alliance between the CHP, civil society actors, and the military actively expressed resentment about the Islamic government, which in turn motivated the TCC to stay firm in its defensive activism. The TCC, as a part of the receding secularist regime, used its powers to keep the old regime alive; eventually, however, the Court was packed by the new pro-Islamic regime.

My research also lends support to the fragmentation theory, which posits that judicial autonomy is contingent on the fragmentation of political power. Existing studies have shown that, in a political system where either the executive and legislature or the federal and local governments were dominated by opposing parties, fragmentation allows constitutional courts to exercise their powers. My research took the fragmentation theory further, showing that it is not only institutional fragmentation of the government that creates a window of opportunity for courts to activate their powers; fragmentation of informal regime coalitions does the same. Between 2007 and 2010, although a single party dominated both the executive and

legislature in Turkey, the regime was fragmented between republicans (who controlled the army, the judiciary, and the presidency) and the Islamists, who had the majority in the legislature and the cabinet. The Turkish Constitutional Court exercised a high level of defensive activism to stop the Islamists. Also, the packed court seized the opportunity posed by the tug of war between Islamists to claim its autonomy and challenge the party in power. In both instances, correspondence between the political cleavages underlying the fragmentation and a split within the court judges facilitated court activism. The defensive activism of the secular court ended with Islamist victory and court-packing in 2010. However, between 2013 and 2016, we witnessed another episode of increasing court activism in Turkey. I argued that, in this episode, the collapse of the informal alliance between the incumbent AKP and Islamic groups opened a judicial opportunity for the TCC to exercise its autonomy and gain prestige. This episode coincided with the introduction of individual applications to the TCC in cases that involved human rights issues. The TCC used this new avenue to challenge the government in individual rights cases. So as to prove to both Turkish seculars and the ECtHR that it was still an independent court.

As I noted at the beginning of this chapter, willingness of justices and possibility and magnitude of political backlash determine court behavior in the face of political challenges: court justices need to think that the government policy is unconstitutional and needs to be stopped; and their actions should not lead to the death of the court. The willingness of justices is a function of their legal and political preferences. But the preferences that dominate the institution is a matter of institutional design and time. Most constitutions have detailed rules the selection of judges. Pluralist models distribute the decision-making power in the selection of

judges among different political groups and institutions. In stark contrast to pluralist models, corporatist model of judicial selection, aims the concentration of some interests in the courts, thus restricting judicial selections. In the Turkish case, I argued that the corporatist nomination system of 1982 left out elected branches in judicial selections in order to maintain the secularist domination in the TCC. As we saw in Chapter 4, the TCC majority consisted of secularist justices, who had a high level of attachment to the previous regime. I argued that this made it easy for the TCC to mount an effective challenge to the Islamist government during the 2007-2010. In times of regime transition, the pace of change in judiciaries can lag behind the change in elected branches, which might create a disjunct between the court majority and incumbent governments. This is all the more dramatic in countries where court justices have lifelong tenure, as is the case in the U.S. Supreme Court. This is another factor that makes court-government disputes more likely.

The structure of the political regime determines the magnitude and direction of the political backlash against the court. Political fragmentation creates coordination problems for governments when they want to penalizing unruly courts. If a single political party controls the government, political backlash is more likely. In case different political parties control the government, inter-party coordination is required to take action. Political parties themselves are coalitions. Party members can be divided on policy issues, but they can support party policy so as not to be alienated within the party or appear fragmented to their opponents. In such cases, those who are not satisfied with the party policy might not join the anti-court coordination. Besides preventing governments from taking action against courts, coordination problems can motivate courts to challenge governments. In Chapter 6 I

showed that even the divisions within an informal alliance between the government and powerful social groups can thwart anti-court coordination.

Finally, judicial support structure affects court behavior. Courts are inherently weak institutions. They need allies in their battles against governments. Preferably, allies will be a branch of a government or a formal political institution. However, courts can effectively ally with civil society actors or international institutions against governments. The internationalization of human rights regimes and cooperation between international courts and constitutional courts changed the relationship between governments and courts. Governments have international liabilities in human rights issues, and domestic courts mediate between the domestic and international realms. This novel relationship between the domestic and the international affects court behavior in two ways. Government backlash against courts draws international criticism and harms the prestige of governments. Also, constitutional courts care about their prestige and legitimacy in the eyes of their international peers as much as they care about domestic actors and governments. The TCC's connection with the ECtHR mediated the relationship between the TCC and Turkish governments; at times the TCC used the ECtHR's precedent on human rights as an excuse to challenge the government in individual rights cases, at times the government tolerated the TCC decisions, because it kept the plaintiffs from applying the ECtHR, thus preventing internationalization of domestic grievances.

8.3 Constitutional Courts and Democracy

Representative democracy and constitutional judicial review came into vogue in the making of constitutions after World War II. A charter of human rights, a popularly elected legislative assembly, and a mechanism for constitutional review were

expected to prevent democratic states from falling into the hands of authoritarian governments. The post-war and post-colonial democratic ethos was so strong that even single-party regimes relied on popular elections to establish legitimacy. We have all become democrats today (Dunn, 1993). However, the discursive hegemony of democracy and human rights has not translated into practice when we consider the abundance of tyrannical regimes, the plight of human rights, and rampant electoral engineering.

Instead of getting rid of liberal democratic institutions and processes altogether, authoritarian rulers have discovered that they can use democratic procedures to subvert democracy, derive popular legitimacy, and consolidate their political power. A resent strand of research on authoritarian legalism (Landau, 2013; Scheppele, 2018) and democratic backsliding (Ginsburg & Huq, 2018) explores how authoritarian rulers exploit constitutional processes to undermine liberal democracy. This dissertation can also be read as a generic story of authoritarian legalism where an organized revisionist group came to power with democratic elections, used constitutional procedures to change laws, pack courts, and suppress opponents, thus subverting the democratic process. Like all contemporary populist parties, the AKP thrived on a flawed democracy. It capitalized on voters' frustrations with a string of dysfunctional coalition governments during the 1990s, economic crisis, and the military's sway in politics. On the other hand, the secular elite, who witnessed the erosion of their support base under the new regime, clung to their strongholds in the military and judiciary to sustain their privileged positions and protect the republican regime against Islamist and Kurdish political movements.

During the 1990s, the Turkish secular elite tried to deal with political problems with judicial solutions. Eventually they failed. The rise of Islamism and

Kurdish nationalism jeopardized the republican project of a unitary state with a secular nation. Since secular republicans were outnumbered in elections by their populist conservative rivals, they embarked on a judicial war with Islamists and Kurdish political parties. As we saw in Chapter 3, the TCC closed down Kurdish and Islamist parties, and legalized the de facto the ban on the wearing of religious headscarves in universities. While republicans were busy with their judicial strategy, both Islamists and Kurdish nationalists expanded their social power, recruited voters, and each time a party was closed, they struck back harder than ever. If one lesson is to be learned from Turkish democracy in the 1990s, it is that deep political problems and social problems cannot be resolved judicially.

My research also showed that neither powerful constitutional courts nor constitutional tools such as unnameability clauses or militant democracy are sufficient to stop ideologically-motivated revisionist parties. We might say that the TCC's aggressive exercise of judicial power to stop the Islamist challenge between 1995 and 2010 helped the Islamists generate a populist discourse and mobilize the electorate against the TCC and secularism. Courts that do not have the popular legitimacy of electorally formed branches risk being taken over by governments that aggressively exercise their powers. All populist leaders depict bureaucratic institutions as anti-democratic enclaves to justify their attempts to dismantle constitutional checks and balances. Courts can resist those forces only if they enjoy popular support and prestige. One interesting question for future research on the rule of law might be this: How might courts generate popular legitimacy and [what I would like to call] an "embedded autonomy" to protect democratic regimes against anti-democratic forces. An embedded autonomy must be something different from the standard account of judicial independence, which emphasizes either normative

supremacy of the law and the courts or the institutional design of the judiciary. How can courts knit ties with civil society, the legal complex, and international legal networks to carve their embedded autonomy?

Courts are inherently weak institutions. As Alexander Hamilton once put it, the judiciary has neither the "purse nor the sword" of other political institutions. Thus, when they engage in a war with the legislature and executive branches, their success depends on factors over which they have little control — fragmentation of political power, for instance. But once a revisionist political party monopolizes governmental power through elections, the courts are virtually defeated. The constitutional courts derive their power from the utility they provide for the regime and the social support they enjoy. The characterization of constitutional courts as a guardian of democracy and individual rights is therefore a false promise of normative constitutionalism. In normal times, when political stakes are not high for incumbents or in times the government is so fragmented that it hinders a united action against courts, constitutional courts can function well, expand their autonomy, exercise their powers, and regulate the constitutional order. Some of their decisions might upset the incumbents, but their benefits outweigh the distaste they create. However, in times of deep political crisis, when political branches fight for their survival, they have numerous options for getting rid of the courts. In resisting revisionist political parties that want to dismantle democratic institutions and establish an authoritarian regime, courts can be a part of a broad democratic alliance, but they cannot resist alone.

APPENDIX A

POLITICALLY SALIENT INDIVIDUAL APPLICATIONS

Politically Salent Individual Application Cases	Decision	Application Date	Decision Date	Days
(*Mustafa Ali Balbay*, B. No: 2012/1272, 4/12/2013)	violation	26.12.2012	04.12.2013	343,00
(*Yaman Akdeniz ve diğerleri*, B. No: 2014/3986, 2/4/2014)	violation	25.03.2014	02.04.2014	8,00
(*Youtube Llc Corporatıon Service Company ve diğerleri* [GK], B. No: 2014/4705, 29/5/2014)	violation	04.04.2014	29.05.2014	55,00
(*Sencer Başat ve diğerleri* [GK], B. No: 2013/7800, 18/6/2014)	violation	14.01.2014	18.06.2014	155,00
(*Abdullah Öcalan* [GK], B. No: 2013/409, 25/6/2014)	violation	01.07.2013	25.06.2014	359,00
(*Rahil Dink ve diğerleri*, B. No: 2012/848, 17/7/2014)	violation	03.03.2014	25.06.2014	114,00
(*Mansur Yavaş ve Cumhuriyet Halk Partisi*, B. No: 2014/5425, 23/7/2014)	rejected	21.04.2014	23.07.2014	93,00
(*Tezcan Karakuş Candan ve diğerleri*, B. No: 2014/5809, 10/12/2014)	rejected	29.04.2014	12.10.2014	166,00
(*Mahmut Tanal ve diğerleri* [GK], B. No: 2014/18803, 10/12/2014)	rejected	12.01.2014	12.10.2014	273,00
(*Yasemin Çongar ve diğerleri* [GK], B. No: 2013/7054, 6/1/2015)	violation	26.08.2013	01.06.2015	644,00
(*Mehmet Encu ve diğerleri*, B. No: 2014/11864, 24/2/2016)	rejected	07.08.2014	24.02.2016	566,00
(*Erdem Gül ve Can Dündar* [GK], B. No: 2015/18567, 25/2/2016)	violation	12.04.2015	25.02.2016	319,00
(*Ahmet Tunc ve diğerleri*, B. No: 2016/2629, 21/4/2021)	violation	23.01.2016	29.01.2016	6,00
(*Süleyman Bağrıyanık ve diğerleri*, B. No: 2015/9756, 16/11/2016)	rejected	11.06.2015	16.11.2016	524,00
(*Ahmet Kadri Gürsel* [GK], B. No: 2016/50978, 2/5/2019)	violation	26.12.2016	05.02.2019	771,00
(*Akın Atalay* [GK], B. No: 2016/50970, 2/5/2019)	no violation	26.12.2016	05.02.2019	771,00

(*Mehmet Murat Sabuncu* [GK], B. No: 2016/50969, 2/5/2019)	no violation	29.12.2017	22.05.2019	509,00
(*Ahmet Hüsrev Altan* [GK], B. No: 2016/23668, 3/5/2019)	no violation	11.08.2016	01.11.2018	812,00
(*Mehmet Osman Kavala* [GK], B. No: 2018/1073, 22/5/2019)	no violation	29.12.2017	22.05.2019	509,00
(*Kadri Enis Berberoğlu (2)* [GK], B. No: 2018/30030, 17/9/2020)	no violation	23.06.2017	18.07.2018	390,00
(*Selahattin Demirtaş* [GK], B. No: 2016/25189, 21/12/2017)	rejected	17.11.2016	21.12.2017	399,00
(*Zübeyde Füsun Üstel ve diğerleri* [GK], B. No: 2018/17635, 26/7/2019)	violation	12.06.2018	26.07.2019	409,00

APPENDIX B

LIST OF INTERVIEWS

Interview 1	11.07.2018
Interview 2	17.07.2018
Interview 3	08.11.2018
Interview 4	27.11.2018
Interview 5	27.11.2018
Interview 6	09.03.2019
Interview 7	27.05.2019
Interview 8	09.07.2019
Interview 9	09.07.2019
Interview 10	09.07.2019
Interview 11	09.07.2019

APPENDIX C

ABSTRACT REVIEW STATISTICS (1962-1980)

	Abstract Review		Concrete Review	
Years	Petitions	Annulments	Petitions	Annulments
1962	6	1	29	0
1963	149	26	30	5
1964	15	9	20	1
1965	13	7	21	2
1966	7	10	19	3
1967	15	4	24	1
1968	7	5	48	0
1969	19	8	31	5
1970	23	7	32	2
1971	17	13	29	2
1972	13	15	38	1
1973	16	3	22	2
1974	9	10	39	5
1975	5	6	187	34
1976	22	10	30	4
1977	11	11	119	8
1978	20	7	49	2
1979	10	5	29	6
1980	3	2	73	3

Source: TCC website, anayasa.gov.tr

APPENDIX D

TCC JUDGES IN 2011

Judge	Appointed by	Judge	Appointed by
Haşim Kılıç	Turgut Özal	Recep.Kömürcü	Abdullah Gül
Sacit Adalı	Turgut Özal	Alparslan.Altan	Abdullah Gül
Osman Paksüt	Ahmet N. Sezer	Burhan Üstün	Abdullah Gül
Fulya Kantarcıoğlu	Ahmet N. Sezer	Engin Yıldırım	Abdullah Gül
Necmi Özler	Ahmet N. Sezer	Nuri Necipoğlu	Abdullah Gül
Serdar Özgüldür	Ahmet N. Sezer	Hicabi Dursun	Parliament
Serruh Kaleli	Ahmet N. Sezer	Celal M. Akıncı	Parliament
Fettah Oto	Ahmet N. Sezer	Erdal Tercan	Abdullah Gül
Ahmet Akyalçın	Süleyman Demirel		

Source: TCC website, anayasa.gov.tr

APPENDIX E

ABSTRACT REVIEW STATISTICS (2003-2017)

Years	Annulled	Partially Annulled	Rejected	Total	
2003	3	1	1	5	
2004	1	3	2	6	
2005	2	5	5	12	
2006	3	3	3	9	
2007	1	10	5	16	
2008	8	5	9	22	
2009	3	6	4	13	
2010	2	5	7	14	
2011	2	8	20	30	
2012	1	27	20	48	
2013	1	18	21	40	
2014	0	9	5	14	
2015	0	6	5	11	
2016	0	3	7	10	
2017	0	0	10	10	
				Total	260

Source: TCC website, anayasa.gov.tr

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