INTRODUCTION

The political system of Turkey has changed dramatically since the failed coup attempt of July 15, 2016. Earlier tendencies towards de-valorisation of the rule of law mechanisms and democratic standards have since resulted in open autocratisation.[10] During the two years of state of emergency that followed the attempted military coup, repeated mass purges among judges, teachers, academics, and other professional groups created an atmosphere of arbitrariness and fear. This has barely changed since the state of emergency was lifted in July 2018: the constitutional referendum of 2017 abolished basic institutional checks and balances of the parliamentary system, and most of the administrative emergency measures have been converted into regular law.[11]

Currently, the Turkish regime can be best characterised as an unconsolidated autocracy. This assessment, however, has to be put into perspective, as Turkey's political system could never be characterised as a fully-fledged, consolidated liberal democracy. Instead, for over half a century, phases of democratisation were followed by partial setbacks or even serious authoritarian intermezzi, including open (1960, 1971, 1980), indirect (1997), and failed (2016) military coups. Violent internal conflicts and prolonged phases of states of emergency in the Kurdish part of the country heavily impacted the political, social, and economic systems.[12] Whereas the political regime gradually liberalised over the years, Turkey never developed into a consolidated constitutional democracy. Instead, phases of democratisation and de-democratisation alternate; the current drastic re-autocratisation after some years of liberal opening seems to affirm this pattern once again. While the military's once dominating role has gradually eroded since the 2000s, the functional logic of other state institutions stayed tutelary, and the political culture never completely outgrew its paternalistic, and even authoritarian, character.[13]

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10 Cf. Çalışkan 2018.
11 See Chapter I.1.2 for details.
12 For an overview of the political history of the Turkish Republic see Altunışık / Tür 2005; Öktem 2011; Kalaycıoğlu 2012; 2019; Taşkın 2013; Turan 2019.
13 Cf. Gençkaya / Özbudun 2009, p. 22; Işiksel 2013.

The Constitutional Court of Turkey (*Anayasa Mahkemesi*, AYM), one of the oldest constitutional courts in Europe, has been a crucial institutional element in this particular political setting for six decades. Established in the aftermath of the first military intervention in Turkey in 1960, it has strongly impacted the Turkish rule of law system as well as politics and society at large under changing political conditions. By and large, it developed a reputation of reasonable judicial autonomy. Whereas its image was never that of an unbending protector of individual rights and liberties against state infringement, the Court usually kept its autonomy vis à vis government institutions. Hence, scholars have repeatedly attested the AYM to be "both independent and powerful".[14]

This is no longer the case since the dramatic events of July 2016: immediately after the failed coup attempt, two justices were arrested under the suspicion of collaboration with the *Gülen* movement (FETÖ/PDY), which was held responsible for the coup by the Turkish Government. Only two weeks later, the remaining fifteen justices legitimised this action by unanimously dismissing their colleagues. They justified the decision in a highly questionable ruling: in the absence of any hard facts or judicial norms to build on, they argued solely on the basis of "information from the social circle" (*sosyal çevre bilgisi*) and "common conviction".[15] This unmasked demonstration of stalwart loyalty to the Government was followed by a massive act of self-censorship concerning the Court's right of constitutional review. Without any convincing judicial reasoning, the AYM abandoned its long-standing case law, according to which it was entitled to determine the constitutionality of executive decrees under emergency rule.[16] *Zühtü Arslan*, the President of the AYM, justified this submissive attitude in June 2017 during a meeting with the heads of other European constitutional courts. According to him, the executive branch should be given free rein in times of intense political crisis, such as the aftermath of the attempted coup.[17]

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

14 Belge 2006, p. 654; for similar assessments cf. Özbudun 2000; Özbudun 2010.
15 E. 2016/6, K. 2016/12 (not published in the Official Gazette, but accessible on the Court's website (electronic archive).
16 Cf. E. 2016/166, K. 2016/159 (04/11/2016); E. 2016/167, K. 2016/160 (04/11/2016); E. 2016/171, K. 2016/164 (08/11/2016); E. 2016/172, K. 2016/165 (08/11/2016). Cf. also Sağlam 2018.
17 Cf. Wefing 2017.
18 Göztepe 2018b.

the AYM has lost much of its reputation as a fairly independent constitutional institution within the Turkish political system. The very institution in charge of defending the constitutional order against attacks by other branches of government seems to have – at least temporarily – given up any such claim. One aim of this book is to provide an explanation for this development and to reflect on the Court's chances of 'recovery'.

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

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

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

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

explanation for what he sees as a path-dependent lack of consistency in the Court's decision-making.[22]

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

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

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22 Cf. Ergül 2016.

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

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

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

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

Until the 1990s, political scientists mostly studied constitutional courts in consolidated democracies, if they were interested in the subject at all. Since the 'judicial turn' in the social sciences at the end of the 20th century, a considerable amount of literature also discusses the crucial role these non-majoritarian institutions may play during democratisation processes.[26] Likewise, the (de)stabilising effect of (constitutional) courts in consolidated authoritarian regimes has been analysed in some detail.[27] There is, however, almost no theoretically substantiated knowledge about the possible impact of judicial review in a regime continuously oscillating between autocratic and democratic features. Will the constitutional court defend the legal status quo, opposing any changes, even if these changes would enhance the democratic quality of the political system? Or will it act per definition as a promoter of constitutional checks and balances, fundamental rights, and democratic liberties? And, moreover, how does a constitutional court react if democratic achievements are jeopardised by tendencies of re-autocratisation time and again?

When assessing the role of constitutional courts within a political system, social scientists usually focus on non-legal explanations, no matter what the particular political context may be. They pick up on the established 'judicial behaviour'-research inspired by over sixty years of literature on the US Supreme Court. According to this theoretical approach, constitutional justices are perceived as political players or, more precisely, policy seekers who act strategically.[28] The classic 'attitudinal model', deducted from empirical studies on the individual votes of US Supreme Court justices, stipulates a direct causal link between their individual policy preferences and the collective court decisions.[29] While more sophisticated versions of this model developed over time,[30] they still conceptualise constitutional courts as 'ordinary' political actors among others, such as governments or parliamentary opposition.[31] As the original attitudinal

26 Cf., among others, Daly 2017; Issacharoff 2015; Stone 2012; Scheppele 2005; Ginsburg 2003; Sadurski 2002; Epstein et al. 2001; Schwartz 2000.
27 Cf. Ginsburg / Moustafa 2008; Trochev 2006.
28 Cf., among others, Dahl 1957; Epstein / Knight 1997; Tsebelis 2002; Segal / Spaeth 2002; Bailey / Maltzman 2011.
29 Cf. Dyevre 2010, pp. 300 - 302; Segal / Spaeth 1993; Spaeth / Segal 2000.
30 Cf. Epstein / Knight 1997.
31 For a good overview of this research tradition cf. Dyevre 2010 or Wrase / Boulanger 2013.

model is no longer seen as a sufficient explanation by most scholars, other non-legal factors, such as public expectations[32] or external pressure group influence,[33] are taken into consideration.

More recently, a concurring non-legal attempt at explaining constitutional courts' varying roles within political systems emphasises the institutional determinants of judicial behaviour. This (neo-)institutionalist perspective may focus either on a constitutional court's institutional status within the respective political systems,[34] or on its internal organisation and the institutional design of its competences. Scholars have analysed – among other aspects – the effects of internal decision-making structures on the argumentation of individual justices in politically sensitive cases[35] or tried to measure whether the political positioning of the court varies according to different judicial proceedings.[36]

Regarding political science explanations of constitutional courts' decision-making, this book mainly builds on Arthur Dyevre's comprehensive model "reconciling the various attitudinal and institutionalist approaches".[37] He introduces three levels of analysis: the individual attitudes of the judges are located on the micro level, while internal institutional conditions like the discretion over case selection and assignment, term limits and renewability, or the possibility of publishing dissenting opinions, form the meso level of analysis. Finally, on the macro level, external institutional variables, such as power fragmentation, constitutional checks and balances, or public support for the court, should be taken into consideration.[38] Dyevre rightly stresses that explanations on all three levels are not mutually exclusive, but have to be assessed in varying combinations, depending on the particular situation of each respective court.[39]

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

32 Cf. Vanberg 2005; Giles / Blackstone / Vining 2008.
33 Cf. Epstein / Knight 1997; Collins 2008.
34 Cf. Ferejohn / Pasquino 2002; Ferejohn et al. 2009.
35 Cf. Davis 1999; Magalhes et al. 2017.
36 Cf. Ewert / Hein 2016.
37 Dyevre 2010, p. 297.
38 Cf. ibid., p. 318.
39 Cf. ibid., p. 314.

mental rights and an effective system of checks and balances normative aims in itself, are an indispensable precondition for any successful institutionalisation of judicial review.[40] Other academics assume that it is mainly the uncertainty about future outcomes and power relations during a transition period that encourages politicians to delegate some of their power to a group of 'neutral' justices.[41] Following this 'assurance theory', a once-established autonomous constitutional court gives opposition parties and minority groups the chance to appeal against majoritarian decisions and thus inevitably promotes fundamental rights and other democratic principles.[42] It is obvious that these approaches do not fully apply in the case of the AYM.

Ran Hirschl developed a concurring explanation, which is more sceptical about the automatic link between judicial review and democracy promotion and thus seems to fit the Turkish experience much better. Following his 'hegemonic preservation' thesis, judicial review may just as well be established by dominant political elites as a tool to protect their threatened power and privileges in times of transition against hostile elected majorities. In this case, the constitutional justices are not supposed to protect or even promote democratic principles, but to preserve as much of the *status quo ante* as constitutionally possible in order to serve the interests of the old elites.[43] Regarding the AYM's founding after the military coup of 1960, this 'hegemonic preservation' theory seems most convincing.[44] Rather than promoting democratic government or human rights protection, the military in charge of the constitution-making process shaped the Constitutional Court as one counter-majoritarian institution among others so as to preserve the hegemony of the so-called Kemalist elite over a presumably leftist and pro-Islamic parliamentary majority.[45] The institutional development and the extensive case law of the Court since its founding, though, cannot be evaluated exclusively through the lens of Hirschl's thesis: in a system of particularly high political and institutional volatility and social mobility like the Turkish Republic, it seems unlikely that any 'old elite' should have been able to preserve its

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

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

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

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

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

46 Belge 2006, p. 656.
47 Ibid., p. 666.
48 Ibid., p. 687.
49 Ibid., p. 671.
50 Belge (2006, pp. 676 ff.) concedes that the 'Republican alliance' experienced two phases of instability (after 1971 and in the early 1990s), resulting in a temporary shift to more progressive human rights' rulings by the AYM.
51 Cf. Belge 2006, p. 664.

similar patterns beyond this epoch. Asli Bâli, for example, identified a "paralysing model of judicial guardianship" in favour of Kemalist "elite preferences" as the Court's main rationale in her influential 2012 article on "The Perils of Judicial Independence".[52] Following this assessment, the AYM should have turned into a fundamental opponent against the political take-over by the "non-elite party" AKP and its main representatives. While some publicly contested rulings during the 2000s seemed to point in this direction, many others did not, as will be shown in this book.

The idea of a purely ideology-driven, homogeneous Constitutional Court unyieldingly defending the interests of a hegemonic elite within the political regime is also put into question by the rare attempts to statistically analyse AYM case law over time. Yasushi Hazama,[53] for example, scanned 175 abstract norm control decisions issued by the AYM between 1984 and 2007 and compared the success rates of the proceedings according to the referring authority[54] and referral reasons, very roughly distinguishing between issues of "state principles" and claims of "horizontal accountability".[55] In a nutshell, he found that so-called "state-elite parties" – a category very similar to that of the 'Republican alliance' – were by no means more successful when applying to the AYM than "non-state-elite parties". Instead, the Court was generally more inclined to "accept unconstitutionality claims of executive transgressions than those of state-principles violations."[56]

A recent study by Aylin Aydın-Çakır analysing the impact of "the court's political preferences"[57] in relation to the political composition of respective Governments on AYM rulings comes to similar conclusions. According to her quantitative analysis of all decisions published between 1984 and 2010, several variables "attenuate" the effect of ideological distance (or proximity) between the Court's decisions and "state-elite preferences".[58] In this context, one finding concerning the "legal preferences" of the Court is particularly telling: regardless of the political context, there is a signifi-

52 Bâli 2012, p. 310.
53 Even Hazama, without giving any explanation, bluntly stated in his article: "(…) Constitutional Court judges are also considered part of the state-elite" (2011, p. 427).
54 For details on the right to initiate abstract norm control proceedings cf. Chapter I.3.1.
55 Hazama 2011, pp. 429-430.
56 Ibid., p. 421.
57 Aydin-Cakir 2018, p. 1101.
58 Ibid., p. 1119.

cantly higher probability of the AYM overturning laws that are claimed to violate state principles than those supposed to violate individual rights.[59]

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

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

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

59 Cf. ibid.
60 Shambayati 2008, p. 99.
61 Örücü 2009.
62 Can 2012.
63 Cf. Abad Andrade 2020, pp. 24-25.; pp. 197 ff.
64 Moral / Tokdemir 2017, p. 276.
65 The AYM adjudication on political party dissolutions is discussed in detail in Chapter II.4.1.

Court reform in 2010.[66] While their quantitative analysisof 200 randomly selected rulings between 2007 and 2014 did prove a "conservative ideological shift"[67] among the sitting justices, this did not (yet) translate into any statistically significant effect on the outcome of the case law.[68] This finding supports the assumption that there is no directly proportional relation between justices' individual political attitudes and their voting behaviour. Hence, it is misleading to conceptualise the AYM as a monolithic institution and/or a completely homogenous group of justices at any phase of its existence, as is often implied in the literature.[69]

There is plenty of room for further micro-level explanations of the AYM's political role. Empirical research is needed to better understand the impact of Court Presidents, to trace the influence of the 'great dissenters', or to explain the importance of individual votes during different phases of collective decision-making. As Maria Abad Andrade has impressively shown in her recent book on the decision-making process of the AYM, the many inconsistencies within this process heavily contribute to the lack of doctrinal clarity and to its, at times, even contradictory case law.[70] Whereas our study does not particularly focus on individual voting behaviour, some of the key rulings analysed in Part II also cover numerous dissenting opinions, revealing rich information about individual justices' agendas.

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

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

66 Varol et al. 2017, p. 201.
67 Ibid., p. 187.
68 Cf. ibid., p. 214.
69 Cf., for example, Shambayati 2008, p. 106.
70 Cf. Abad Andrade 2020.

legal perspectives of interpreting constitutional court adjudication. Third, we introduce elements of qualitative content analysis to the interpretation of court rulings, which can be productive far beyond the Turkish case.

Our analysis is based on an interdisciplinary socio-legal understanding of judicial power: in order to assess the political role of any constitutional court, a comprehensive analysis of its rulings is indispensable.[71] While the interpretation and annotation of case law has always played an essential part in jurisprudential research, most social scientists still neglect the importance of the specific argumentation explicated in (constitutional) court decisions. If they engage with adjudication at all, they usually content themselves with merely stating whether or not the unconstitutionality of a norm was stipulated. They overlook that – whatever personal, political, or other non-legal motives might be involved – rulings ultimately are legal texts which cannot be deciphered without referring to legal frames of argumentation and interpretation.[72] In this regard, legal scholars have a "clear and uncontested advantage" over social scientists, as Ran Hirschl, one of the most prominent scholars working in this field, rightly put it.[73]

First and foremost, apex courts are institutions that function on the basis of legal procedures very similar to those applicable in any common court. Additionally, constitutional justices are mostly trained lawyers, many of whom were socialised as professional judges.[74] It is naïve to neglect the influence of these particular rules and mindsets on the outcome of the decision-making process. And, even more importantly, the legal framing contributes significantly to the legitimisation of the decisions as well as of the constitutional court's role within the political system in general.[75] A constitutional court, exercising its power in a judicial form and operating under constraints that are typical of collegiate judicial bodies, clearly

71 For a comprehensive overview of the state of the art and the gaps in interdisciplinary socio-legal research on constitutional court decision-making cf. Steinsdorff 2019.

72 Cf. Steinsdorff 2019, p. 208.

73 Hirschl 2018, p. 21.

74 While in most countries only trained lawyers are eligible as constitutional justices, there are exceptions, like in France or the US. But even in these cases, *de facto* most justices have a legal professional background. This also applies to Turkey, where the justices have always come from different professional backgrounds, and not all of them have worked as professional judges before. The eligibility criteria to the AYM are described in more detail in Chapter I.2 of the book.

75 Cf. Landfried 2019, p. 3.

distinguishes itself from 'ordinary' political institutions:[76] Instead of public vote-seeking and political majority building, it is supposed to decide on the basis of "rational deliberation"[77] and convincing legal argumentation. The earnestness and transparency of the consensus-oriented deliberation not only legitimise the counter-majoritarian character of constitutional courts' decision-making, they also foster the public acceptance of the decision's outcome.[78]

As the decision-making usually takes place behind closed doors[79] and therefore cannot be entirely reconstructed, the ex-post rationalisation of this process in form of the published ruling is crucial.[80] While it is obvious "that the making and the presentation of a decision can fall apart",[81] the judicial deliberation displayed in the published text is an important element of its credibility.[82] David Robertson, one of the very few non-lawyers advocating the significance of legal reasoning in constitutional court rulings, aptly characterises this restraint: "Of course judges bargain with each other to get majorities on multimember courts – but the currency they trade in is itself argument."[83] Hence, a close reading of the justices' argumentation can reveal much about the 'real reasons' of a decision, be they legal, non-legal, or a mixture of both. To put it in a nutshell, justices "determine themselves whether something is constitutional or not, but are only free to make this determination inside a complex web of legal and political restrictions".[84]

One particular restriction constitutional justices have to keep in mind concerns their dependence on public acceptance of the rulings: constitutional courts are reactive institutions, i.e. cases have to be brought to court and rulings have to be implemented by other actors.[85] Hence, the

76 Cf. Cappelletti 1989, pp. 53-56.
77 Da Silva 2013, p. 559.
78 Cf. Cohen 2014, p. 408; Landfried 2019, p. 5.
79 There are very few apex courts in the world which deliberate in public. One exception is the Brazilian Supreme Court, which holds its sessions with an audience and even allows its public deliberations to be recorded and broadcasted on TV. The Supreme Court justices don't meet (secretly or officially) beforehand (cf. Da Silva 2013, p. 568).
80 On the difference between the process of decision-making and its representation cf., among others, Röhl / Röhl 2008, p. 610.
81 Grimm 2019, p. 311.
82 Cf. Hübner Mendes 2013, p. 107.
83 Robertson 2010, p. 21.
84 Ibid., p. 34.
85 Cf. Steinsdorff 2010, pp. 492-493.

court depends on the cooperation of possible applicants as well as on the political and societal compliance with its decisions. It must convince the addressed audience(s) that the ruling in question is consistent with the court's doctrine, as bound by and referring to the constitution, previous decisions (precedent), or binding international law.[86] Only if this is the case, can the constitutional court legitimately build a substantial and sustainable "power of interpretation" (*Deutungsmacht*).[87] As will be shown in Parts II and III of this book, the rulings of the AYM were (and are) not always consistent in this regard, which might explain why the Court never acquired an uncontested, legitimate authority as defender of the constitutional order in Turkey.

In order to identify recurring patterns of argumentation and various characteristics of judicial and/or political reasoning, a systematic, comparative reading of the rulings is necessary. As specific empirical tools for the in-depth analysis of judicial texts are still missing,[88] our study of selected AYM case law does pioneering work in this regard. The innovative design is partly inspired by the book on "Comparative Constitutional Reasoning", edited by Arthur Dyevre, Giulio Itzcovich and András Jakab in 2017. This remarkable study assembles text analyses of the 40 "leading cases" in 18 apex courts across Europe and beyond.[89] The case selection as well as the analyses have been executed by interdisciplinary groups of country experts. They all applied a common questionnaire, consisting of 37 "opinion characteristics". These categories are comprised of the language and form of the texts, the institutional setting of the decision-making, recurring argumentative patterns, and the political context of the decisions.[90] The adaptation of this approach to the purpose of our study, including selection criteria for the AYM rulings and the categories of analysis, will be discussed in detail in Chapter II.1.

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

86 Cf. Ferejohn / Pasquino 2004, p. 1684.
87 Vorländer 2006, p. 15.
88 Cf. Steinsdorff 2019, pp. 218 ff; Jakab et al. 2017a, pp. 4-5.
89 Cf. Jakab et al. 2017a, p. 27.
90 Cf. ibid., pp. 31 ff.

decisions, let alone long-standing doctrinal principles. Besides, whenever the argumentation of AYM decisions has been discussed in the (mostly political science) literature at all, it usually refers to a very narrow range of particularly politicised issues, like the prohibition of political parties[91] or the headscarf decisions.[92] As a result, the perception of the Court's reasoning is so far very vague and lopsided.

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

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

91 The particular significance of the huge number of party ban rulings over the history of the AYM is discussed in Chapter II.4.1.
92 Cf. Chapter II.4.3.1, Chapters III.3.3 and III.3.4.
93 Jakab et al. 2017b, p. 764.
94 Bilgin 2008, p. 142.
95 Cf. tbmm.gov.tr/anayasa/anayasa_2018.pdf (last accessed: 25/06/2020). Even though this list indicates only 19 amendments, one more should be counted since the amendment law 5678 was itself amended by law 5697 (see footnote 36 of the list).
96 A detailed quantitative overview of the AYM's output over the whole period of its existence is displayed in Chapter II.2.

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

4. Plan of the Book

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

97 Cf. Chapter I.5.1 for details on the Analytical Service and the intensified attempts of the AYM at creating a more transparent and approachable self-image since 2015.

98 For sampling criteria, the content analytical approach and further information about the rulings included into the analysis, cf. Chapters II.3 and III.1.