PART I: THE INSTITUTION

The Constitutional Court of Turkey is one of the oldest exemplars of the 'concentrated' model of judicial review, introduced to the political systems of many civil law countries in Europe and beyond during the last half century.[99] Since its establishment in 1961, the Court's main task has been to review the constitutionality of parliamentary laws and – since the constitutional amendments in 1971 – executive decrees. In addition, the AYM has several special competences, most importantly the discretion over the dissolution of political parties. For most of its existence, Turkish citizens were not allowed to individually access the Court in order to claim a violation of their fundamental rights and freedoms. This changed in September 2012, when the comprehensive constitutional reform of 2010 took effect and resulted in a skyrocketing number of individual complaint proceedings at the AYM. The enormously increased workload induced fundamental changes to the institutional functioning of the Court in general and to the organisation of its internal decision-making process in particular. These reforms are only the latest episode in a series of transformations the AYM underwent over the years, causing inconsistencies in and partial disruptions of its institutionalisation.

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

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

99 For an overview of the consecutive "waves" of judicial review development cf. Lustig / Weiler 2018.

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

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

1. Constitutional History of Turkey and the AYM

1.1 The 1961 Constitution and the AYM

The first Constitution of the Republic of Turkey (1924), like the subsequent Constitutions of 1961 and 1982, set a rigid framework for the political process, since they all included one or more unamendable constitutional clauses. In Art. 102 TA 1924 the form of government of the Republic was laid down as an unamendable provision (para 4), and a particular constitutional amendment procedure[100] was stipulated (para 2 and 3). Art. 103 expressly banned the enactment of unconstitutional legal provisions. Yet, as no institutionalised and independent supervisory body for these protective provisions existed, parliamentary sovereignty was unlimited. This situation of judicially unchecked parliamentary majority decisionscreated little opposition during the one-party government of the Republican People's Party (*Cumhuriyet Halk Partisi* / CHP). But after the transition to a multi-party system in 1946 and the victory of the right-conservative Democratic Party (*Demokrat Parti* / DP) in the 1950 elections, the political tension could no longer be restrained.

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

100 Constitutional amendments required an application quorum of one third of the total number and an acceptance quorum of two thirds of the total number of Members of Parliament.

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

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

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

101 For details of the proposed laws, cf. Onar 2003, pp. 188-195.
102 For a detailed explanation of the circumstances of these decisions, cf. Feyzioğlu 1951, pp. 255-264; Onar 2003, pp. 166-187.
103 Surprisingly, the military envisioned a more liberal Constitution than the leading Turkish law professors of the era.
104 Cf. Gençkaya / Özbudun 2009, pp. 14-15.
105 Cf. the Justification of the Constitutional Commission of the Constituent Assembly (*Kurucu Meclis*), p. 3706; for further opinions supporting these basic

structures popularly elected".[106] It introduced a powerful constitutional court as one of the mechanisms by which the then ruling elites intended to prevent the consequences of unchecked majoritarian democracy.[107] Unsurprisingly, the articles concerning the AYM led to animated discussions during the parliamentary sessions debating the draft of the 1961 Constitution.[108]

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

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

---

ideas, cf. p. 3716 (*Sadettin Tokbey*); p. 3770 (*Şükûfe Ekitler*); pp. 3776-3777 (*Muammer Aksoy*).

106 Heper 1985, p. 88.

107 Cf. Hazama 1996, p. 316.

108 Cf. Öztürk 1966, pp. 3705-3807.

109 The difference between regular and alternate justices is explained in detail in Chapter I.2.

110 In order to reach the number of 15 regular and five alternate justices (stipulated by Art. 145 TA 1961), four more AYM members were appointed in the following months: regular members *Celâlettin Korelman* and *İsmail Hakkı Ketenoğlu* (2.06.1962); alternate member *Fazıl Uluocak* (9.06.1962); regular member *Yekta Aytan* (19.06.1962). (The appointments were published in the Official Gazette).

tary's interference with the AYM's competences was the decision of the Court of 16 June 1970. In this ruling, the AYM had not only formally reviewed the constitution-amending law No. 1188 (06/11/1969), but had also examined the substance of the law and declared it unconstitutional.[111] The law amending the Constitution was interpreted in the light of the unchangeable Art. 9 TA 1961, which protected the republican form of government, and the procedure for constitutional amendments as prescribed in Art. 155 TA1961. Even if the Court ultimately declared the law unconstitutional with regard to its form, the decision was accompanied by a long *obiter dictum*. Accordingly, the AYM had the duty to interpret and protect the concept of the Republic not only as a term, but as a comprehensive concept, with all the characteristics enumerated in Art. 2 TA. Thus, the AYM had made it very clear that it considered parliamentary majorities not only bound by the formal requirements, but also by the 'spirit' of the Constitution.

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

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

111 Cf. E. 1970/01, K. 1970/31 (07/06/1971); this decision is not documented in Part III of the book.

112 Cf. E. 1973/19, K. 1975/87 (26/02/1976), E. 1976/38, K. 1976/46 (20/01/1977), E. 1976/43, K. 1977/4 (21/04/1977), E. 1977/82, K. 1977/117 (14/01/1978). All not included in Part III.

113 Own calculations. Cf. also Öngel 2017.

of only one MP (*Niyazi Ağırnaslı*). After the general elections of 1965, the party group temporarily increased to 15 members, but dropped again to only two representatives in 1969. Obviously, the parliamentary majority was not pleased at all about the huge impact even this very small parliamentary minority could exert by applying to the AYM.[114] As a result, the constitutional amendments of 1971 excluded active individual MPs and small parties without a parliamentary group from the range of applicants.

1.2 The 1982 Constitution and the AYM

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

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

---

114 For details on the constitutional review activities of the TİP cf. Chapter II.4.
115 Cf. Öktem 2011, p. 56.
116 Ibid.
117 Cf. Gençkaya / Özbudun 2009, p. 19.

While the constitutional referendum of 1961 had taken place in a rather free atmosphere, the referendum on 7 November 1982 was held in a very repressive political context. It was prohibited to express any views that might have influenced the voters' decision negatively, and all criticism of the new Constitution was banned. Additionally, the provisional Art. 1 TA coupled the acceptance of the Constitution by referendum with the automatic appointment of General Kenan Evren, the leader of the putschists, as President of the Republic. As the military made it implicitly clear that a rejection of the draft Constitution would result in the continuation of the military regime, the high approval rate of 91.37 percent did not come as a surprise.[118]

The 1982 Constitution reflected the military's mistrust of the 'people's will' even more openly than its predecessor: elected assemblies, political parties, and all civil society institutions, such as trade unions or professional and voluntary associations, were weakened. Also, the competences and areas of action of the Constitutional Court as well as the range of possible applicants (Art. 150 TA) were further restricted. Most importantly, a very rigid definition of "formal review" was introduced in Art. 148 (2 TA), explicitly prohibiting any judicial review of the substance of constitutional amendment laws.[119] At some point, the very existence of a judicial body that protects the Constitution seemed to be at stake in the Constituent Assembly, but in the end, the AYM as an institution survived. In retrospect, one can state that the Court stood its ground within the new constitutional system despite the introduced restrictions. In particular, it succeeded in partly reining in the executive branch by regaining judicial control over emergency decrees. In a series of decisions since the 1990s, the AYM also defined the standards and the implementation framework of basic rule of law principles. This process of growing institutional self-assurance and a gradual promotion of the fundamental values of liberal constitutional democracy will be retraced in Parts II and III of the book via the documentation and analysis of crucial rulings pointing in this direction.

---

118 Cf. Gençkaya / Özbudun 2009, p. 20.

119 Art. 148 (2) second clause: "(…) the verification of constitutional amendments shall be restricted to consideration of whether the requisite of majorities was obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed". The crucial importance this provision plays in the political reasoning and self-empowerment of the AYM is discussed in detail in Chapters II.4.3.1 (Headscarf Decision II, documented in Chapter III.3.4 and II.5.4.)

When the Justice and Development Party (*Adalet ve Kalkınma Partisi* / AKP) won the elections in 2002, for the first time in Turkish history a right-wing Islamic party formed a single party government. In the following years, social and political tensions between the established elites and the new force in power became more and more intense. The AYM got involved in these conflicts very early on.[120] In 2007, a constitutional crisis erupted over the election of the President of the Republic, in which the Court played a controversial role.[121] In the end, the direct election of the head of state was introduced by a constitutional amendment via referendum. In 2008, the AKP Government initiated a constitutional reform aimed at dissolving the headscarf ban because ordinary laws to this end had been repeatedly declared unconstitutional by the AYM.[122] In the same year, a party prohibition case against the AKP was filed, in which the party only very narrowly escaped a ban before the Constitutional Court.[123]

In 2010, the AKP introduced another major constitutional reform, which many saw as the party's response to the ongoing constitutional crisis.[124] The amendment affected different aspects of state organisation, but the changes to the High Council of Judges and Prosecutors (*Hâkimler ve Savcılar Yüksek Kurulu* / HSYK and to the Constitutional Court were particularly controversial.[125] While the Government praised all constitutional reforms as steps towards a further democratisation of the judiciary, some of them *de facto* fostered its dependence on political majority decisions.

For example, members of the ordinary courts were given the opportunity to participate in the composition of the HSYK, the highest self-governing body of the Turkish judiciary. What reads like an inclusive, deliberative provision turned out to have the opposite effect in practice: Since the new law contained a ban on advertising, possible candidates had no opportunity to make themselves known to the electoral body of prosecutors and judges. Hence, the list of candidates drawn up by the Ministry

120 Cf., for example, Brown / Waller 2016, p. 829. The most crucial AYM decisions in this regard are discussed in detail in Part II of the book, and the translated rulings are documented in Part III.

121 Cf. E. 2007/45. K. 2007/54 (27/06/2007), III.2.21. For a detailed analysis cf. Chapter II.4.2.5 as well as Göztepe 2007a; 2007b; Gönenç 2008.

122 Cf. the in-depth analyses of the *Headscarf Decisions* E. 1989/01, K. 1989/12 (05/07/1989), III.4.3.3 and E. 2008/16, K.2008/116 (22/10/2008), III.4.3.4. in Chapter II.4.3.1.

123 This ruling is discussed in detail in Chapter II.4.1.

124 Cf., for example, Varol et al. 2017, p. 197.

125 Cf., for example, Göztepe 2010, pp. 685–686; Bâli 2010.

of Justice was in the end accepted as it stood, thus indirectly reinforcing political leverage over this important institution of judicial autonomy.

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

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

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

126 The changing appointment rules and their implications for the Court's autonomy are discussed in detail in Chapter I.2.

127 Cf. E. 1962/02, K. 1962/01 (03/10/1962); not included in the panel of key decisions analysed in Part II and documented in Part III.

1962 (109 cases) and 1963 (168 cases). Consequently, similar applications came to an end in the subsequent years due to the established case law.

Four decades later, it was the AYM justices themselves who proposed to open their institution to individual applications, but the bill they submitted in 2004 did not find a parliamentary majority.[128] When the major change was finally realised by the constitutional amendment of 7 May 2010,[129] it primarily aimed at lowering the high number of Turkish applications to the European Court of Human Rights (ECtHR) by introducing a national filter for complaints of fundamental rights violations. The main rationale behind the amendment was to avoid "the massive compensations to be paid by the Turkish state due to frequent ECtHR judgments to its disadvantage".[130] The far-reaching consequences for the AYM in terms of its political importance as well as the effectivity of its internal decision-making process were more or less unintended side effects.

Most strikingly, the number of AYM decisions increased dramatically: while the Court had rendered less than 4,000 rulings, including all proceedings, between 1962 and 2011, a total of over 15,000 decisions were issued between 2012 and 2019, 10,000 of them concerning individual complaint proceedings.[131] This enormous increase of case load not only forced the Court to adapt its internal work organisation, but it also impacted on the decision-making process and, even more important, on the adjudication of fundamental rights problems. These effects will be discussed in more detail in the following Chapters (particularly I.5, II.2 and II.4.3). Whereas counter-factual reasoning is always problematic, it is intriguing to imagine how the AYM as an institution might have evolved under the changed circumstances without the dramatic political and legal ruptures that have taken place since 2015/2016.

---

128 Göztepe 2018c, p. 68; Sağlam 2020.

129 The Constitutional Amendment Act no. 5982 was passed by the Parliament on 7 May 2010. Since the President submitted the law to a referendum pursuant to Art. 175 TA, the amendments did not enter into force until 23 September 2010 after publication of the official results of the referendum of 12 September 2010. Cf. the Official Gazette of 23 September 2010, No. 27708. For an in-depth analysis of this constitutional amendment process, cf. Göztepe 2010.

130 Göztepe 2018c, p. 69.

131 Own calculations, based on the decision database of the AYM General Assembly (http://kararlaryeni.anayasa.gov.tr/) and on the official statistics of the Court for norm control decisions only (2012-2019) (https://anayasa.gov.tr/media/6761/norm_istatistik.pdf) (last accessed: 26/06/2020).

It goes without saying that the failed coup attempt of 15 July 2016, the following state of emergency, as well as the massive constitutional amendments of 2017 had far-reaching consequences for the role of the AYM within the Turkish political regime. While the direct legal effect on the Court was marginal,[132] the political context within which it operates changed dramatically. As described in the Introduction, the arrest and dismissal of two AYM justices in the aftermath of the attempted coup have seriously undermined the authority of the Court. Moreover, the massive erosion of fundamental rule of law standards during the two years under the state of emergency (July 2016 – July 2018)[133] and the weakening of essential separation of power principles by the introduction of the so-called "state presidentialism" in the 2017 constitutional reform heavily impacted on the Court's adjudication.

The fundamental revision of the Constitution in 2017 abolished the dualist structure of the executive branch (monarch/president and the council of ministers), which had been a core feature of the Turkish parliamentary regime since the introduction of the constitutional monarchy in 1876 and in all republican constitutions (1924, 1961, and 1982), in favour of an extremely powerful monist executive: since 2017, the President of the Republic is the sole Head of Government, and the Members of Government act as his deputies which are politically responsible only to (and dependent on) him. The competences of the Grand National Assembly were significantly curtailed, and any parliamentary checks on the President were weakened or even completely eliminated.[134] From the perspective of the AYM, the constitutional change of the presidential decree power is particularly important. According to the new Art. 104 (17) TA, the Head of State no longer needs an enabling parliamentary act to exercise his regulative competence[135]. More than five years after this constitutional reform,

132 The only constitutional change affecting the AYM concerned the number of justices which was reduced from 17 to 15 (Art. 146 (1) TA). Cf. also Chapter I.2 for details.

133 For a detailed analysis cf. Göztepe 2018b.

134 Cf. Haimerl 2017b; Petersen / Yanaşmayan 2017; Steinsdorff 2017; Göztepe 2018a.

135 Until the constitutional reform of 2017, executive decrees (KHKs) had the force of law, i.e. the executive branch exercised genuine legislative power (within the constraints of the respective parliamentary enabling law). This is no longer the case with the newly established presidential decrees; while they have immediate and binding legal effect, they cannot change or abolish laws enacted by Parliament. Therefore, we use the term 'regulative' instead of 'legislative' when referring to presidential decree power.

the AYM still hesitates to principally define, let alone to limit, the newly introduced presidential decree power. While the Court has handed down several decisions – including numerous dissenting votes – discussing some aspects of the President's regulative competence, it deliberately refrained from giving a comprehensive and final view on the matter.[136]

An equally important change of the politico-legal framework within which the AYM is operating concerns the long-term consequences of the state of emergency regime from July 2016 until July 2018. On the one hand, several emergency decrees were transformed into 'regular' laws immediately after the state of emergency was lifted in July 2018. For example, many restrictions to criminal procedure rights and fair trial, such as the limitation of the number of defence lawyers or the extension of the competences of the prosecution,[137] have since been enacted by Parliament. On the other hand, some measures justified as necessary under the state of emergency were immediately passed as ordinary laws instead of as emergency decrees.[138] Hence, the state of emergency was obviously not only used to bestow the executive branch with extraordinary powers for a clearly limited amount of time, but it was perceived as an appropriate opportunity to restrict fundamental rights and freedoms on a permanent basis, somehow 'normalising' this situation. The long-term implications of these recent constitutional and political changes for the AYM adjudication are controversially debated in the literature.[139]

We will argue in this book, that any well-founded assessment of the current situation and, even more, reflections on possible future scenarios, require an in-depth analysis of the Court's institutional development and its case law over the last decades. As this brief historical summary shows, the AYM repeatedly adapted to substantial alterations of the constitutional and legal basis of its work, as well as to fundamental changes of the political context. Not only did the Court render its fundamental judicial review decisions in a highly unstable constitutional and political context, but the repeated changes in the legal framework also resulted in a volatile procedural basis for the AYM's work. Each time a new Constitution or extensive constitutional amendments took effect, the according law on the AYM (CCA) was also substantially altered: Act No. 44 in 1962,[140] No. 2949

136 For a detailed discussion of this problem cf. Barın 2020.
137 Cf. emergency decrees No. 674, 676, 680, 694 and 696.
138 Cf., for example, laws No. 6723, 6763, 6754, 7035 and 7145.
139 Cf. Göztepe 2018b; Haimerl 2017a; Haimerl 2017b; Yılmaz 2019.
140 Published in Official Gazette 25/04/1962, No. 11091.

in 1983,[141] and No. 6216 in 2011.[142] Consequently, the internal Rules of Procedure (RoP) of the Court had to be amended accordingly.[143] In the following Chapters, the effects of this continuously changing normative framework on the institutional setting within which the AYM rendered – and still renders – its rulings will be depicted.

2. *Selection of the Justices*

The appointment of justices belongs to the most disputed issues of any constitutional court law. Regardless of the chosen institutional arrangement, politically motivated court packing-strategies always seem to play a role. As the Canadian political scientist Peter H. Russell aptly put it, the only "choice is between a process in which the politics is open, acknowledged, and possesses some degree of balance or a system in which political power and influence is masked, unacknowledged, and unilateral."[144] Roughly speaking, four basic selection modes can be distinguished, i.e. split, collaborative, and legislative models, as well as a system which transfers the appointment power mainly to (co-opted) judicial councils.[145] While very different in form and logic, all these systems are designed to avoid conferring unqualified appointment power to a single institutional body or person.[146] They enshrine the separation of powers as a design principle, e.g. by allowing different political actors to negotiate appointments, or by allocating appointments to different institutions. They also account for professional legitimation, i.e. merit-based selection criteria.

---

141 Published in Official Gazette 13/11/1983, No. 18220.

142 Published in Official Gazette 03/04/2011, No. 27894. The English translation of the Constitutional Court Act is available in the translation of the Venice Commission. Cf. Council of Europe Venice Commission, CDL-REF(2011)047, Opinion no. 612/2011 (12/09/2011).

143 1st Rule of Procedure (RoP) published in Official Gazette 03/08/1962, No. 11171; 2nd RoP in Official Gazette 03/12/1986, No. 19300; 3rd RoP, Official Gazette 12/07/2012, No. 28351 (additional amendments published in Official Gazettes 05/03/2014, No. 28932, 05/07/2014, No. 29051 and 06/11/2018, No. 30587).

144 Russell 2006, pp. 420.

145 For more detail, cf. Harding / Leyland (eds.) 2009; Sadurski 2009; Ginsburg (ed.) 2003.

146 Cf. Harding / Leyland (eds.) 2009, p. 15.

In the light of these general options, the Turkish appointment system seems rather well-balanced, as it includes many different stakeholders in the selection process, and even partly relies on co-optation by peers. The rules of this 'game', however, are very complex and tend to hide the political bargaining behind an opaque screen of procedural details. It also comes as no surprise that the selection rules count among the constitutional provisions which have been discussed and amended most frequently. Particularly in times when the decisions of the AYM on critical political issues were not in line with the interests of the ruling party and/or (coalition) Government, the electoral procedure as well as the qualifications of the justices were called into question time and again.[147] On the following pages, the meandering institutional development of judicial appointment rules in Turkey is sketched out in some detail. To provide some guidance, the main features are synthesised in Table 1.

The number of justices sitting on the bench changed several times since the establishment of the Court. Originally, the AYM was composed of 15 regular and five alternate members (Art. 145, 1961 TA). When the new Constitution entered into force in 1982, this number changed to 11 regular and four alternate members (Art. 146, 1982 TA). After the constitutional amendment of 12 September 2010, the difference between the two categories of members was abandoned,[148] and the number of justices was increased to 17. In accordance with Art. 146 (1) TA, the Constitutional Court currently has 15 members. After the constitutional amendments of 16 April 2017, which, *inter alia*, abolished the High Military Administrative Court and the High Military Court of Appeals, a transitional period had to be implemented for the acting AYM justices who had been elected from these – no longer existing – military courts. As a result, the AYM continued to sit with sixteen justices until the departure of Justice *Serdar Özgüldür* of the High Military Administrative Court in December 2020.[149]

Under the 1961 Constitution and 1982 Constitution (until 2010) alike, the justices were not appointed for a specific term of office. From the time of their appointment, they could work until their retirement at the age of 65.[150] With the constitutional amendment of 12 September 2010,

147 Cf., for an historical overview, Kurnaz 2006.

148 The role of alternate justices is explained in more detail in Chapter I.5.

149 Provisional Article 21 d): "The members of the High Military Court of Appeals and the High Military Administrative Court who have been elected to the membership of the Constitutional Court shall continue their membership until their office terminates for any reason".

150 Art. 146 (1) 1961 TA / Art. 147 (1) 1982 TA.

the term of office was limited to twelve years, and a member cannot be re-elected (Art. 147 (1) TA). Notwithstanding this reform, the members of the Constitutional Court still have to retire when they reach the age of 65.

The 1961 Constitution introduced a mixed selection system, according to which the constitutional justices were appointed from three sources (Art. 145):

1. Through the Grand National Assembly of Turkey (National Assembly: 2 regular members, 1 alternate member; Senate of the Republic: 2 regular members, 1 alternate member);
2. From the judges of the supreme courts (the so-called co-optation system) (Court of Cassation: 4 regular members, 2 alternate members; Council of State: 3 regular members, 1 alternate member; Court of Accounts: 1 regular member);
3. By the President of the Republic (2 regular members).

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

The 1982 Constitution further strengthened the role of the President of the Republic in the appointment process: "(…) the 1982 Constitution transformed the presidency from a largely symbolic and ceremonial office, as it was under the 1961 Constitution, into an active and powerful one, with important political and appointive functions."[151] One of these important appointive functions relates to the President's role in the selection of AYM justices. The 1982 Constitution abandoned the mixed system of the 1961 Constitution and concentrated the power of appointment on the President of the Republic (Art. 146 TA), even though they had the combined right to select and to appoint only four (three regular members, one alternate member) out of a total of 15 justices. Most importantly, the original version of the 1982 Constitution ensured that Parliament would no longer appoint any constitutional justices. Instead, the plenaries of the supreme courts had to nominate from their ranks three candidates for each vacant position which was not directly filled by the President, i.e. eight

151 Özbudun 2012, p. 198.

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

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

This complicated procedure becomes even more problematic in light of the massive imbalance among the 83 suggesting bar associations: while the chair of each bar has one vote, the number of the bars' members differs significantly: the Istanbul, Ankara, and Izmir Bars have between 12,000 and 56,000 members each, but most others consist of only 100 to 500 members.[152] As these small associations are more easily controlled by the majority party than the much more heterogeneous associations in bigger cities, this offers one more opportunity for indirect political influence on the AYM appointment procedure. A much fairer representation could be guaranteed if the Plenary of the Turkish Bar Associations (*Türkiye Barolar Birliği*), in which the 83 bar associations are proportionally represented, were to suggest possible future AYM justices.

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

Table 1: Selection Procedure of the AYM Justices

Selecting Body	1961 TA	1982 TA until 2010	1982 TA since 2010	1982 TA since 2017
Court of Cassation (***Yargıtay***)	4 rm* / 2 am*	2 rm / 2 am	3	3
Council of State (***Danıştay***)	3 rm/ 1 am	2 rm / 1 am	2	2
High Military Court of Appeals (***Askeri Yargıtay***)	1rm** (not nominated by the court but appointed directly by the President)	1 rm	1	
High Military Administrative Court (***Askeri Yüksek İdare Mahkemesi***)		1 rm	1	
Court of Accounts (***Sayıştay***)	1 rm	1 rm		
Council of Higher Education (***Yükseköğretim Kurulu***)		1 rm	3	3
President of the Republic (***Cumhurbaşkanı***)	2 rm (one of the two to be appointed from among members of the High Military Court of Appeals)	3 rm / 1 am	4	4
Grand National Assembly of Turkey (***Türkiye Büyük Millet Meclisi***)	3 rm / 1 am		3 (2 from the Court of Accounts; 1 self-employed lawyer)	3 (2 from the Court of Accounts; 1 self-employed lawyer)
Senate of the Republic *** (***Cumhuriyet Senatosu***)	2 rm / 1 am			
Total number of justices	**15 rm/4 am**	**11 rm/4 am**	**17**	**15**

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

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

stitutional amendment, arguing that the aim was "to achieve a compromise in the first ballots".[153]

Since the foundation of the AYM, the professional education as well as the occupation of the justices prior to their appointment has been very diverse. Whereas the majority of AYM members have usually served as ordinary judges before they joined the Constitutional Court, non-lawyers from the Council of State or the Court of Accounts can sit on the bench as well. According to the current constitutional provisions, only six out of fifteen justices have to have completed legal training: the three constitutional justices appointed by the Court of Cassation, two members chosen by the Council of Higher Education, and one solicitor elected by Parliament have to be lawyers. The remaining nine justices may well come from other professions, i.e. four justices directly selected by the President of the Republic and one appointed by him from the candidates of the Council of Higher Education, two justices nominated by the Council of State, and two elected by Parliament from the candidates presented by the Court of Accounts. Hence, theoretically the majority of the fifteen constitutional justices could be non-lawyers. With regard to the complex legal basis of judicial review procedures, and even more so with constitutional complaint procedure, this could be seen as problematic. The explanation put forward in the literature, according to which "the constituent power wanted to provide the Court with a structure that was suitable for finding fair solutions to constitutional problems with social and economic backgrounds",[154] is not fully convincing. Ultimately, all constitutional questions have a socioeconomic background, and legal training may well provide the knowledge and methods for dealing with them.

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

153 Justification of Art. 17 in the proposal for the constitutional amendment of 05/04/2010.

154 Azrak 2007, p. 220.

old. Hence, Parliament limited the scope of Article 146(5) to the effect that it should be only applied to the group of possible candidates listed explicitly in the article. It remained an open question whether there is any minimum age requirement for any other candidates.

Analysing the composition of the Court in terms of its gender-balance, it is more than obvious that the AYM has been an almost entirely male-dominated institution until today. The first female (alternate) justice appointed in 1990 was *Samia Akbulut*. In the following years, four more female justices were elected: *Fulya Kantarcıoğlu* (19 December 1995), *Aysel Pekiner* (alternate; 20 December 1995), *Tülay Tuğcu* (22 December 1999), and *Zehra Ayla Perktaş* (27 June 2007). *Tülay Tuğcu* even became the first ever female president of the Court in 2005.[155] Since 2007 no more women have been appointed, and, as of 2022, the Court exclusively consists of male justices.

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

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

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

155 Cf. Başlar 2012, p. 26.

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

3. Status and Competences of the AYM

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

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

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

157 For a detailed discussion on this matter cf. Azrak 2007, p. 222; Kanadoğlu 2004, pp. 3 ff.; Özbudun 2014, pp. 408-409.

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

Even though it is generally accepted in Turkish legal literature that the "position and competences [of the Constitutional Court] are protected against intervention by any State authority",[158] the position and competences of the Court are questioned time and again in politics. To give only one example of this sort of criticism, the outburst of then President of Parliament Bülent Arınç (AKP) may be recalled. Referring to the controversial *Headscarf Decisions*[159] of the AYM he said in 2005 that this issue should be decided by Parliament instead of the Court, and that in the last instance Parliament could even abolish the AYM by constitutional amendment. According to *Arınç*, many EU countries do not know such powerful judicial review as Turkey does.[160]

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

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

158 Azrak 2007, p. 221.

159 Cf. E. 1989/01, K. 1989/12 (05/07/1989), III.4.3.3 and E. 2008/16, K.2008/116 (22/10/2008), III.4.3.4., analysed in Chapter II.4.3.1.

160 Cf. http://www.cnnturk.com/2005/turkiye/05/01/tbmm.isterse.anayasa.mahkemesi.kapatilabilir/92449.0/ (last accessed: 04/08/2022).

2. Criminal proceedings, in the capacity as a Supreme Criminal Tribunal, against the President of the Republic, the Speaker of the Grand National Assembly of Turkey, the deputies of the President of the Republic, the Ministers, the Presidents of the Constitutional Court and its members, High Court of Appeal and Council of State, the Chief Public Prosecutors of the High Court of Appeal and the Council of State, the Deputy Chief Public Prosecutor, the President and the members of the Council of Judges and Prosecutors as well as of the Court of Accounts. Also, the Chief of General Staff, the Commanders of the Land, Naval and Air Forces shall be tried in the Supreme Criminal Tribunal for offences regarding their duties;
3. Judicial review of parliamentary decisions: in case the Grand National Assembly of Turkey resolves to remove parliamentary immunity or revoke membership of the MPs, to submit annulment requests for those concerned or other deputies alleging repugnance to the provisions of the Constitution, laws, or the regulation regarding the Grand National Assembly of Turkey (RoP);
4. Control over political parties: to conclude cases concerning dissolution of political parties and deprivation of state aid to political parties, warning applications and demands for determination of the status of dissolution or to review or have reviewed the legality of property acquisitions by the political parties and their revenue and expenditure;
5. Decision of individual applications.

3.1 Abstract Judicial Review

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

Abstract judicial review can refer to:

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

The criteria for review are first and foremost positive constitutional provisions. These may be supplemented and/or supported by references to general constitutional principles such as the 'unity of the constitutional

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

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

---

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

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

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

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

165 Cf. also Özbudun 2014, p. 424.

166 Cf. in particular Chapters II.5.2 and II.5.3.

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

3.2 Concrete Judicial Review

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

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

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

Apart from these variations in the maximal time span for decision-making, the main difference lies in the consequences of the

AYM's non-compliance. According to Art. 150 (4) of TA 1961, the court submitting the question of unconstitutionality is supposed to "settle the claim of unconstitutionality according to its own conviction, and shall thus decide on the case under consideration". In contrast, Art. 152 (2) of the TA 1982 does not leave the court any margin of discretion and obliges the court to conclude the case "under the legal provisions in force". The fundamental decision of the constitutional legislator to locate the exclusive competence to decide on constitutionality issues with the Constitutional Court appears to be in accordance with this regulation.[167] The decision of the AYM is binding beyond the parties involved in the original court case and thus has an *erga omnes* effect (Art. 153 (6) 1982 TA).[168] In the 1982 Constitution, the option of *inter partes* effect, which had existed according to Art. 152 (3) Constitution of 1961, was no longer provided.

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

3.3 The AYM as the Supreme Criminal Tribunal

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

According to Art. 148 (6 and 7) TA the AYM functions as Supreme Criminal Tribunal for offences relating to the functions of high state officials and high court judges as well as the Chief of General Staff and the commanders of the Land, Naval and Air Force. Under disciplinary law, the Supreme Judges and Public Prosecutors are subject to the area of competence of the Council of Judges and Public Prosecutors. The details of the preliminary proceedings are governed in the laws of the individual supreme courts.[169]

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

167 Cf. also Özbudun 2014, p. 447. For further details, cf. Chapter I.3.4.

168 The Constitutional Court has used this option on only one occasion. Cf. E. 1972/26, K. 1972/38 (07/01/1973); not included in the panel of key cases.

169 Law on the Court of Cassation, no. 2797 (*Yargıtay Kanunu*) Art. 19, 43 ff.; Law on the State Council, no. 2575 (*Danıştay Kanunu*), Art. 20-21; 53-54; 67 ff.; Law on the High Military Court of Appeals, no. 1600 (*Askeri Yargıtay*), Art. 9; 34 ff.

criminal procedure against a Supreme Court judge was conducted. The former chair of the 6th Civil Law Chamber of the Court of Cassation, Judge *Hasan Erdoğan*, was indicted before the AYM on suspicion of corruption. He was cleared on 19 December 2012, as the evidence submitted by the Public Prosecutor's Office had been obtained by unlawful means and, in accordance with Art. 38 (6) TA, could not be used in the criminal proceedings.[170]

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

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

---

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

171 The former Chief of General Staff *İlker Başbuğ* (2008-2010) was arrested on 6 January 2012 and charged of attempts to violently overthrow the constitutional Government of Turkey and to establish a terrorist organisation. *Başbuğ's* complaint was that the prosecution of the initial charges denied him the right to a judge as guaranteed by Article 148 (7) TA. He demanded to be tried by the AYM, acting as Supreme Criminal Tribunal. After a lengthy procedure through all criminal court levels, the case finally reached the AYM, but – as of July 2022 – was not yet scheduled for decision. For further details on the case and *İlker Başbuğ's* successful constitutional complaint procedure cf. 2014/912, 6/3/2014.

Prior to the 2017 amendment, the indictment procedure concerning the members of the Council of Ministers and the consequences of an indictment were stipulated in Art. 100 and 113 (3) TA. It stated that "a minister who is brought before the Supreme Court by decision of the Grand National Assembly of Turkey shall lose his/her ministerial status. If the Prime Minister is brought before the Supreme Court, the Government shall be considered to have resigned". Following the constitutional amendment of 16 April 2017, the consequences of this criminal procedure before the Constitutional Court were largely mitigated. According to the new version of Art. 106 (9), "(t)he deputies of the President of the Republic or ministers who are convicted of a crime by the Supreme Criminal Tribunal for a crime that prevents them from being elected shall lose their mandate". This means that during the criminal proceedings before the AYM, the President of the Republic and the ministers can stay in office and can take political decisions until a final judgment. Consequently, the President of the Republic could theoretically appoint new constitutional justices and thus change the bench during the course of the criminal proceedings. The only restriction to the President's action regards the prohibition of snap elections in case they are under investigation.

3.4 Immunity and Loss of Membership Cases

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

Members of Parliament and cabinet members are granted protection from criminal prosecution during their time in office according to Art. 83 TA (Art. 106 (10) TA). However, this immunity is not absolute: it can be removed by a decision of Parliament and it does not apply when a member is caught *in flagrante delicto,* requiring a heavy penalty, or in cases subject to Article 14 TA, as long as an investigation has been initiated before the election. The reasons for a loss of mandate are listed in Art. 84 TA.[172] If the decision of lifting the immunity or of revoking membership of one of its members was taken by the Grand National Assembly itself

172 Art. 84 (I) Resignation of the deputy; (II) Through a final judicial sentence which precludes the election to the Turkish Grand National Assembly or deprivation of legal capacity; (III) Insistence of a deputy to hold a position or carry out a service incompatible with membership according to Article 82 (IV) Failing to attend Parliamentary proceedings without excuse or leave of absence for five sessions, in a period of one month.

and not by a court (according to Art. 84 (1,3,4), it can be contested before the AYM within seven days. The Court has to decide within fifteen days whether the parliamentary act was in accordance with the provisions of the Constitution, the laws and the RoP of the Grand National Assembly (Art. 3 f CCA; Art. 85 TA). Art. 85 TA grants the right to file an action against the decision of the Parliament before the AYM not only to the deputy or to the ministers in question, but also to all other MPs, as there is a general interest in the protection of the public function of the political mandate.[173] It is important to note that the AYM does not act as a criminal court in these cases, but simply verifies whether the accusations are serious enough for a criminal action and thus justify the removal of immunity.[174]

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

---

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

174 Cf. also Özbudun 2014, p. 304. For the annulment of the parliamentary decision cf. E. 1994/18, K. 1994/37 (MP *Selim Sadak* / HEP) (21/03/1994).

175 Cf. the press statement by the CHP chairman *Kemal Kılıçdaroğlu*: "The application is unconstitutional, we will not consent to it", Milliyet, 14/04/2016 (http://www.milliyet.com.tr/siyaset/anayasaya-aykiri-ama-evet-diyecegiz-2226787); http://www.diken.com.tr/kilicdaroglu-akpnin-dokunulmazlik-teklifi-anayasaya-aykiri-ama-evet-diyecegiz (last accessed: 13/04/2016).

176 After its electoral victory of June 2011, the AKP initiated peace talks in order to end the politico-military Kurdish conflict lasting since 1984. Among other measures, a Reconciliation Commission was established, in which all parliamentary party groups were proportionally represented. The commission's task was to prepare a new Constitution, but this process failed after two years, and the peace talks were finally cancelled in the summer of 2015 (for details cf. Petersen / Yanaşmayan 2019).

(…) from the first sentence of the second paragraph of the Article 83 of the Constitution". Hence, the parliamentary majority did not *de jure* waive the immunity of the deputies, but *de facto* abstained from exercising this right by temporarily changing the Constitution instead. This resulted in a massive breach of a core rule of law principle, because it not only automatically lifted the immunity of more than one hundred deputies without an explicit parliamentary decision, but it also deprived them collectively of any legal remedy against this act.

70 members of the HDP appealed to the AYM, claiming the unconstitutionality of this constitutional amendment. The Court rejected this application on the grounds that, under Article 85 TA, MPs could only apply in the event of a parliamentary decision. Since Parliament had voted on a constitutional amendment law instead, the MPs were not entitled to ask for judicial review (according to Art. 148 TA).[177] In its ruling, the AYM did not touch upon the matter that the constitutional amendment law *de facto* did prevent any legal action against the immunity waiver. It only stated in the abstract that MPs and cabinet members are *de jure* granted protection from criminal prosecution during their time in office according to Art. 83 TA (Art. 106 (10) TA).

3.5 Procedures for the Prohibition of Parties

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

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

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

177 Cf. E. 2016/54, K. 2016/117 (09/06/2016).

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

3.6 Financial Checks on Political Parties

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

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

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

3.7 Constitutional Complaints

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

In 2010, three new paragraphs (paras. 3-5) were inserted into Art. 148 TA.[179] With these amendments, the constitutional complaint procedure was introduced into Turkish constitutional law: the right to "apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities" was granted to everyone after ordinary legal remedies have been exhausted (para. 3). Since the constitutional amendment regulated only the basic principles of this new competence of the AYM, the right to individual constitutional complaint took effect in September 2012, after a transitional period of two years, during which the procedural elements and substantive law specifications were incorporated into the amended Constitutional Court Act (CCA)[180] and the RoP of the Constitutional Court.[181]

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

179 The Constitutional Amendment Act No. 5982 was enacted by Parliament on 7 May 2010. Since the President submitted the law to a referendum pursuant to Art. 175 TA, the amendments did not enter into force until 23 September 2010 after publication of the official results of the referendum of 12 September 2010. Cf. Official Gazette 23/09/2010, No. 27708. For an analysis of this constitutional amendment process, cf. Göztepe 2010.

180 For the English translation, cf. http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)047-e (last accessed: 04/08/2022).

181 The initial date of 23 September 2012 for allowing constitutional complaints relates to the Transitional Article 18 (7) of the Constitutional Amendment Act of 12 September 2010, which provided that the AYM Act should be enacted at the latest within two years and that individual complaints should be allowed after entry into force of that Act. The CCA No. 6216 was enacted by Parliament on 30 March 2011 and entered into force upon publication in the Official Gazette on 3 April 2011. However, the Transitional Article 1 (8) of the CCA No. 6216 provided that the Court may only accept constitutional complaint applications which deal with acts and court judgements which became binding after 23 September 2012. The implementation of the new comprehensive competence of the Constitutional Court was therefore fixed by statute. Correspondingly, Art. 76 of the Act provided that provisions on constitutional complaint proceedings (Art. 45-51) did not enter into force until 23 September 2012.

lysts[182] as well as representatives of the legal professions[183] have repeatedly stressed the importance of this instrument in order to improve the protection of fundamental rights and liberties in Turkey. The motivation of the constitutional amendment of 2010 which finally introduced this legal remedy explicitly refers to the high number of complaints of Turkish citizens to the European Court of Human Rights (ECtHR) and expresses the expectation that the new competence of the AYM should reduce this number by introducing a national filter.[184] This explains why, other than similar mechanisms in Germany, Austria, or Hungary, Art. 148 (3-5) TA links the national remedy not (only) to the fundamental rights guaranteed in the Turkish Constitution, but to the respective provisions of the European Convention of Human Rights (ECHR). Consequently, not all fundamental rights and freedoms guaranteed by the TA fall within the scope of constitutional complaint, but only those guaranteed also by the ECHR.

4. Effects and Scope of AYM Decisions

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

4.1 Suspensive Effect and Interim Measures

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

182 Cf. Sabuncu 1982; Göztepe 1998; Pekcanıtez 1995; Sağlam 2012.
183 Cf. Sağlam 2012; Türkiye Barolar Birliği Anayasa Önerisi 2007.(http://tbbyayinlari.barobirlik.org.tr/TBBBooks/2007_Anayasa%20Taslagi_TBB.pdf; last accessed: 11/08/2021).
184 For the motivation of the law No. 5982 cf. https://www2.tbmm.gov.tr/d23/2/2-0656.pdf (last accessed: 26/01/2020).

be delayed by the submitting court: what are the consequences, if the Constitutional Court does not decide within the prescribed time frame? In abstract review cases, the question is whether or not the AYM may stipulate an interim measure, resulting in a temporary suspension of the provision(s) under review.

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

In abstract judicial review cases, the contested law, decree having the force of law (until the constitutional reform of 2017), presidential decree (since 2017), or parliamentary RoP remains valid until the Court's judgement declaring the unconstitutionality of the provision comes into force. Art. 153 (3) TA determines that the contested norm "shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That duration shall not be more than one year from the date of publication of the decision in the Official Gazette". This article provoked huge discussions, because the Court established a practice of publishing the operative provisions of a ruling earlier than the legally valid integral decision in the Official Gazette. Hence, the question of the effective date of annulment turned out to be a difficult one to answer. The launch of the Court's website even consolidated the unconstitutional practice of publishing the tenor and operative provisions of a ruling without a justification on the grounds, as summaries of judgements were made available online even before this justification was finalised. In 2015, the Court announced its serious intent on abolishing this practice,[185] and since then Court President *Zühtü Arslan* has successfully implemented the rule that annulment decisions are not announced without a simultaneous publication of the merits.

185 Anayasa Mahkemesi 2015, p. 269.

Although the Constitution allows the postponement of decisions for up to one year, the repeal of the contested provision until the stipulation of a legally valid judgement is not provided for in either the Constitution or the CCA. The AYM nevertheless found a way to issue temporary orders in order to prevent very serious and irreversible consequences if the contested provision were to be implemented before its (un)constitutionality was finally decided upon. While the Court refrained from ascribing itself this competence when the problem was first addressed in the *Death Sentence* ruling (1972), analysed in Chapter II.4.3.4,[186] it finally changed its doctrine on the question of repeal in 1993, in the abstract review procedure *Judicial Emancipation in Review of Statutory Decrees*[187]. Since this initial judgement, the AYM has made frequent use of its self-ascribed competence.[188] Regarding abstract norm control proceedings, however, this legal remedy was not included in the amended CCA of 30 March 2011. Yet in the case of the constitutional complaint procedure introduced at the same time, the requirements for temporary orders have been included in the CCA and the RoP. In accordance with Art. 49 (5) CCA, "the chambers may, ex officio or upon request of the applicant, decide on measures they deem necessary for the protection of the applicant's fundamental rights. In the event a decision to take measures is made, the decision on the merits must be made within six months at the latest. Otherwise, the decision on measures is revoked *ipso facto*". Art. 3 (1) RoP clearly limits this CCA provision by narrowing the scope of temporary orders to "a serious threat to the life or to the physical or intellectual integrity" of the applicant. Hence, only a small fraction of basic rights can actually be protected by means of interim measures.

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

186 Cf. E. 1972/13, K. 1972/18 (24/07/1972), III.3.12.
187 Cf. E. 1993/33, K. 1993/40-1 (23/10/1993), III.2.13. The ruling is analysed in Chapter II.4.2.3.
188 Cf. also Chapter II.5.4 for details.

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

4.2 Scope of Decisions

a. *Dismissal decisions* concern cases in which the AYM does not find a breach of constitutional law. They differ in form: negative judicial review decisions (both abstract and concrete) may be based on permissibility requirements (*usul*) and/or on substantive law (*esas*). The permissibility requirements can include the factual jurisdiction of the AYM, the jurisdiction of the submitting court (in concrete judicial review cases), a failure to comply with the period for filing an action, or the incompetence of the applicant.[189] If an abstract judicial review case is rejected under substantive grounds, there is still the option of bringing the provision before the AYM by way of a concrete judicial review procedure. However, if the Court then rejects the application again on substantive grounds, Art. 152 (4) TA stipulates a barring clause of ten years.[190] In view of the dynamics of Turkish society and its rapidly changing living conditions, this time span is justifiably criticised as being too long and as a hindrance to judicial advancement.[191] It should be emphasised that according to the text of the Constitution, this ten-year barring clause can only be applied in *concrete* judicial review procedures due to reasons regarding the content of the application. The Constitutional Court, however, has repeatedly applied it also in *abstract* judicial review procedures, thereby disregarding the wording of the Constitution and impeding the possibility to re-check the norm in question by means of concrete judicial review procedure within ten years.[192] This practice violates the text of the Constitution and it contradicts the purpose of the norm.

---

189 Cf. Gözler 2015, pp. 435 ff.

190 Art. 152 (4) TA: "No claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits".

191 Cf. Teziç 2009, p. 220; Özbudun 2014, p. 448; Öden 2000, p. 77.

192 Cf. E. 2003/23, K. 2006/26 (02/11/2006); E. 2010/18, K. 2010/45 (21/06/2010); E. 2010/48, K. 2010/70 (07/07/2010); E. 2010/1, K. 2011/149

b. If the AYM determines the unconstitutionality of a contested provision, it is declared invalid. As mentioned above, the entry into force of this decision can be delayed for up to one year by means of not publishing it in the Official Gazette. Such a postponement serves to prevent a loophole in the legal system. While Art. 153 (4) TA stipulates that in these cases "the Grand National Assembly of Turkey shall debate and decide as a priority on the government bill or private members' bill designed to fill the legal void arising from the annulment decision", this has not always been the case. Whenever the legislative body failed to act in time, the AYM profited from the opportunity to ultimately decide on a controversial political issue.[193]

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

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

---

(25/01/2012). Cf. for an extensive critique of this legal practice: Ozan Ergül (2014), pp. 863 ff.

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

194 Cf. Sağlam 1982.

195 Cf. for the very first decisions E. 1984/08, K. 1984/10 (28/12/1984); E. 1984/12, K. 1985/6 (17/05/1985); the most prominent decision is the *Headscarf II* decision, E. 1990/36, K. 1991/8 (09/04/1991, III.3.4), analysed in Chapter II.4.3.1.

196 As of 2022, the AYM has not yet decided whether it regards itself as "a court hearing a case" according to the meaning of Art. 152 (1) TA in constitutional complaint procedures against instance court decisions. If this were the case, the norm on which the lower court had built its decision could be subject to concrete judicial review as well, opening an indirect access to (concrete) judicial review procedures.

include a 30-day period for filing an action, non-acceptance due to *ratione personae*, *ratione loci*, *ratione temporis*, the factual incompetence of the Constitutional Court, or the fact that other legal remedies have not been exhausted or that the application lacks an explicit legal basis (*açıkça dayanaktan yoksunluk*).[197] If the individual application is rejected on the grounds of non-exhaustion of legal remedies, the applicant can submit a new application to the AYM after fulfilling this criterion. Art. 50 (1) CCA specifies possible consequences once the Court has stated a violation of constitutionally enshrined rights: while it can decide "on the actions to be taken in order to abolish the violation and its consequences, (…) expediency checks may not be carried out and decisions may not be given in the manner of an administrative act and transaction". In case the violation has been caused by a court decision, the file is returned to this court and the violation must be remedied in a renewed judicial procedure. If there is no legal interest in a new trial, the AYM can decide that a compensation be paid, or "the applicant might be directed to the general courts to bring a lawsuit" (Art. 50 (3) CCA). As practice has shown so far, the AYM decided in several cases that financial compensation for immaterial damage has to be paid in varying amounts.[198] Record sums were awarded for the most serious violations of the prohibition of torture in Art. 17 (3) TA.

4.3 Binding Force

Decisions of the AYM are final and binding for all legislative, executive, and judicial organs, for the administrative authorities, and for persons and corporate bodies (Art. 153 (6) TA). As mentioned above, they have only an *erga omnes* effect. The initial option of an *inter partes* effect in concrete judicial review procedures (Art. 151 (4) 1961 TA) was abolished in 1982. All norm control decisions have to be published immediately in the Official Gazette, while annulment decisions shall not be made public without a written justification (Art. 153 (1) TA). Whereas annulment decisions shall not be applied retroactively,[199] they may well have this effect in concrete

197 Cf. Sağlam / Göksu 2014.

198 Cf. the following decisions for the violation of **Art. 17 (3) TA**: 2013/6359; 2013/293; 2013/2438; **Art. 19 TA**: 2013/1615; 2014/2159; 2014/328; **Art. 26 TA**: 2013/9343; 2013/7363; 2013/3614; 2014/12151; **Art. 36 TA**: 2014/13157; 2014/12874; 2014/12733; 2014/12435; 2013/8492; 2013/7017.

199 The AYM discussed the question of the retroactive effect of its decisions repeatedly and finally confirmed that annulment rulings should not apply

judicial review cases when the unconstitutional provision is no longer to be applied by the submitting court or any other court planning to draw on it in pending decisions. This effect has been also confirmed by several administrative court decisions which stipulated that a provision declared unconstitutional by the AYM was no longer to be applied in pending cases.[200]

The publication of constitutional complaint rulings in the Official Gazette is not obligatory and can be decided upon by the Court itself. According to Art. 50 (3) CCA and Art. 81 (4 and 5) of the Court's RoP, a distinction is made between decisions of the sections (*bölüm*) and decisions of the commissions (*komisyon*). The indicated norms also stipulate that all individual complaint decisions of the sections, as well as fundamental rulings of the commissions (i.e. those of principal significance from an admissibility point of view) are to be published on the Court's website. In addition, the chairpersons of the sections may select rulings to be published in the Official Gazette if they are regarded as pilot decisions or represent guidelines for established case law.

It is debated in academic literature whether the binding effect of AYM rulings covers only the operative provisions of the judgement or also its supporting reasons. With reference to administrative and civil law procedures, some scholars claim that only the operative provisions should be binding.[201] On the contrary, the AYM itself stresses that the legislator is not only bound by the operative provisions but also by the supporting reasons, since both parts of the ruling belong into the same context.

---

to cases decided prior to this ruling. Cf. in this regard the following decisions (not documented in the panel of key cases): E.1963/124, K. 1963/243 (04/12/1963); E. 1970/40, K. 1971/73 (02/07/1972); E. 1980/10, K. 1980/69 (04/03/1981); E. 1986/18, K. 1986/24 (31/01/1987); E. 1989/11, K. 1989/48 (22/01/1990); E. 1990/1, K. 1990/21 (16/07/1991) (with reference to the enabling laws for legal provisions); E. 1990/12, K. 1991/7 (13/08/1991); E. 1993/33, K. 1993/40-2 (06/11/1993); E. 1994/43, K. 1994/42-1 (15/04/1994); E. 1996/50, K. 1996/37 (29/06/2001).

200 Danıştay Dava Daireleri Kurulu E. 1961/1095, *Danıştay Kararlar Dergisi*, Sayı: 119-122, p. 106; Danıştay 5. Daire, E. 1962/2199, K. 63/4567 (27/12/1963), *Danıştay Kararlar Dergisi*, 91-92, p. 100 vd.; Danıştay 6. Daire, E. 1985/5429, K. 1985/193; Askeri Yüksek İdare Mahkemesi (AYİM) 1. Daire, E. 1993/815, K. 1993/1205 (28/12/1993), *AYİM Dergisi*, Sayı: 9, p. 135-140. According the Court of Cassation also (*Yargıtay*), 7. Daire, E. 1994/6945, K. 1994/10568, *Yargıtay Kararları Dergisi*, Cilt: 21, 1995.

201 Cf. Özbudun 2014, pp. 453-454; Gözler 2015, p. 437; Arslan 2008, pp. 59-89; Hakyemez 2008; Döner 2008.

Besides, the supporting reasons give the legislator operating instructions and prevent the passing of laws with different wording but to the same effect.[202] This position is more convincing, as constitutional review fulfils a particular function within the legal system and is subject to specific procedural law. Hence, the application of more general and more extensive procedural regulations is problematic. Furthermore, in judicial review proceedings, sometimes only a few words or adverbs are declared unconstitutional and the ruling may consequently only gain significance in connection with the supporting reasons. The supporting reasons are thus also binding for the legislative body in order to avoid a situation in which the new, amended provision may be again unconstitutional.

5. *Internal Organisation and Decision-Making Process*

As mentioned in the Introduction, there is very little secured knowledge about the AYM's decision-making process. While internal procedures are described as a 'black box' in many constitutional courts,[203] the Turkish case is characterised by a particular lack of transparency. Until recently, no single publication about the internal work process existed in Turkish, let alone comparative academic literature.[204] As Maria Abad Andrade shows in her detailed study about decision-making and dissenting opinions at the AYM, the justices are well aware of the lack of systematic reflection about the logic of the Court's decision-making process and complain about its inconsistencies.[205] The following description is mainly based on Abad Andrade's findings, stemming from documentary analysis, interviews with (former) justices, and personal observations.[206]

Generally speaking, the structure and the internal work organisation of the AYM have not changed decisively for decades.[207] One can certainly assert a gradual professionalisation since the institution's establishment in 1961, i.e., the division of labour among the justices and their staff has evolved and become more efficient over time. And of course, comparable

202 Cf. E. 1998/58, K. 1999/19 (04/03/2003); E. 2000/45, K. 2000/27 (28/10/2000). In this respect, cf. also Teziç (2009), p. 222; Tanör / Yüzbaşıoğlu 2015, pp. 511 ff.
203 Cf., for example, Kranenpohl 2010, p. 20; Steinsdorff 2019.
204 Cf. Abad Andrade 2020, p. 42.
205 Cf. ibid., pp. 220-237.
206 Cf. ibid., pp. 132-150.
207 Cf. ibid., p. 166.

to similar processes in other countries,[208] the Court's work process profited from general improvements, such as technological progress or the modernisation of judicial training. But apart from these incremental changes, no substantial innovations were introduced until the massive court reform of 2010.

5.1 Structure and Prominent Figures of the Court

One of the most important features of the AYM's internal organisation, which stayed more or less the same since 1961, regards its highly hierarchical structure with a powerful Court President at the top. They are elected from among the Court's regular members for a renewable term of four years by secret ballot and by an absolute majority of the justices (Art. 8 (1) RoP). Whereas similar self-selection mechanisms within the peer-group are common practice in many European constitutional courts,[209] few court presidents dispose of such comprehensive competences. According to Art. 10 RoP, the President of the AYM controls the whole internal organisation, he appoints all the staff, represents the Court to the outside world, and determines its information policy. Even more importantly, the Court President also plays a decisive role in the adjudication. They not only have the decisive vote in the event of votes cast being equal, but they also determine the Court's agenda, i.e., the order and the timing of the decision-making. Moreover, they personally assign the files to the rapporteurs who prepare the decisions, which gives them considerable leverage on the outcome of the adjudication.

The court reform of 2010 further strengthened the position of the AYM President by providing them with the right to sanction justices who do not hand in their separate opinions in time.[210] In regard to individual complaint procedures, they are also granted the power to decide whether the Court's plenary (the General Assembly) shall be convened in case of an assumed dissonance between the jurisdiction of the sections on a particular question.

Another peculiarity of the internal organisation of the AYM concerns the crucial role of the law clerks working at the court. Candidates for the

208 For the ECtHR cf. Arold 2007, pp. 24-29; for the BVerfG cf. Kranenpohl 2010, pp. 81-132.
209 Cf. Kelemen 2018, p. 29.
210 For details, cf. Chapter II.5.2.

position of a so-called rapporteur (*raportör)* should have either at least five years of professional experience as a judge, prosecutor, or auditor, chief auditor or expert auditor at the Court of Accounts, or they should have been working as associate professor, assistant professor, or post-doctoral research fellow at higher education institutions in the field of law, economics, or political sciences. Law clerks at the AYM have to work as assistant rapporteurs for at least five years before they can be promoted to a full rapporteur position (Art. 24 CCA).

The position and influence of (full) rapporteurs differ substantially from that of law clerks in most European constitutional courts in two regards: first, they are not assigned to one specific justice, but they are directly allocated to the President. Second, they have – as their name suggests – the task of presenting the case to the court. To this purpose, they collect materials and information and autonomously prepare a draft report or judgment before the voting. The fact that they perform this task independently gives them considerable importance; in most other European courts the justices, functioning as 'rapporteur justices', write and present the report themselves.[211] Despite this substantive contribution, the names of the rapporteurs did not appear in the AYM's decisions at all for decades. This changed only in 2010, when the new RoP stipulated in Art. 57(4) that the rapporteur in charge should sign the decision they prepared.[212]

As mentioned above, the number of AYM justices has been altered repeatedly over time. Due to the peculiarities of the Turkish Constitutional Court, all decisions used to be taken in plenary session, meaning that 11 (1982 – 2010),[213] 15 (1962 – 1982 and again since 2017[214]), or even 17 (2010 – 2017) justices had / have to coordinate their views. Only in 2012, when the extreme increase in applications caused by the new individual complaint procedure forced a major internal reorganisation, part of the Court's work was delegated to smaller panels: two sections of six justices

211 Cf. Kelemen 2018, pp. 39-44.

212 The first decisions with the names of the rapporteurs indicated were E. 2011/27, K. 2012/101 (06/10/2012); E. 2012/48, K. 2012/75 (06/10/2012); E. 2011/111, K. 2012/56 (06/10/2012).

213 Act No. 2949 (1983), Art. 2.

214 As mentioned above, after the constitutional amendment of 16/04/2017 that inter alia abolished the high military courts, a transitional period had to be implemented for the justices who had been elected from the former High Military Courts. As a result, the Constitutional Court met with sixteen judges until the departure of Justice *Serdar Özgüldür* of the High Military Administrative Court on 22 December 2020.

were formed, and these panels plus one Vice-President decide almost all individual complaints (Art. 149 (1) TA new version). For the pre-examination of admissibility questions, the sections are even further divided into three commissions of two justices each (Art. 3 RoP 2012).[215] Yet all other proceedings are still decided by the General Assembly.

According to the findings of organisational psychology, decision-making is most efficient in groups of five to seven people.[216] It therefore seems reasonable that most European constitutional courts usually take their decisions in panels of about this size.[217] In this respect, the AYM was, and partly still is, an outlier. As Maria Abad Andrade has shown in great detail,[218] the overlarge decision-making body substantially contributed – in combination with other factors – to the Court's inefficient internal working process. Hence, the establishment of commissions and sections, if only for individual complaint procedures, can be interpreted as one important (albeit very late) step of professionalisation of the decision-making process.

Another sign of late professionalisation is the abolition of the alternate member system by the judicial reform of 2010. From 1961 to 1982, the AYM consisted of 15 regular and five alternate members (Art. 145 1961 TA), and from 1982 to 2010, 11 regular and four alternate members (Art. 146 1982 TA). The alternate members had a genuine deputising function: as long as all regular members were present, they did not have any independent tasks. One consequence of this deputising role was that the alternate members could no longer sign a ruling once the regular justice they had substituted during the deliberations resumed their work. Apparently, this "bizarre distinction"[219] lead to conflicts among the justices and alternate justices. It complicated the deliberations in the (over)large plenary even further, as the members participating in the deliberations could frequently change.[220]

The 2010 reform also brought another important change of the Court's organisational structure: after fifty years without any proper internal mechanism of documentation or even analysis, a "Research and Case-Law Unit" (*Araştırma ve İçtihat Birimi*) was established by Constitutional Court Act No. 6216. The main task of the unit is to monitor judgments of

215 For details cf. Göztepe 2015, pp. 490-491.
216 Cf., for example, Grunwald 1996, p. 741.
217 Cf. Kelemen 2018, p. 18.
218 Cf. Abad Andrade 2020.
219 Başlar 2012, p. 27.
220 Cf. ibid., p. 27-28.

International Human Rights Courts and to provide the AYM with summaries of recent ECtHR judgments and decisions which could be of importance for pending cases.[221] Besides this important step towards a more internationally and comparatively oriented form of self-reflection, the new department also enhances the accountability and transparency of the Court's work in a broader sense: since 2015, an annual statistical overview of the workload and performance has been published by the AYM, and the official homepage has significantly improved.[222] It provides basic information on the Court's history, structure, and functions as well as a detailed data base on its case law, including summaries of important rulings – occasionally even in English. A printed version of the documentation of the Court's work is also annually published since 2015. AYM President *Zühtü Arslan* introduced the first yearbook, issued in 2015, with the words:

> "I sincerely wish that this first of its kind publication of the Constitutional Court serves to ensure accountability, transparency and the rule of law, development of law and increasing public awareness on fundamental rights and freedoms".[223]

5.2 Decision-Making Process

The internal decision-making process at the AYM proceeds in six main steps: After the assignment and preliminary examination (a), a draft report is prepared (b), the deliberation on the merits takes place (c), the decision is drafted (d), which is then deliberated in a common reading by the justices (e). The final step consists of the writing of dissenting opinions (if any) and the publication of the ruling (f).[224]

a. Regarding all proceedings, *the Court President assigns the case to one particular rapporteur* (Art. 26 (1) CCA 2012). The President is free to decide which case is assigned to which rapporteur, which grants them an important degree of influence over the outcome of the procedure. The rapporteur prepares a preliminary examination report within 5 days.[225] As this

221 Cf. Perilli 2014, pp. 24-25; Steinsdorff / Petersen 2016.
222 https://www.anayasa.gov.tr/tr/anasayfa/ (last accessed: 15/07/2020).
223 https://www.anayasa.gov.tr/media/2743/annualreport2015.pdf (last accessed: 04/08/2022).
224 Cf. Abad Andrade 2020, pp. 166-180.
225 Art. 15 (RoP 1962); Art. 8a; b (RoP 1986); Art. 48 (1) (RoP 2012).

draft report serves as the basis for discussion at meetings of the plenary (General Assembly) or the section, the rapporteur also plays an influential role in shaping the final decision. By voting on their report, the justices decide whether or not the case is accepted for further deliberation. In politically sensitive cases, the assignment of a particular rapporteur may even be announced in an official AYM press release.[226]

Until the introduction of the individual complaint procedure, no filter-mechanism existed at this stage of the proceedings, i.e. every application had to be scrutinised in detail, and a reasoned opinion had to be written, " n]o matter how ungrounded or frivolous the application."[227] Since 2012, at least for the huge amount of individual complaints, a preliminary examination of admissibility is conducted by commissions of two justices. Only if unanimity cannot be achieved among these two justices, the problem is referred to the section, which then decides on the admissibility.[228] In all other cases, the section decides only on the substantive points of the application (Art. 3ğ and 27, RoP 2012).

b. Once an application has been accepted for decision, *the rapporteur prepares a draft report*. This draft report suggests the tenor, analyses the meaning and scope of the norm(s) in question, and evaluates the claims of contrariety to the Constitution and additional materials. Since 2012, the rapporteur has also to prepare a draft decision if "the nature of the task allows" for this (Art. 50 (5) RoP 2012). In the RoP of 1962 and 1986, a period of one month was stipulated to complete this report.[229] The RoP of 2012 no longer determine a general time limit; instead, the President of the Court may decide on the particular time limit after hearing the opinion of the responsible rapporteur (Art. 50 (2)). Once the draft report is finalised, it is distributed among the justices (and – until 2010 – among the

226 As discussed in detail in Chapter II.4.1, this was the case in the party prohibition procedure against the governing AKP (rapporteur: *Osman Can*), cf. E. 2008/01, K. 2008/02 (24/10/2008). Another example is the abstract judicial review case *Constitutionality of the New Presidential Election Law* (E. 2012/30, K. 2012/96 (01/01/2013, III.2.23) analysed in Chapter II.4.2.5, in which *Ali Rıza Çoban* was the rapporteur.

227 Başlar 2012, p. 37.

228 Art. 3p and 32–33 RoP 2012. In terms of the unconstitutionality of a provision or infringement of a basic right in constitutional complaint procedures, the Court is not bound with the reasons and evidence submitted by the applicant. The Court may rely on other legal grounds, but the Court may not take decisions that go beyond the application of the petitioner (Art. 43 CCA 2012).

229 Art. 16 (1) (second sentence) RoP 1962; Art. 9 (1) (second sentence), RoP 1986.

alternate members) at least one week before the deliberation on the merits starts.[230]

c. Based on this report, *deliberations on the merits are conducted*, moderated by the President or – in case of individual complaints – the Deputy President affiliated to the section in charge. All participating justices can express their views in the order they have requested it (Art. 54(3) RoP 2012. As explained, the number of members in the General Assembly has varied over the years. Since 2017 it consists of 15 justices, but it may convene with at least twelve members present under the chairmanship of the President or a Deputy President (Art. 21 (1) CCA 2011). In general, the General Assembly decides with the absolute majority of participants, and voting starts with the most junior member (Art. 65 (3) CCA 2011). As mentioned, the President has the decisive vote "in the event of votes cast being equal" (Art. 65 (1) CCA 2011). However, a two-thirds majority is required for decisions on the annulment of constitutional amendments, the dissolution of political parties, or for decisions depriving political parties of state aid (Art. 65 (2) CCA 2011). Decisions in the sections are taken by simple majority (Art. 72 (1) RoP 2012).

d. After the deliberations, *a draft decision is prepared*. According to Art. 19 (2) RoP 1962, the author of this draft used to be the Court President or a justice entrusted by them. The amended RoP of 1986 added the Vice-President as a possible drafter of the decision. In this regard, the court reform of 2010 also brought about substantial changes. In consequence of the increased workload at the AYM, the new RoP determine that a draft decision is generally written by the rapporteur: "When necessary, the President can assign one of the members who agree with the decision to the drafting of the decision with the rapporteur" (Art. 57 (3) RoP 2012). Hence, the responsibility of decision writing has been shifted towards the law clerks, which massively increased their influence on the Court's output.[231]

e. After the draft decision has been circulated, *a separate "reading deliberation" is conducted*, i.e., the justices come together in person once more to discuss the submitted text.[232] Changes are implemented by the justice and/or rapporteur responsible for writing the final decision. In case of

230 Art. 53 (2) RoP 2012; the RoP of 1962 foresees a period of 10 days (Art. 16 (1) third sentence, the RoP of 1986 does not determine any time frame (Art. 9).

231 Cf. Abad Andrade 2020, 278.

232 Art. 19 (3) first sentence, RoP (1962); Art. 12 (4) first sentence, RoP 1986; Art. 56 (3) first sentence, RoP 2012.

disagreement over the wording of the text, the President is supposed to determine its final version.[233] This reading deliberation has lost part of its relevance since the reform of 2010, because the rapporteur and/or justice in charge of preparing the draft version play a much more dominant role in the final writing process than before.[234]

f. *Those members of the Court who dissent from the final decision must submit their reasons in written form*.[235] The 2012 RoP provide for a term of ten days for members to submit their dissenting or concurring opinion. If they do not finalise their opinion within this term, the decision will be published without it (Art. 57 (6) RoP 2012). As mentioned above, this rule gives the President additional leverage over the members of the Court. In the earlier versions of the CCA and RoP, no deadline for the submission of the dissenting or concurring opinion was specified. The new mechanism creates an effective means to change the problematic practice of the Court, which used to delay the publication of its rulings due to announced but not submitted dissenting opinions.[236]

The detailed reconstruction of the AYM's internal decision-making schedule gathered from various legal sources, scattered information in occasional Turkish publications, and Maria Abad Andrade's interviews with (former) justices, is illustrative of the broader institutional portrait of the Court in two ways.

First, it demonstrates that, while many relevant facts about the functioning of this important constitutional institution are technically available, they are thus far rarely documented, let alone analysed, in a systematic and publicly accessible way. This is partly due to the (at least until 2015) almost complete lack of coherent information issued by the AYM itself. In some regard, though, the AYM's decision-making is even more transparent than that of comparable European apex courts because individual voting results and the extremely frequent dissenting opinions are always published. This opens an additional venue to evaluate the Court's role between legal and political reasoning via a thorough content analysis of its rulings, as will be demonstrated in Part II of the book.

---

233 Art. 19 (3) second sentence, RoP 1962; Art. 12 (4) second sentence, RoP 1986; Art. 57 (5), RoP 2012.

234 Cf. Abad Andrade 2020, 281.

235 Art. 19 (1) second sentence, RoP 1962; Art. 12 (5), RoP 1986; Art. 57 (6), RoP 2012.

236 Cf. Abad Andrade 2020, pp. 236-237; pp. 275-277.

Second, the institutional setting within which the AYM justices operate has changed repeatedly and substantially over the whole period of the Court's existence. While a general tendency of professional rationalisation is visible, significant inconsistencies remain. To recall only some particularly problematic aspects spelled out in the previous Chapters: despite repeated amendments to the appointment procedures, the selection of justices is still opaque and grants the State President strong, if partially indirect, leverage. In addition, consensus-oriented deliberation as well as efficient decision-making are hampered by partially unclear or dysfunctional provisions, such as the overlarge AYM plenary, collectively deciding all norm control proceedings, or the huge but mostly informal impact of the *rapporteurs* on the drafting and final writing of the rulings. Whereas the comprehensive constitutional reform of 2010 improved the institutional framework of the AYM in several regards (by finally abolishing the dysfunctional distinction between regular and alternate justices, for example, or by rationalising the internal division of labour in light of the newly established constitutional complaint procedure), it also introduced new problems. From the perspective of judicial independence, one particularly concerning innovation concerns the further substantiation of the already very influential Court President's discretionary power.

All in all, the thorough collection and systematic presentation of detailed information about the institutional history, the comprehensive competences (which were further extended in 2012), and the internal decision-making procedures of the AYM resulted in the nuanced, multifaceted portrait of a principally strong and autonomous constitutional institution, which had to adapt repeatedly to massive, mostly externally induced changes. Various persistent (and some newly introduced) inconsistencies of this institutional setting reflect the overall incoherent political system of the country, oscillating between phases of democratisation and (re-)autocratisation.