

Politik und Recht



von Steinsdorff | Göztepe | Abad Andrade | Petersen

The Constitutional Court of Turkey

Between Legal and Political Reasoning



Nomos

„Politik und Recht“

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Editorial

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

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

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

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

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

Roland Lhotta, Christoph Möllers, Rüdiger Voigt

PREFACE

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

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

The only way for constitutional courts to operate consists in rendering decisions on constitutional controversies. It is therefore remarkable that the output of constitutional courts, their judgments and the reasons given for them, play a small role in comparative constitutional research, be it legal or political. Questions regarding the impact courts have on political systems as well as their institutional arrangements are in the foreground. This may be understandable for

PREFACE

political scientists who deal with constitutional adjudication; they are mainly interested in the governmental and institutional aspects of constitutional courts while their legal work remains alien to them, or is simply regarded as politics in the disguise of law. Yet, even legal scholars of comparative constitutionalism tend to avoid the case law produced by the courts.

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

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

After the seminal changes in 1989 and 1990, constitutionalism and constitutional adjudication seemed to have become universally established. For many countries, constitutions became relevant for the first time through the work of their newly established constitutional courts. Thirty years later, the constitutional map looks different. The tremendous rise of constitutional adjudication is followed by an opposing rise against it. What will come next? Turkey's history may

portend what other countries are just now facing; the alternation of ups and downs that characterizes its past. Turkey's history of constitutional adjudication thus has something to teach other countries as well, and this book makes these valuable experiences accessible.

Dieter Grimm

Professor of Public Law, Humboldt Universität zu Berlin

Former Justice, Federal Constitutional Court of Germany

ACKNOWLEDGEMENTS

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

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

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

ACKNOWLEDGEMENTS

Hopefully, the research results presented in this book are valid and valuable beyond these volatile realities of Turkish politics.

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

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

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

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ABBREVIATIONS

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

1 Another official abbreviation for the AKP is “AK Parti”.

2 The official name is T.C. Anayasa Mahkemesi (Türkiye Cumhuriyeti Anayasa Mahkemesi), Constitutional Court of the Turkish Republic.

3 The Devlet İstatistik Enstitüsü (State Institute of Statistics) was replaced in 2005 by the Türkiye İstatistik Kurumu (TÜİK) (Turkish Statistical Institute) (see E. 2008/105; K. 2010/123 in this volume).

ABBREVIATIONS

FP	Fazilet Partisi (Virtue Party)
HSYK	Hâkimler ve Savcılar Yüksek Kurulu (High Council of Judges and Prosecutors)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
K.	Karar sayısı (Decision number)
KHK	Kanun Hükümünde Kararname (Statutory decree)
MHP	Milliyetçi Hareket Partisi (Nationalist Movement Party)
MİT	Millî İstihbarat Teşkilatı (National Intelligence Organisation)
MM	Millet Meclisi (National Assembly)
MP	Member of Parliament
PKK	Partiya Karkerên Kurdistan / Kürdistan İşçi Partisi (Kurdistan Workers' Party)
R.G.	Resmi Gazete (Official Gazette)
SHP	Sosyaldemokrat Halkçı Parti (Social Democratic Populist Party) ⁴
SPK	Siyasi Partiler Kanunu (Political Parties Law) ⁵
SUBPARA.	Subparagraph
TA	Türk Anayasası (Turkish Constitution)
1961 TA	1961 Türk Anayasası (Turkish Constitution of 1961)
1982 TA	1982 Türk Anayasası (Turkish Constitution of 1982)
TBMM	Türkiye Büyük Millet Meclisi (Turkish Grand National Assembly)
T.C.	Türkiye Cumhuriyeti (Republic of Turkey)
TCK	Türk Ceza Kanunu (Turkish Criminal Code)
TCY	Türk Ceza Yasası (Turkish Criminal Code) ⁶
THKO	Türkiye Halk Kurtuluş Ordusu (People's Liberation Army of Turkey)
TİP	Türkiye İşçi Partisi (Workers' Party of Turkey)

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

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

6 The usual abbreviation for the Turkish Criminal Code is TCK (Türk Ceza Kanunu). However the Court has also used the abbreviation TCY (e.g. E. 1991/18; K. 1992/20).

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

7 The official abbreviation for the Turkish Civil Code is TMK. However, the Court has also used the abbreviation MK or even both abbreviations in one decision (e.g. E. 1990/03; K. 1990/31).

8 The English abbreviation is TURKSTAT.

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

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