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This book began with the sobering diagnosis that, in the aftermath of the July 2016 coup attempt, the AYM has lost much of its reputation as a fairly independent constitutional authority. In the first weeks after this dramatic event, and during the following two years under the state of emergency, the AYM repeatedly failed to protect the most basic standards of the rule of law and individual rights. In 2022, when this book was published, the Court has not yet fully recovered from this major setback. As we also stated in the Introduction, it is still too early to predict if and when the AYM might regain a more self-reliant attitude and resume its previous role as a noticeable counterbalance to the executive and legislative branches of government, and an (at least partially) effective protector of fundamental rights. However, our in-depth analysis of the institution and its case law over the Court's lifespan provides reliable indicators to assess not only the past, but probable future scenarios regarding the Court's role within the legal and political system of Turkey as well. It equally allows for some general insights into the limited, but far from insignificant, autonomy constitutional courts can have in political regimes that are oscillating between phases of democratisation and (re-)autocratisation.

To begin, the AYM as an institution and as a collective interpreter of the constitutional order heavily depends on the political and societal environment within which it is acting. The most obvious form of dependence, applying to all apex courts alike, concerns their reactive role: the justices can only decide on alleged violations of the Constitution, if relevant cases are brought before them. Hence, the AYM's often-criticised passivity in defending individual rights was to a large extent caused by the reluctance of instance courts to initiate concrete norm reviews. Our case law analyses clearly demonstrated that the Court did develop a comprehensive (if not always coherent) doctrinal position whenever it had the chance to do so. The most concrete evidence of this is the AYM's extensive adjudication on equality before the law, the only right frequently claimed even prior to the introduction of the individual complaint procedure in 2012. Since this seminal reform, the quantity of decisions on alleged violations, covering the whole range of constitutionally granted fundamental rights, skyrocketed. Equally important, the quality of the constitutional reasoning displayed in several of these rulings significantly improved compared to

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earlier norm review decisions, as our analyses of rulings on fair trial and prisoners' rights before and after 2012 documented.⁷⁷²

Besides these manifest political dependencies, unfavourable societal context conditions further impeded the AYM's ability to establish itself as an uncontested, broadly legitimised guardian of the constitutional order. One particularly important facet of this adverse environment is the reluctance of varying parliamentary majorities to comply with the Court's rulings. Both *Equal Treatment of Spouses in Case of Adultery* decisions analysed in Chapter II.4.3.5 are paradigmatic in this regard. The prevalent disinterest in the AYM's adjudication expressed by most Turkish legal scholars poses an equally serious problem: in the absence of a continuous doctrinal discourse monitoring the outcome and the implementation of their rulings, it is difficult for the justices to raise public awareness of and support for the Court's activity. In times of political turmoil and the endangerment of both the constitutional democracy in Turkey in general, as well as the independent agency of the AYM in particular, this lack of continuous academic and public support further weakens the Court's chances to realise its potential role as a defender of liberal constitutionalism in Turkey.

The theoretical assumption discussed in the book's Introduction, according to which constitutional courts, once established, may almost automatically foster rule of law standards or even democratisation at large, is disproved – at least in Turkey. What we found instead is an institution which capably adapted itself to a repeatedly and fundamentally changing political context. The AYM certainly contributed to the advancement of constitutional democracy in Turkey at times, but above all it mirrored the upheaval of Turkey's repeatedly changing political landscape. Against the backdrop of this macro-level picture, our specific focus on the institutional framework within which the AYM operates proved most revealing.

Above all, the concrete wording of the Constitution is of particular importance for a differentiated understanding of the Court's adjudication. It not only defines the AYM's competences and their limitations in great detail, but it also stipulates very specific and far-reaching principles of Turkish nation- and statehood. While the frequently and substantially amended (though never completely renewed) post-coup Constitution of 1982 does *de jure* provide for the usual requisites of democratic

772 Cf. Chapter II.4.3.4.

state-organisation⁷⁷³ and the protection of individual rights, the fundamental principles of Atatürkism enshrined in the unamendable Art. 2 TA include some rather authoritarian concepts.⁷⁷⁴ Above all, the specific constitutional framing of nationalism (excluding all forms of ethnic minority rights or even autonomy) and laicism (clearly prevailing over religious freedom) has translated into extremely state-centred, sometimes openly authoritarian, AYM adjudication on relevant issues.

The comprehensive provisions on the prohibition of political parties, detailed in Art. 68-69 TA, represent one further element of the restrictive constitutional corset shaping the AYM's decision-making. Between 1962 and 2009, the Turkish Chief Public Prosecutor brought 49 requests to ban political parties before the Court, i.e. almost one case per year on average. As we showed in Chapter II.4.1, the Court's reactions to these multiple applications are significant in two regards. On the one hand, the justices by no means automatically accommodated all requests: of the 43 cases initiated under the 1982 Constitution, they rejected more than half (23). This underlines the AYM's self-confident autonomy in relation to Governments from all political camps during most of its existence. On the other hand, however, the Court handled some of the party ban proceedings as a political activist, openly supporting particular Governments' attempts to restrict party pluralism in Turkey. This attitude became most evident in the 13 cases initiated against parties accused of violating the constitutional principle of nationalism, a charge regularly brought forward against parties that supposedly supported Kurdish autonomy, regardless of their concrete political program and actions. Instead of carefully balancing the equally important constitutional principles of party pluralism and freedom of political association against the concept of nationalism, the AYM invariably prohibited all parties accused of supporting (Kurdish) separatism. This leads one to assume that a broad majority of justices from all generations principally endorsed the "statist nationalist ideology"⁷⁷⁵ deeply rooted in the Turkish Constitution.

773 At least, this was the case until the constitutional reform of 2017, which introduced elements of presidentialism into the political system of Turkey and seriously weakened the separation of power principle; cf. for details Chapter I.1.2.

774 Because of these principles, Turkuler Işıksel (2013) concludes that the complete political regime in Turkey is based on "authoritarian constitutionalism". While the authors do not share this general diagnosis, Art. 2 TA definitively manifests some authoritarian tendencies.

775 Kogacioglu 2004, p. 442.

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These openly politically motivated party-ban rulings are often referred to in the scholarly literature in order to prove the assumption of a ‘Republican alliance’ between the Court and a so-called Kemalist political elite.⁷⁷⁶ The contextualisation of the very prominent, though episodic, party-ban rulings within the overall trends of AYM case law suggests a different interpretation. As our content analyses of key decisions covering the whole range of issues brought before the Court clearly document, attitudinal theories do not offer any convincing explanation of AYM adjudication in general. In terms of political behaviour, most Turkish justices showed little or no consistent individual, let alone collective, strategy, but rather mirrored mainstream societal and/or political trends. Instead, we noted that the institutional framework within which the justices’ decisions were made had a significant impact on the decisions themselves; that is to say, in addition to the meta-norms stipulated in the Constitution, the internal institutional rules of the AYM played a crucial role in this regard.

Part I of this book presented a detailed analysis of the many problems AYM justices face in relation to the internal institutionalisation of the Court. While we observed a general tendency of professional rationalisation, particularly as of the 1990s, considerable inconsistencies remain unsolved. They mainly concern the contradiction between consensus-oriented decision-making principles and partially unclear or dysfunctional provisions hampering a transparent and efficient process to this end.⁷⁷⁷ Besides, the discretionary power of the Court President is – compared to other European apex courts – extremely broad. For example, the *rapporteurs* (law clerks), who have a significant but mostly informal impact on the drafting and final writing of the rulings, are directly and solely responsible to the Court President. The judicial reform of 2010, although substantially improving the institutional framework in some regards (such as the abolition of the dysfunctional distinction between regular and alternate justices, for example), further strengthened the internal dominance of the Court President. With respect to the autonomy of individual justices, this development is as concerning as the often amended, but still very opaque and executive-dominated, selection process of AYM justices.

These institutional-level explanations contextualise the findings of the case law analysis and documentation displayed in Parts II and III of the book: the Court never succeeded in developing a coherent, sustainable

776 This theory is explained and assessed in the Introduction.

777 For a comprehensive analysis of these contradictions cf. Abad Andrade 2020.

interpretation of the Turkish Constitution which could have strengthened its authority as guardian of the Constitution in times of political crisis and authoritarian backlash.

From a doctrinal perspective, the Court did in some ways develop substantiated positions on a range of important constitutional issues. Several of the analysed key rulings clearly show that different generations of justices actively fostered the stabilisation and further development of constitutional democracy in Turkey. In particular, a series of rulings on crucial rule of law questions, such as the independence of the judiciary, or the legislative control over executive law-making activities, had a considerable impact in this regard. Although the AYM was – partially due to missing opportunities, as explained earlier – generally less active in protecting individual rights, some key decisions nevertheless substantially enhanced the *de facto* standards also in this regard. For example, several of the analysed key decisions on questions of gender equality in Turkey are particularly important from this perspective. On the other hand, none of these developments led to a sustainable and predictable doctrinal self-positioning of the Court. Instead, later rulings on very similar issues outrightly contradicted earlier decisions, often without giving any convincing explanation for this abrupt change. Even if one concedes that no constitutional court will follow a completely straightforward doctrinal concept in all its rulings, and will occasionally issue deviant decisions, we found that the degree of doctrinal inconsistency of AYM case law is extraordinarily high.

Decisions based on substantial inconsistencies of constitutional reasoning have created legal ambiguity, resulting in a wide variety of ruling outcomes. Here, two main problems stand out. First, our in-depth reconstruction of methods and argumentative patterns displayed in the analysed key rulings reveal a striking coexistence of very different modes of decision-writing. While some rulings are based on a systematic interpretation of constitutional norms according to clear (if limited) patterns, subsuming concrete cases to abstract constitutional principles and substantiating the argumentation developed in the merits by referring to precedent or external sources, other key decisions completely lack any form of constitutional reasoning. Despite all interpretative considerations, we could not find a convincing rationale behind these massive differences. Instead, the intensity and quality of the argumentative tools seem to vary almost randomly across all phases and topics of AYM case law.

The second fundamental inconsistency of the AYM's reasoning concerns the juxtaposition of irreconcilable constitutional concepts and moral val-

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ues without any strategy to mediate conflicting constitutional claims. In some of the numerous decisions on questions of gender equality, for example, the principle of equality before the law, generally well-defined and actively defended by the Court, was completely set aside because it clashed with traditional, paternalistic family values that are equally enshrined in the Constitution.⁷⁷⁸ The prioritisation of one constitutional principle over another becomes even more arbitrary when alleged necessities of public order come into play. While this constitutional concept is almost omnipresent in the AYM adjudication, it was never clearly defined by the Court and can therefore be broadly applied, conveniently justifying almost any argument brought forward by the Court. In combination with the missing practice of mediating conflicting constitutional claims, this instrumentalisation of an indeterminate legal concept renders AYM decisions unpredictable and ambiguous.

In addition to the unfavourable institutional context of the Court's decision-making, we identified one main variable that can explain the remarkable lack of doctrinal and argumentative consistency. In stark contrast to the image of a very homogeneous AYM, unanimously supporting one particular political position, which has been falsely evoked in scholarly literature,⁷⁷⁹ we found a deeply divided Court, that often renders decisions by the smallest possible majority of votes and issues an extremely high number of dissenting opinions. The constant pattern of dissent, forcing the justices to compromise on the smallest common denominator, dominates the case law during all periods of the AYM's existence and across all issues of adjudication. As a result, minor changes on the bench could easily alter the doctrinal self-positioning of the Court as well as its approach towards the methods and tools of constitutional reasoning displayed in the merits of the rulings.

Whereas we documented constant disagreement within the AYM throughout all phases of its institutional history, and in relation to all issues under consideration, the intensity of dissent became even more salient when highly politicised cases were at stake. Our in-depth content analyses suggest a strong link between the political polarisation in relation to the issue under review, the amount of disagreement among the justices according to the voting results and the number of published dissenting opinions, and the poor constitutional reasoning of the respective ruling.

778 Cf. Chapter II.4.3.5.

779 Cf., among others, Bâli 2012, 2013; Belge 2006; Örucü 2009; Shambayati 2008; 2009.

The *Parliamentary Procedure of Presidential Election* decision⁷⁸⁰ and the *Death Sentence* ruling⁷⁸¹ are particularly telling examples in this regard. In both cases, the manifest weakness of constitutional reasoning is a direct result of the question under review becoming highly politicised combined with fierce dissent among the justices, who were fundamentally unable to agree on a coherent explanation of the finally reached majority decision.

Summarising our main findings on the Constitutional Court of Turkey, we deduce three generalisable conclusions, applicable for any constitutional court in a political regime either permanently dwelling in the grey zone between democracy and autocracy or currently caught on the slippery slope of re-autocratisation.

First of all, this study about the AYM impressively proved that even in an unstable political context characterised by repeated democratic breakdowns and lasting authoritarian remnants, judicial review can make an important difference. As long as the constitutional court is not turned into a mere puppet institution or abolished altogether, its rulings do play a significant role in defining – and sometimes even enhancing – general rule of law standards, establishing some monitoring capacity in relation to the executive and legislative branches of government, and in translating *de jure* constitutionally granted rights into *de facto* applicable claims. The development of the AYM's case law over its 60-year lifespan further shows that, while external political influence has doubtlessly been exerted in many ways, no constant and coherent political control of the adjudication can be upheld over such a long time. During the first phase following the Court's establishment the concept of hegemonic preservation definitely applied,⁷⁸² but it has long since lost its explanatory value in Turkey's case. Instead, the AYM, much like Turkish society at large, had to adapt to repeated and profound changes of the political environment. Even after periods of enforced political compliance or passivity following military coups, for example, the justices gradually regained substantial autonomy.

It is important to understand, however, that constitutional courts in unstable regimes, permanently threatened by re-autocratisation, walk a fine line between flexible adaptation to the changing and often adverse political environment, and mere opportunism; or, as we diagnosed for the AYM in the aftermath of the 2016 coup attempt, even temporary self-abandonment. If Turkey as a case study is anything to go by, consti-

780 Cf. Chapters II.4.2.5 and III.2.21.

781 Cf. Chapters II.4.3.4 and III.3.12.

782 This theoretical concept is explained and evaluated in the Introduction.

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tutional courts will therefore definitively not act as resolute and unbending forerunners of (further) democratisation under these difficult circumstances. Instead, they will primarily mirror mainstream attitudes towards the political system in general and constitutional values in particular, using their existing but constantly threatened autonomy in a rather cautious and re-active way.

Second, the institutional well-functioning of the court is paramount; in this regard, the AYM is not an altogether positive example. Whereas components of the institutional setting, such as the selection procedure and the number of justices, are determined by external political actors, the internal working process can be structured, or at least informally organised, by the justices themselves. Details like the distribution of cases among individual justices, the sequencing of the actual decision-making process, or the assignment of tasks to the law clerks, do have a decisive impact on the court's output in terms of quantity *and* quality. Additionally, the Court President's internal competences play an important part when it comes to the judicial autonomy of individual justices as well as to the institutional autonomy of the court in relation to the executive and legislative branches of government. We showed in detail how the delayed and incomplete process of internal institutionalisation complicated the AYM decision-making and contributed to the impression of internal dissent and incompetency. The resulting lack of transparency and efficiency of the Court's operating significantly impeded its legitimacy- and authority-building relative to the political class and the public in Turkey. These deficits are even more crucial in an unconsolidated political system, oscillating between phases of democratisation and (re-)autocratisation, where the institutional and political legitimacy of the constitutional court may be fundamentally put into question at any moment.

Third, the in-depth analysis of key AYM decisions clearly documented how important consistent techniques of constitutional reasoning are in establishing a court's long-term credibility as an effective guardian of the constitutional order. Our study of this particular case perfectly reinforces the interdisciplinary theoretical approach introduced in Chapter II.1, according to which the legitimacy of constitutional adjudication largely depends on the specific framing of its argumentation between legal and political reasoning. It is the particular competence of judicial norm control to transform political conflicts into legal issues and resolve them by referring to the Constitution. While this applies equally to apex courts in established democracies (and stable autocracies, if applicable), it is of the utmost importance in a highly polarised and unstable political regime,

where harsh political confrontation may lead to an authoritarian backlash at any moment. In this continued 'limbo' situation, the already-limited freedom of self-determination may be best defended by transforming politically loaded constitutional conflicts into 'merely' legal issues, and by solving them via a watertight argumentation in the merits.

In light of this insight, the many inconsistencies and fundamental ambiguities which characterise the constitutional reasoning of many AYM decisions certainly did not strengthen its capacity as a defender of rule of law and fundamental rights in times of political crisis. While counter-factual argumentation is always speculative, it seems plausible to assume that a higher standard of doctrinal reliability and argumentative rigour in the rulings at large would have reinforced the Court's resilience against external pressure in the long run. The inaptitude of the justices' reaction to the massive and manifest violation of rule of law principles and individual rights in the aftermath of the 2016 coup attempt illustrate this problem in a most striking way. Even if it might have been reasonable to avoid open conflict with the executive branch in order to save the Court's mere existence at that crucial moment, a cautious, explicitly non-political constitutional reasoning referencing well-established doctrinal positions could have protected basic constitutional standards – as well as the reputation of the AYM as a reliable guardian of these principles. Instead, the justices rendered openly contradictory decisions lacking any coherent constitutional reasoning, be it legally or politically induced.⁷⁸³

Returning to the book's title situating the AYM between legal and political reasoning, there is a clear lesson within this detailed portrait of a constitutional court in a political system that continually hovers in the grey zone between democracy and autocracy: the most crucial question is not about the dominance of legal or political reasoning, but about the argumentative and methodological quality of the reasoning as such, be it rather legally or politically motivated.

783 Cf. Chapter II.4.2.4 for details.

