PART II: THE CASE LAW

Interpreting the role of the AYM within the Turkish political system through its rulings is no easy endeavour. As shown in the first part of the book, the institutional development of the Court was and still is characterised by repeated ruptures and inconsistencies. Many of these problems are closely linked to the turbulent political history of the Turkish Republic since the first military coup in 1960. Obviously, the ups and downs of Turkish politics are not only mirrored in the institutional history of the Court, but they can also be traced in its adjudication. Hence, it does not come as a big surprise, that the AYM has always been a rather politicised court. This often-repeated observation, however, does not explain how exactly the political context impacted the rulings of the AYM – and how, in return, consecutive generations of justices contributed to shaping the Turkish political system by their decisions. Such an in-depth understanding demands a comprehensive analysis of the case law, covering the whole range of decisions over six decades. In the following chapters, we will start to finally paint this broad and detailed picture.

This approach is partially inspired by the conceptional and empirical work assembled in the volume "Comparative Constitutional Reasoning", edited by András Jakab, Arthur Dyevre and Giulio Itzcovich in 2017.[237] From their ambitious project to "map and compare the argumentative practices of constitutional courts in a systematic fashion"[238] in 18 established democracies, we not only adopted the concept of constitutional reasoning, but also the strategy of selecting key cases and analysing them according to a set of guiding questions. Of course, we had to adopt this analytical framework to the particularities of the Turkish case, where the Constitutional Court acts within a political system permanently oscillating between democratic and autocratic tendencies.

Part II of the book begins with a few brief reflections on the non-legal analysis of legal texts in general, and of AYM decisions in particular. How can we deduce from the argumentation displayed in the rulings whether the reasoning of the justices is mainly inspired by legal or by political reasoning? These considerations end in a precise list of the quantitative

237 Jakab et al. 2017a.
238 Jakab et al. 2015, p. 3.

and qualitative criteria guiding our case selection and case-by-case analyses. It follows a quantitative overview of the AYM case law since its establishment (Chapter II.2), gathering the available statistical information and assessing the development of the Court's workload over the years.

As explained earlier, the neglect of major parts of the Court's adjudication is mainly due to the feeble interest of many Turkish legal and social-science scholars, except for a narrow range of highly politicised decisions. Equally important, the available documentation of AYM rulings is neither complete nor always consistent; until recently, the Court itself never provided for any regular quantitative synopsis of its work. During the first decades of the AYM's existence, even the compulsory publication of the decisions in the Official Gazette was not completely reliable.[239] While this situation has improved since the 1990s, official statistical material on the case law is still not always reliable. In the absence of a well-organised public register, let alone a digitalised database of all decisions, it is difficult to retrospectively retrace how the Turkish justices interpreted a particular constitutional provision at a certain point in time or how this interpretation may since have evolved. This is made even more difficult as the AYM never developed a methodical habit of self-referencing.[240] Against the backdrop of this complex and sometimes incoherent quantitative data set, the selection criteria and the overall characteristics of the sample used in this book are particularly important, and they are explained in Chapter II.3.

The actual case-by-case analyses (Chapter II.4) include key decisions covering the whole thematic range and all chronological phases of the AYM adjudication. Beginning with a comprehensive assessment of the party ban decisions, the most publicly, but often myopically, observed and discussed of all constitutional court proceedings. The significance of this specific aspect of AYM case law is put into perspective in the following subchapters, displaying the full picture of the Court's judicial review activities over the years. Grouped into ten thematic sets, covering different disputes on state organisation questions (Chapter II.4.2), as well as the main features of adjudication on fundamental rights and freedoms (Chapter II.4.3), we retrace the specifics as well as general trends of constitutional reasoning developed by the AYM. On the basis of these systematic analyses, Chapter II.5 distils structural and linguistic particularities, main patterns of argumentation, frequently used constitutional principles and values, as well as

239 Cf. Abad Andrade 2020, p. 136.

240 This problem is addressed in more detail in Chapter II.5.2.

dissent and doctrinal inconsistencies characterising the AYM case law in general. By thus identifying possible strategies of self-legitimisation and authority-building and their limitations, we offer an explanation to the Court's continual shifting between political and legal reasoning, resulting in the current failure to effectively defend rule of law principles and constitutionally guaranteed rights in Turkey.

1. Content Analytical Approach

Whereas the interpretation of court rulings has always formed an integral part of the legal discourse – be it conducted by practitioners or by academics –, there is no similar tradition in the social sciences. Instead, complaints about the incomprehensibility of legal texts in general and court rulings in particular are commonplace.[241] This explains why the published argumentation of court decisions has rarely ever been studied in detail from a non-legal perspective. Our analysis shows how important it is to overcome such reluctance: only an interdisciplinary approach, which explicitly includes content analytical techniques developed in empirical social science research, can fully retrace the complex "argumentation practices"[242] applied by judges in general and by (Turkish) constitutional justices in particular.

Court rulings are first and foremost legal texts. They use a specific, often technical language and follow a strict formal structure. Hence, in order to understand and evaluate their inherent logic, the "rational process [of the judges' reasoning] based on specifically legal methods of interpretation"[243] must be taken seriously. Generally speaking, the interpretative techniques employed by judges aim at construing the norm(s) to be applied in a concrete case. For this purpose, the wording of the norm(s) has to be analysed, and the political or historical context of their creation, as well as assumed intentions of the legislator may be reconstructed. Basic legal methods also comprise the reference to existing precedent (if any), and more recently, to international adjudication.[244] Despite these generally acknowledged

241 Cf. Lerch 2004, p. XV.
242 Jakab et al. 2017a, p. 34.
243 Grimm 2019, p. 311.
244 Cf. Steinsdorff 2019, p. 218. For a detailed scheme of legal methods of interpretation, particularly concerning constitutional law, see Jakab 2013, pp. 1227-1247.

principles, legal methods of text interpretation are increasingly put into question – even within judicial academia – for being reductionist and mechanistic:[245] The argumentation judges develop in their rulings is no "stringent deduction of indubitable results from a quantity of axioms"[246]. Instead, it is a complex process, combining doctrinal rules and technics of norm interpretation with individual evaluations, subjective choices and other non-legal deliberations.

Non-legal elements play an even bigger part when it comes to constitutional court decisions. As sketched out in the Introduction, public observers and social scientists often perceive constitutional adjudication as more politically than legally motivated. This is partially due to the politically salient subject-matters of many key decisions and by the direct impact their outcome may have on political decision making.[247] Besides, constitutional law is particularly prone to non-legal forms of argumentation. While legal norms are generally formulated in an abstract way in order to be applicable to a broad variety of concrete cases, constitutional law is especially vague. As former German Constitutional Court justice Dieter Grimm put it: "Constitutional law is notoriously unclear. Many of its norms are principles, not rules (…)".[248] Hence, constitutional justices have to operate as creative interpreters, bridging "the gap between norm and case"[249] by referring to all sorts of plausibility arguments, be they legally, politically, economically, scientifically or otherwise motivated. It is crucial, though, that the final argumentation convinces the audience of the justices' ability to competently interpret and efficiently protect the constitution. Therefore, the judicial framing of decisions is paramount, emphasising "legally defensible arguments"[250], even if other considerations may be equally important.

245 For an overview of the discussion on legal methods, cf. Boulanger 2013, pp. 40-43.
246 Neumann 2005, p. 379.
247 Cf. Grimm 2019, p. 308.
248 Ibid., p. 314.
249 Ibid., p. 314.
250 Landfried 2019, p. 7.

Jakab et al. describe this argumentative technique[251] as constitutional reasoning, i.e. "the discursive practices of judges"[252] when interpreting abstract and not always very pertinent constitutional provisions in order to decide cases brought before them. They also speak of a "rhetorical exercise"[253], by which the justices seek to legitimise their decisions in the eyes of their audience(s). David Robertson, one of the rare social scientists who so far examined constitutional court rulings from a content analytical perspective, comes to similar conclusions in his seminal book "The Judge as a Political Theorist". He even puts slightly more emphasis on the legal side of the justices' reasoning when retracing "the role of judicial argument, methodology, and logic"[254] in the rulings of several constitutional courts around the world. According to his analysis, constitutional adjudication usually does include non-legal arguments and may well favour some (political) values over others, but it significantly differs from political decision-making. First of all, most constitutional justices are trained lawyers and are therefore professionally socialised to think and express themselves in legal terminology and logic. Hence, Robertson rightfully argues, one should take seriously their intentions to decide cases brought before them according to "legal and constitutional values".[255]

Even more importantly, the legitimacy of constitutional adjudication largely depends on the specific legal framing of its argumentation. Whereas a clear-cut juxtaposition of legal versus political arguments is pointless in constitutional law, because its subject-matters necessarily have a political dimension, the way these arguments are explained and applied can differ substantially. To encapsulate this difference, Robertson repeatedly quotes "an old say to the effect that 'Politicians bargain, judges argue'".[256] In other words: the more convincing the argumentative reasoning developed in the rulings, the higher their plausibility and credibility – and, as a long-term result, the legitimacy of the constitutional court

251 The terms 'interpretation', 'argumentation' and 'reasoning' are used more or less synonymously here. According to Jakab et al. 2017a, p.5, "interpretation (…) means determining the content of a normative text (…). This determination of content can be argued for (or against) with the help of arguments. Consequently, what is traditionally called 'a method of interpretation', is in fact a type of argument used to interpret a text."
252 Jakab et al. 2017a, p. 12.
253 Ibid., p. 23.
254 Robertson 2010, p. 20.
255 Ibid., p. 21.
256 Ibid., p. 383.

in general. Constitutional reasoning therefore should not be based on mere assumptions or on open political bargaining. Instead, "the difference between political and judicial decision-making"[257] displayed in the rulings is not only an important indicator of their interpretive quality, but also of their presumable conflict-solving capacity within the political system. According to Jakab et al., "taming ideological and political conflicts by transforming them into technical-legal issues"[258] is one of the core functions of constitutional reasoning.

In applying these general reflections about the source of legitimacy and, in the long run, authority of a constitutional court to the AYM adjudication, we aim at better understanding the role of this institution within the Turkish political system. What are the patterns of constitutional reasoning displayed in the AYM rulings under scrutiny? Does the Court strive at "taming" political conflicts by transforming them into judicial ones? And if so, by which means? In which way and (if at all) to which extent do its decisions contribute to fostering the rule of law, democratic principles of state organisation and the respect for constitutionally guaranteed rights and freedoms? The quantitative and qualitative analyses of the Court's case law over the years are guided by the following questions, mainly derived from the comparative literature briefly sketched out above:

Quantitative assessment of the AYM adjudication

- How often is the AYM applied to and by whom / by which institutional actors? What is the ratio between the different modes of proceedings? How has the case load evolved over the years?
- What do we know about the ratio between accepted and rejected claims of unconstitutionality? Did it change over the years?
- What issues are addressed (most) frequently? Which topics and/or norms are underrepresented or entirely missing?
- How frequently are dissenting and concurring opinions documented in the rulings? Did this change over the years?

Qualitative analysis of the selected key cases

- Do the rulings display a standardised, coherent internal structure?
- What interpretative methods are used – and how?
- How (if at all) is the 'gap' between abstract constitutional principles and concrete cases filled?
- Are there certain recurrent argumentative patterns to be observed?

257 Landfried 2019, p. 3.
258 Jakab et al. 2017a, p. 23.

- What constitutional and/or political values can be deducted from the Court's main argumentative patterns?
- How important/prominent are dissenting votes and opinions?
- Which (if any) strategies of self-empowerment or judicial activism can be traced?
- Is it possible to distinguish between legal and non-legal, particularly political arguments and/or modes of argumentation?
- What (if any) dynamic developments / changes in the adjudication can be traced over time?

2. *AYM Rulings – a Quantitative Assessment*

Despite our thorough research covering all available sources, it is impossible to determine the exact number of decisions the AYM ever rendered. Particularly the earlier volumes of the Official Collection of Decisions (*Anayasa Mahkemesi Kararlar Dergisi;* AMKD) are incomplete and partly of poor quality. Even some of the rulings which are published in the AMKD in the 1960s and 1970s are hard to access, because the printed text is barely readable, and until today no comprehensive electronic version exists.[259] On top of these technical problems, there are inconsistencies as to the counting of cases: while official statistics often indicate all submitted (and accepted) files, other sources only count decided cases. Besides, not necessarily all decisions are published in the Official Gazette, making it even more difficult to compare the number of applications to the number of decisions. Another problem arises from the unsystematic handling of joinders: sometimes each application is counted individually, sometimes files joint during the proceedings are counted as one single case.

As mentioned in Chapter I.5.1, the inchoate record-keeping and archiving of the Court improved significantly after the establishment of the "Research and Case-Law Unit" (*Araştırma ve İçtihat Birimi*) during the great reform of 2010.[260] Since this analytical unit started working in 2015, statistical figures on many aspects of the AYM's activity are available online and in the regularly published yearbooks. Not all of this information, however, is completely comprehensible and transparent. To give only one example: When indicating the number of abstract and concrete judicial review proceedings brought before the Court between 2012 and 2019,

259 Cf. Abad Andrade 2019, p. 136.
260 Cf. Perilli 2014, pp. 24-25; also Steinsdorff / Petersen 2016.

pending applications, opened earlier than 2012, are included in the number of decisions within this period.[261] There even seem to be some small calculation errors and inconsistencies between different versions of the published statistics.[262]

In light of these multiple ambiguities, we can only provide for an approximate overview of the AYM's activities. Rather than compiling accurate statistics, we aim at plausibly scaling the quantitative dimension of the case law, focusing on the development over time. We mainly refer to the AMKD, the Official Gazette and the statistics published by the Research and Case-Law Unit. Additionally, we took stock of previous attempts at quantitatively assessing the outcome of the Court. As Table 2 shows, several scholars have counted part of the rulings, focusing on different aspects, such as particular issues, acceptance rates, or dissenting votes. Whereas it is not possible to systematically compare these findings, because they operate on different time periods, use different modes of calculation and sometimes even lack basic information about sample size or sampling criteria, we refer to them to complement our own data and to put it into perspective.

261 https://www.anayasa.gov.tr/media/6794/norm_istatistiking.pdf (last accessed: 27/01/2021).

262 Particularly the numbers published in the first AYM yearbook (Report 2015: https://www.anayasa.gov.tr/media/2743/annualreport2015.pdf; last accessed: 27/01/2021) differ from later indicated versions in various respects.

Table 2: Quantitative Studies on AYM Adjudication

Author(s)	Examined Period	Type of Proceedings	Dataset	Annulment Rate	Research Question(s) / Main Finding(s)
Hazama (1996)	1964-1993	Only abstract review decisions	No total N indicated; "12.8 decisions on average over 29 years" → *371 decisions*	7.8 annulments per year on average; 5.0 rejections per year on average → *60,9% annulment rate* "Under the 1982 constitution approximately ten abstract reviews were made annually, out of which more than 70 per cent led to nullity decisions." (p. 327)	AYM's importance for parliamentary opposition parties. Abstract review as an opportunity "to compensate for its [the parliamentary opposition's] legislative weakness" (p. 316). "Turkey ranks among the highest in Europe in the number of referrals and nullity decisions in abstract constitutional review." (p. 337)
Belge (2006)	1962-1982 (in-depth) 1962-1999 (overall)	All types of proceedings, including procedural rejections	671 cases: 1962-70: 327 1971-77: 194 1978-82: 150	46% overall annulment rate 1962-70: 41% annulment rate 1971-77: 61% annulment rate 1978-82: 29% annulment rate	Reasons for the AYM's "restrictive take on civil liberties" (p. 653) despite its comprehensive competences and guaranteed judicial independence Selective judicial activism of the AYM: active protection of the autonomy of certain social groups; passive/restrictive attitude regarding civil rights and liberties Rulings are (ideologically) in line with the Kemalist positions of the "Republican Alliance" (→ hegemonic preservation theory)

Author(s)	Examined Period	Type of Proceedings	Dataset	Annulment Rate	Research Question(s) / Main Finding(s)
Hazama (2011)	1984-2007	Only abstract review decisions	175 cases; each unconstitutionality claim within a case is counted separately → 3,153 claims	Unclear; probably 125 (partial) annulments → *71,4% annulment rate*	Effects of judicial review in divided societies like Turkey: Fostering hegemonic preservation or horizontal accountability? "In sum, the evidence points to Court preference for horizontal accountability over hegemonic preservation." (p. 435) AYM more prone to find unconstitutionality in referrals "that alleged executive transgressions than [in] those that alleged the violation of secular-unitary state principles." (p. 435)
Moral/Tokdemir (2017)	1983-2011	All types of proceedings, including party dissolution cases	2,074 judicial review cases → individual votes of 85 justices 41 party ban cases	*Not specified* 19 parties dissolved → 46% of cases stipulated unconstitutionality of party in question	Effects of justices' individual strategic behaviour on party dissolution decisions Ideologies of justices play an important role in the dissolution decisions. "(…) anti-establishment parties are more likely to be dissolved (…) than pro-status quo parties" (p. 276)
Varol et al. (2017)	2007-2014	Abstract and concrete review decisions	200 randomly chosen cases (114 before 2010, 131 after 2010) →245 decisions (some cases included more than one decision)	*Not specified*	Effects of the Judicial Reform 2010 on judicial behaviour; voting behaviour of individual justices "significant break (…) in the ideological position of the Court"; "conservative ideological shift" (p. 187). Not (yet) any statistically significant effect on the case law (p. 208).

Author(s)	Examined Period	Type of Proceedings	Dataset	Annulment Rate	Research Question(s) / Main Finding(s)
Aydin-Cakir (2018)	1984-2010	Abstract and concrete review decisions	1,028 cases	Overall rates between 29% (1986) and 80 % (2000), *no total numbers given; no overall mean specified* (figure 1, p. 1108) *Specific annulment rates for several different actor constellations calculated*	Impact of (political) judicial preferences on constitutional review decisions under different political constellations (strong one-party government vs. weak fragmented government) "(…) the effect of political fragmentation on judicial behavior decreases when there is a weak political alignment between the court and the enacting government" (p. 1119) Moderating impact of justices' legal preferences → individual rights' violations are less frequently stipulated than those of other constitutional principles
Abad Andrade (2020)	1962-2012	All types of proceedings documented in the AMKD	2,683 cases	*Not specified*	Effect of internal decision-making process of constitutional courts on the outcome of the decisions; importance and function of dissenting and concurring opinions for the outcome of constitutionality review Inconsistent decision-making process of the AYM, torn between opposing logics of majority and consensus decision making Extremely high number of dissenting and concurring votes, mainly result from the inconsistency of the decision-making process High rates of dissent reflect internal conflicts of the AYM and weaken its ability to mediate constitutional conflicts

Source: Own compilation; numbers in italics calculated/deducted from the indicated data.

The scope of this quantitative overview is limited to published decisions, because only these are relevant for a qualitative analysis of the adjudication. Moreover, only norm control proceedings[263] and individual complaints[264] (from 2013 onwards) are counted, leaving aside less frequent proceedings, such as financial auditing or criminal charges against high state officials[265]. Party prohibition cases will be – quantitatively and qualitatively – examined separately in Chapter. II.4.1. The presented data cover the whole period from 1962, when the AYM rendered its very first decisions, to December 2019.[266] As discussed in Part I, this long time-span is marked by several significant political as well as institutional disruptions, which can be clearly traced in the Court's output.

263 These proceedings are explained in detail in Chapters I.3.1 and I.3.2.

264 The constitutional complaint proceedings are explained in Chapter I.3.7.

265 The proceedings introduced in Chapters I.3.3, I.3.4 and I.3.6 are excluded from the quantitative overview.

266 While the data presented in this study generally covers the time span up until December 2021, we had to limit our calculations presented in Tables 3 and 4 as well as Figures 1 and 2 to the end of 2019 for the sake of reliability: as described, the data to be found in available sources in general and on the AYM webpage in particular refer to different time periods and various aspects of the case law. In addition, these numbers are calculated on very different, sometimes not even indicated, case populations and cannot be combined in a statistically valid way. For the time period beginning in 2012, we therefore relay primarily on the Court's Annual Report 2019 (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020), the only source that contains reliable statistical data covering and comparing more than one year, i.e. the time period from 2013 (or 2015 in some aspects) to 2019.

Table 3: AYM Decisions 1962-2019

Year	ANR*	CNR**	IC***	Total****
1962	6	29		35
1963	149	30		179
1964	15	20		35
1965	13	21		34
1966	7	19		26
1967	15	24		39
1968	7	48		55
1969	19	31		40
1970	23	32		55
1971	17	29		46
1972	13	38		51
1973	16	22		38
1974	9	39		48
1975	6	187		193
1976	22	30		52
1977	11	119		130
1978	20	49		69
1979	10	29		39
1980	3	73		76
1981	-	16		16
1982	-	6		6
1983	-	11		11
1984	6	8		14
1985	12	19		31
1986	10	14		24
1987	13	22		35
1988	10	52		62
1989	8	23		31
1990	13	27		40
1991	7	54		61
1992	5	43		48
1993	20	33		53
1994	19	34		53
1995	13	43		56
1996	16	61		77
1997	4	73		77
1998	2	56		58
1999	12	39		51
2000	29	57		86
2001	23	472		495
2002	11	160		171
2003	18	95		113
2004	28	90		118
2005	35	134		169
2006	23	146		179
2007	31	84		115
2008	23	93		116
2009	12	82		94
2010	16	105		121
2011	48	102		150
2012	20	139		159
2013	36	133	4,924	5,093
2014	17	187	10,926	11,130
2015	16	107	15,369	15,492
2016	11	119	16,089	16,219
2017	15	161	89,650	89,826
2018	48	71	35,370	35,489
2019	18	83	39,469	39,570
Total	**1,029**	**4,123**	**211,797**	**216,949**
Average per Year	**11.4**	**72.3**	**30,256.7**	**3,806.12**

* Abstract Norm Review

** Concrete Norm Review

*** Individual Complaints Source: Abad Andrade 2020, p. 271; Annual Report 2019 (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020)

**** Total Number of published Decisions

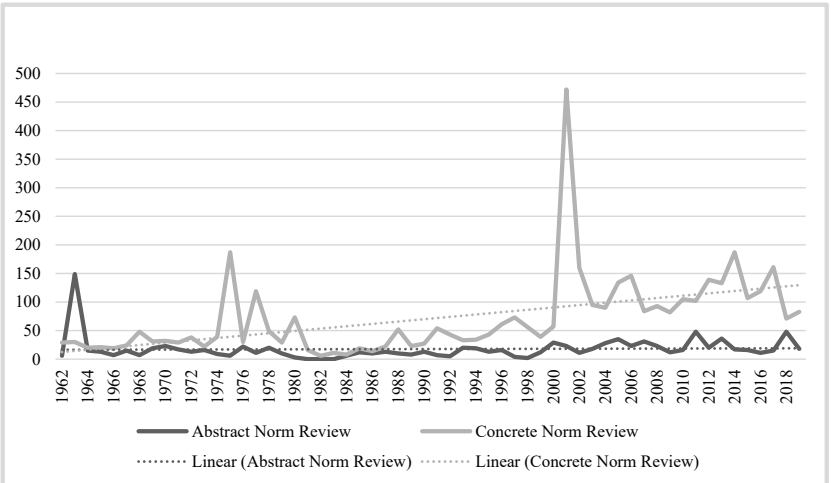
Table 3 documents the absolute number of decisions per year. It shows a steady production of norm controls, summing up to a total of 5,152 decisions, i.e. an average of almost 84 rulings per year. The numbers also indicate a relatively stable ratio between abstract and concrete norm reviews: only one fifth are abstract reviews, initiated by the State President or the parliamentary opposition,[267] whereas the overwhelming majority of the review procedures (80%) were brought before the AYM by other Turkish courts from all levels and branches of the judiciary. Hence, even before 2012, the presumably most 'political' cases (averaged 11.4 rulings per year) represented a comparatively small share in the Court's overall output. Following the skyrocketing of applications, brought about by the major constitutional reform of 2010, abstract norm review cases became a quantitatively almost neglectable portion of the overall output: In 2013 alone, the first year after the introduction of individual complaint proceedings, the AYM rendered 5,093 decisions, i.e. nearly as many as during its whole prior existence. Ever since, it has been facing a yearly influx of more than 31.800 constitutional complaints on average – and it has obviously managed to contain this flood reasonably well by deciding an average of 30,000 of them per year.[268] It is important to note, though, that the vast majority of these rulings is not examined on the merits but routinely rejected as inadmissible or on other procedural grounds.[269]

267 The respective political actors eligible to initiate abstract constitutional review proceedings are listed in detail in Chapter I.3.1.

268 Cf. Annual Report 2019 (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020), p. 184.

269 According to the official statistics, around 9.000 individual complaints had been decided on the merits until December 2019. Cf. Annual Report 2019. (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020), p.189.

Figure 1: Abstract and Concrete Norm Reviews 1962-2019



Source: Abad Andrade 2020, p. 271.

A closer look at the distribution of decisions over time (see Figures 1 and 2) reveals the steady increase in all three types of proceedings, least distinct for abstract norm control decisions and most prominent for individual complaints. This general upwards-tendency is superposed by several significant nadirs and peaks. Regarding abstract norm applications, i.e. the direct constitutionality check of newly enacted laws, the immediate link to the political context seems obvious: As a rule, the AYM tried to avoid deciding abstract norm reviews in the aftermath of major political crises. While our data does not show whether new cases were brought before the Court during these periods[270], pending cases were definitively delayed for some time. Numbers of abstract review decisions significantly dropped after the interventions of the Turkish military in 1971[271], 1980[272]

270 During military government (1980-83) after the 1980 coup, Parliament stayed closed. Hence, no abstract review applications could have been filed by members of parliament/party groups anyway.

271 Here, the effect set in in 1974/75, i.e. three years after the actual coup, which might indicate that pending cases from before 1971 were decided, but no (or less) new applications were heard.

272 After the 1980 coup, a new Constitution was enacted in 1982, hence for some time, the AYM lacked a clear basis for decision-making (cf. Chapter I.1.2 for

and 1997. After the failed coup attempt in 2016, however, the significant nadir during the state of emergency was followed by an all-time high of 48 abstract norm review rulings in 2018. This peak could be interpreted as a sign of quick normalisation after the typical phase of relative inaction during acute political crisis.

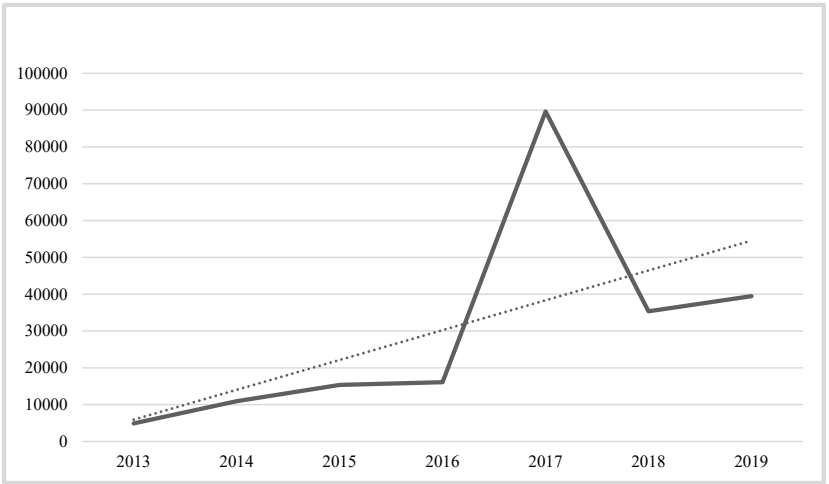
At first sight, the exceptional amount of individual complaint rulings in 2017 seems to point in a similar direction. But this interpretation is only partly true: In the months after the failed coup, while a strict state of emergency was in place in the whole country, the AYM received almost 90.000 applications of Turkish citizens, the vast majority of whom claimed a violation of their fundamental rights by repressive emergency measures.[273] After the Government had created the Commission for Examination of State of Emergency Measures *(Olağanüstü Hal İşlemleri İnceleme Komisyonu)* in January 2017 by emergency decree No. 685,[274] the AYM forwarded all individual complaints related to post-coup measures to this commission, arguing that it introduced a new effective remedy of legal protection. Consequently, the Court rejected all respective individual complaints for not having exhausted all available forms of legal recourse. This strategy also accounts for the unusually low percentage (1,1%) of decisions stipulating a violation of constitutional rights in 2017.

details). This explains why no abstract review procedures at all were decided in 1981,1982 and 1983.

273 The number of individual complaint applications peaked in 2016 (80.756 applications), whereas it dropped to 40.530 in 2017. Because of the necessary delay between application and decision, the number of decisions peaked only in 2017, when the AYM rendered 89.650 constitutional complaint rulings (cf. https://anayasa.gov.tr/media/6789/2019_annual_report.pdf, p. 184). This does not contradict the argumentation of the Court's activism in the wake of the attempted coup.

274 Cf. Official Gazette 23/01/2017, No. 29957.

Figure 2: Individual Constitutional Complaints 2013-2019



Source: Annual Report 2019 (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020)

The development of concrete norm review cases, brought before the AYM by ordinary courts questioning the constitutionality of a law to be applied by them, shows some parallels to that of abstract review proceedings. Particularly after the 1971 and 1980 coups, the number of respective decisions dropped significantly. Yet some specific patterns can be observed as well: Numerous peaks in the statistics follow substantial constitutional amendments (1971, 1995, 2001, 2004, 2010) or the enactment of major legal reforms (i.e. Civil Code 2001, Penal Code 2005, Code of Civil Procedure 2006, Commercial Code 2010/11). Overall, the intensified legal reform activities caused by the EU accession talks of the early 2000s as well as by multiple ECtHR rulings demanding particular adaptations of the Turkish jurisdiction led to a significant rise of concrete norm review proceedings.[275] In the wake of these reforms, many Turkish judges asked the AYM to clarify the constitutionality of some of the changed norms they were supposed to apply. Hence, the Turkish constitutional justices obviously accomplished an important task of norm interpretation and harmonisation of adjudication.

275 Cf. Abad Andrade 2020, p. 271.

In addition to the absolute number of rulings, the relative number of stipulated violations of the Constitution is equally important to quantitatively assess the performance of any constitutional court. In this regard, we also lack comprehensive and robust data covering the whole period of the AYM's existence. While some scholars randomly evoke numbers or percentages without even substantiating their source,[276] others did publish more or less detailed data sets (cf. Table 2). These studies focus on different time-spans and build on different case samples, but in sum they nevertheless establish a base for plausible estimations of acceptance and rejection rates over time. Besides, data availability recently improved substantially: Since the introduction of individual complaint proceedings, the Court's Research and Case-Law Unit regularly publishes the number of decisions stating the violation of constitutional rights.[277] It sporadically even indicated the ratio of decisions which acknowledged (at least partial) unconstitutionality regarding other forms of proceeding. Based on the 2019 Annual Report of the Research and Case-Law Unit,[278] Table 4 documents the development of these numbers for five consecutive years in relation to different forms of proceedings. While there is considerable variation from year to year as well as between different types of constitutional review, all annulment rates are comparatively high.

276 Hootan Shambayati (2008), for example, claims, without giving any reference at all: "Between 1982 and 2000, the Court annulled 72 per cent of the cases it received for abstract review." (pp. 103-104). And, later in the same article: "Between 1962 and the September 1980 military coup, the Constitutional Court received an average of 19 cases per annum for abstract review. It found grounds for unconstitutionality in 37 per cent of these cases." (p. 106).

277 https://anayasa.gov.tr/media/6859/bb_istatitik_2012_2020_ilk_ceyrek_ingilizce.pdf (last accessed: 27/01/2021).

278 https://anayasa.gov.tr/media/6789/2019_annual_report.pdf (last accessed: 27/01/2021).

Table 4: Ratio of Acknowledged (Partial) Unconstitutionality

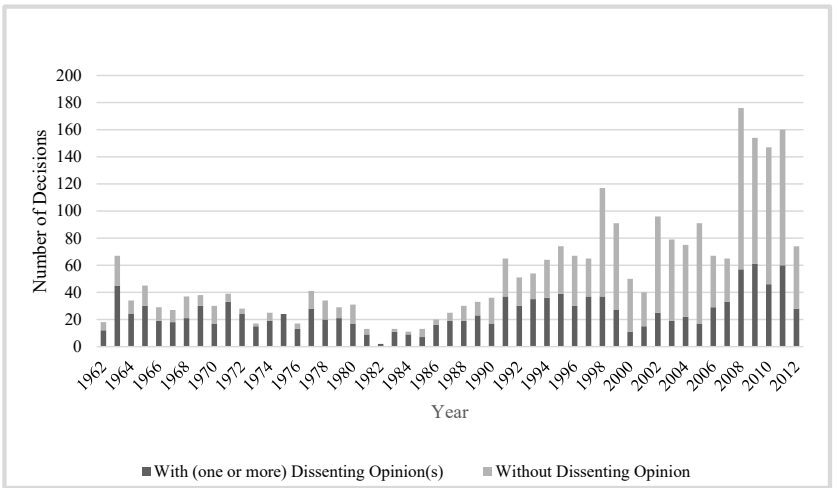
Year	Abstract Norm Review			Concrete Norm Review			Individual Complaint		
	Total Number	(Partial) Unconstitutionality	Annulment Rate	Total Number	(Partial) Unconstitutionality	Annulment rate	Total Number	(Partial) Unconstitutionality	Annulment rate
2013	N/A	N/A	N/A	N/A	N/A	N/A	4,924	75	1.5%
2014	N/A	N/A	N/A	N/A	N/A	N/A	10,926	768	7.0%
2015	14	9	64.3%	104	19	18.3%	15,369	1,827	11.9%
2016	11	3	27.3%	104	15	14.4%	16,089	1,282	8.0%
2017	23	4	17.4%	126	11	8.7%	89,650	1,025	1.1%
2018	47	7	14.9%	65	11	16.9%	35,370	2,167	6.1%
2019	17	10	58.8%	71	12	16.9%	39,469	1,225	3.1%
Average	**22.4**	**6.6**	**36.5%**	**470**	**13.6**	**15.0%**	**211,797**	**8,369**	**5.5%**

Source: Annual Report 2019 (https://www.anayasa.gov.tr/media/6789/2019_annual_report.pdf; last accessed: 20/10/2020)

These findings are generally in line with the – very fragmentary – data available for earlier phases of the AYM's existence. For the time period until 2012, scholarly publications suggest annulment rates ranging from 29% to around 70% (cf. Table 2). This huge spread is certainly due to differences in sampling and calculating. There seems to be, however, some plausibility in the general tendencies to be deducted from these numbers. Ceren Belge, who published one of the most comprehensive and transparent quantitative analyses of the AYM's adjudication, indicated that during the first two decades of its existence, the Court stipulated (partial) unconstitutionality in 46% of its 671 norm control rulings.[279] A similar result can be extrapolated from Aylin Aydin-Cakir's quantitative analysis of all 1028 norm control cases between 1984 and 2010: Whereas she does not give an overall average of annulment decisions, the mean between the lowest (29%) and highest (80%) calculated ratios adds up to 54,5% of rulings stating at least partial unconstitutionality.[280]

279 Cf. Belge 2006, p. 666.
280 Cf. Aydin-Cakir 2018, p. 1108.

Figure 3: Number of Procedures and Rate of Dissent



Source: Abad Andrade 2020, p. 270.

Figure 3 shows, that the slight decline of dissenting opinions at the Constitutional Court of Turkey since the 1980s is directly related to the increasing number of rulings. Consequently, the Court's growing workload seems to be at least one plausible explanation for this development. Nevertheless, the percentage of dissenting opinions stayed exceptionally high for a European-type constitutional court with 'concentrated' judicial review and a more or less consensus-orientated way of decision making: Comparable data from other European constitutional courts document dissent rates from 4,2% (Spain), 7,4% (Germany) to 29% (Czech Republic).[281] And, what is even more telling, the number of often uncoordinated dissenting and concurring opinions to varying parts or to the entire argumentation of one and the same ruling is exceptionally high compared to these other constitutional courts: in over two thirds of all non-unanimously taken decisions, more than one justice uttered their dissent, in every forth case more than three justices did so, and there are even several

281 Cf. Abad Andrade 2020, p. 26, Table 1. Only the Bulgarian constitutional justices dissent almost as frequently as their Turkish colleagues (53%).

rulings with six, seven or eight separate dissenting opinions.[282] As we will discuss in Chapter II.5.4, in the analysed sample of key decisions the ratio of separate opinions is even above average (cf. also Table 9). The published dissenting opinions not only are very diverse in length, argumentation, style and phrasing, but they also shed light on the complexity of decision-making, internal debates and dynamics, and are particularly illuminating with regard to the AYM's lack of argumentative persistence. In many respects, the dissenting opinions document that the AYM has never been that "remarkably homogenous court"[283], which it has so often wrongly been considered to be.

3. The Sample: Selection Criteria and Overall Features

Every attempt at understanding and assessing a court's impact on the political process via the close reading of its rulings has to select a manageable number of decisions out of a large quantity of cases. As any randomised sampling would include too many rulings in order to provide for generalisable explanations, the case selection strategy must be based on a well-informed, relevance-oriented choice. In theory, stratified sampling could be an option to select a representative body of rulings according to all relevant features, such as type of proceedings, constitutional issue/right(s) in question, acknowledged unconstitutionality rate, number of dissenting opinions etc. In practice, however, this is impossible because we still lack systematic knowledge about what features do determine the relevance of a constitutional court ruling – and how they possibly interrelate.[284] Hence, our case selection is based on a sampling strategy similar to the one Jakab et al. used in their study "Comparative constitutional reasoning". For each of the 18 analysed courts, they asked country experts to determine 40 "leading cases", i.e. "the rulings deemed the most important in the legal community of the court under consideration. And 40 was chosen as

282 Cf. Abad Andrade 2020, p. 203. Maria Abad Andrade analyses in great detail the contradictory combination of consensus-oriented and majoritarian elements in the AYM's decision-making process as one of the main reasons for its difficult and partly failed institutionalisation.

283 Shambayati 2008, p. 106.

284 For a detailed discussion of the problems with randomised and stratified sampling strategies, see Jakab et al. 2015, p. 6-7.

the appropriate compromise to enable a thorough examination of every judgment while still providing a meaningful basis for comparison."[285]

Regarding the AYM case law, though, also this form of expert sampling is particularly difficult, because no set 'legal community' exists in which the Court's rulings are regularly discussed and assessed. Whereas in Germany and France, for example, collections of important rulings are published and regularly updated,[286] such a "canon of cases"[287] has never been established in Turkey regarding the norm control decisions. Since 2013 the Court publishes selected individual complaint cases on a yearly basis, though.[288] For norm control decisions this has been done only once (for the years 2020-2021).[289] Of course, case selection on the dependent variable (here: 'importance' or 'relevance' of the ruling) is "necessarily biased to a certain degree"[290], favouring an over-representation of politically salient decisions. In the almost complete absence of other systematic, let alone judicially justified, selection criteria, this bias might become even more crucial. In order to counteract the dominance of these few but highly visible decisions, we explicitly aimed at comprising the whole range of issues the AYM dealt with over the years.

Our sampling processtherefore started by a thorough search of the available literature on the Court, covering the complete time span of its existence. We particularly focused on publications by Turkish law scholars mentioning specific decisions. While some experts, like *Erdoğan Teziç*, *Fazıl Sağlam*, *Ergun Özbudun*, *Bülent Tanör*, *Necmi Yüzbaşıoğlu*, *Kemal Gözler*, *İbrahim Ö. Kaboğlu* or *Esin Örücü* frequently refer to case law, these references are hardly ever backed by a systematic overview of relevant rulings on the issue in question. One of the rare analyses scanning a broad range of AYM rulings is Ceren Belge's widely quoted study "Friends of the Court".[291] The political scientist not only aggregated 671 judicial review decisions issued between 1962 and 1999, but she also provided for a summary evaluation of over 60 of them. She particularly focused on "two issue

285 Jakab et al. 2017a, p. 27.
286 Cf. Favoreu / Loïc 2009; Grimm / Kirchhof / Eichberger 2007.
287 Jakab et al. 2015, p. 7.
288 https://anayasa.gov.tr/tr/yayinlar/bireysel-basvuru-secme-kararlar/ (last accessed: 20/07/2022).
289 https://anayasa.gov.tr/tr/yayinlar/norm-denetimi-secme-kararlar/ (last accessed: 20/07/2022).
290 Jakab et al. 2017a, p. 28.
291 For a detailed discussion of this seminal study cf. the Introduction and Chapter II.1.2.

areas", i.e. rulings protecting the constitutional rights of specific groups, "such as civil servants, the judiciary, and universities" as well as decisions addressing "civil liberties, such as the freedoms of expression, assembly, and association".[292]

On top of the scattered hints of what leading Turkish and international academics, journalists and other public figures consider to be particularly relevant decisions,[293] we also tried to build our sample on the references of the AYM itself. This, however, is also a difficult endeavour, because we found few and very unsystematic self-references. Until the 2010 reform, the Court did not keep any record of what could be particularly important rulings, leaving future referencing to the personal memory of individual justices or to chance.[294] This practice slightly improved since the establishment of the Research and Case-Law Unit: step by step, the Court's homepage set out to provide for more coherent information about recent decisions. It started by a comprehensive documentation of individual complaint decisions, including short English summaries of most of the rulings based on an examination on the merits. This selection contains valuable information about the supposed relevance of certain judgements. More recently, the category "leading judgements" was explicitly added to the homepage. It displays short summaries of certain constitutional review rulings, mostly from the early 2000s, as well as references to selected individual complaint decisions. There is, however, no explanation of what categorises a judgment as "leading"; nor may any systematic sampling strategy be deducted from the steadily growing body of summarised decisions.[295]

Against the backdrop of all the patchy bits and pieces of available information, we developed a threefold sampling strategy: First and foremost, we collected fifty constitutional review cases decided between 1962 and 2012, representing the whole range of issues brought before the AYM until the reform of 2010. After browsing as many of the nearly 3000 decisions as possible, we selected particularly relevant cases, highlighting 'typical' features of AYM argumentation and doctrine. In doing so, we mostly focused on rulings which did not catch much public attention, because they lack an immediate political dimension, but which neverthe-

292 Belge 2006, p. 667.
293 Cf. the literature overview provided in Table 2.
294 The specific function of self-referencing in some of the analysed rulings is detailed in Chapter II.5.2.
295 Cf. https://www.anayasa.gov.tr/en/leading-judgments/constitutionality-review/ (last accessed: 14/11/2020).

less considerably influenced the interpretation of key constitutional law principles in Turkey. The result of this thorough and lengthy selection process is documented in Part III of the book, containing the contextualised, commented and partially abbreviated English translation of the fifty key decisions.

Second, we took stock of all party ban rulings. As these – often extremely long – decisions are well accessible and heavily over-represented in the public perception of the AYM, we did not include them into the documented data corpus. Instead, we sum up the essence of the decisions in Chapter II.4.1, and assess their relevance in relation to the Court's overall political impact. For this particular type of proceedings, we can build on a rich basis of secondary literature included in our evaluation. The third empirical component of the analysis consists of brief references to more recent individual complaint cases. It goes without saying that the new type of proceedings added substantially to the scope and the direction of the AYM's fundamental rights' adjudication. A systematic inclusion of this new phase in the Court's development, however, would not only have been difficult because of the exponential rise of decided cases. More importantly, we explicitly focused our case-by-case analyses on so far mostly ignored older case law. As explained above, the individual complaint rulings have been well documented and contextualised from the start. Hence, the rationale and the impact of relevant decisions in this field are easier to evaluate even without a thorough case-by-case examination. We therefore sporadically refer to them wherever this offers additional insights into the AYM's (changing) doctrine in a long-term perspective, but we do not analyse them in detail.

As a result, our main data corpus consists of fifty constitutional review decisions, which fairly well represent the range of topics and the main patterns of argumentation developed by the AYM during the first fifty years of its existence. The selected rulings can be grouped into ten topical categories, focusing either on questions of state organisation and separation of power or on fundamental rights' issues (cf. Table 5). It is important to note that in all these topical sets, we analysed several rulings from different points in time. Hence, any possible doctrinal development or change of argumentation can be traced. Concerning the Court's adjudication on different aspects of judicial independence, for example, the four analysed decisions date from 1971, 1975, 1993 and 2011; and the key rulings on the constitutional principle of laicism span the period from 1979 to 2008.

Table 5: Topics, Type of Review, Year of Key Decisions

Set	Titel	E. / K. Number	Date of Publication	Review Type	Partial Unconsti-tutionality
2.1 State under the Rule of Law Principle	Limits of Administrative Privilege in Prosecution	E. 1991/26, K. 1992/11	23/11/1992	CNC	Yes
	Stay of Execution and Freedom to Claim Rights	E. 2006/33, K. 2006/36	10/01/2007	CNC	Yes
	Limitation of Executive Influence on Selection Procedures	E. 2005/85, K. 2009/15	03/04/2009	ANC	Yes
	Re-Organisation of the Statistical Institute	E. 2008/105, K. 2010/123	26/02/2011	CNC	No
2.2 Judicial Independence	Independence of Public Prosecutors	E. 1970/39, K. 1971/44	16/12/1971	ANC	Yes
	Legal Basis of the Formation of State Security Courts	E. 1974/35, K. 1975/126	11/10/1975	CNC	Yes
	Appointment Procedures of Judges and Public Prosecutors	E. 1992/39, K. 1993/19	17/10/1995	ANC	No
	Unequal Treatment of Military and Civilian Judges	E. 2010/32, K. 2011/105	27/10/2011	CNC	Yes
2.3 Executive Law-Making Power	Hierarchy of Enabling Laws and Statutory Decrees	E. 1989/04, K. 1989/23	08/10/1989	ANC	Yes
	Time Limits of Enabling Laws	E. 1988/62, K. 1990/03	12/10/1990	ANC	Yes
	Judicial Emancipation in Review of Statutory Decrees	E. 1993/33, K. 1993/40-1	23/10/1993	ANC	Yes
	Constitutional Basis of Privatisation Law	E. 1994/49, K. 1994/45-2	10/09/1994	ANC	Yes
	Judicial Self-Restraint in Review of Statutory Decrees	E. 2011/60, K. 2011/147	15/12/2011	ANC	No
2.4 Emergency Powers and Anti-Terrorism Legislation	Constitutional Review of Emergency Decrees I	E. 1990/25, K. 1991/01	05/03/1992	ANC	Yes
	Constitutional Review of Emergency Decrees II	E. 1991/06, K. 1991/20	08/03/1992	ANC	Yes
	Constitutional Review of Emergency Decrees III	E. 2003/28, K. 2003/28	16/03/2004	CNC	Yes
	Constitutionality of Anti-Terrorism Law	E. 1991/18, K. 1992/20	27/01/1993	ANC	Yes
	Right to Life of Terror Suspects	E. 1996/68, K. 1999/01	19/01/2001	ANC	Yes
	Criminal Responsibility of Children in Case of Terrorist Accusations	E. 2011/26, K. 2012/4	26/06/2012	CNC	No

Set	Titel	E. / K. Number	Date of Publication	Review Type	Partial Unconsti-tutionality
2.5 Parliamentary Sovereignty	Immunity of Members of Parliament	E. 1994/09, K. 1994/28	Not published	Annulment of a parliamentary decision	No
	Parliamentary Procedure of Presidential Election	E. 2007/45, K. 2007/54	27/06/2007	ANC	Yes
	Constitutional Amendments Concerning Presidential Elections	E. 2007/72, K. 2007/68	07/08/2007	ANC	No
	Constitutionality of the New Presidential Election Law	E. 2012/30, K. 2012/96	01/01/2013	ANC	Yes
3.1 Fundamental Rights vs. Principles of the Republic	Religious Identity in ID Cards I	E. 1979/09, K. 1979/44	13/03/1980	CNC	No
	Religious Identity in ID Cards II	E. 1995/17, K. 1995/16	14/10/1995	CNC	No
	Headscarf Decision I	E. 1989/01, K. 1989/12	05/07/1989	ANC	Yes
	Headscarf Decision II	E. 2008/16, K. 2008/116	22/10/2008	ANC	Yes
	Right to Property of Foreigners	E. 1986/18, K. 1986/24	31/01/1987	ANC	Yes
	Right of Minorities to Choose a Non-Turkish Family Name	E. 2009/47, K. 2011/51	12/07/2011	CNC	No
3.2 Freedom of Association	Freedom of Association of International Organisations	E. 1963/199, K. 1965/16	23/09/1965	ANC	No
	Freedom of Association and Assembly	E. 1976/27, K. 1976/51	16/05/1977	ANC	Yes
	Duties of a Demonstration's Organisation Committee	E. 2004/90, K. 2008/78	05/07/2008	CNC	No
3.3 Freedom of Speech and Media	Crime of Stirring Up Social Unrest	E. 1963/193, K. 1964/09	11/06/1964	ANC	No
	Press and Broadcasting Privilege	E. 1999/39, K. 2000/23	12/10/2000	ANC	Yes
3.4 Prisoners' Rights and Fair Trial	Death Sentence	E. 1972/13, K. 1972/18	24/07/1972	ANC	Yes
	Amnesty for Certain Groups of Political Prisoners	E. 1974/19, K. 1974/31	12/07/1974	ANC	Yes
	Treatment of Prisoners and Visiting Rights	E. 2012/07, K. 2012/102	06/10/2012	CNC	No
	Unequal Standards in Military and Civilian Criminal Law	E. 2011/98, K. 2012/24	19/05/2012	CNC	No

Set	Titel	E. / K. Number	Date of Publication	Review Type	Partial Unconsti-tutionality
3.5 Equality before the Law and Gender Equality	Mitigation of Sentence for Rape Crimes	E. 1988/04, K. 1989/03	10/01/1990	CNC	Yes
	Mitigation of Sentence for Honour Killings	E. 1997/45, K. 1998/48	22/11/2003	CNC	Yes
	Increase of Sentence in Domestic Violence Cases	E. 2005/151, K. 2008/37	29/03/2008	CNC	Yes
	Equal Treatment of Spouses in Case of Adultery I	E. 1996/15, K. 1996/34	27/12/1996	CNC	No
	Equal Treatment of Spouses in Case of Adultery II	E. 1998/03, K. 1998/28	13/03/1999	CNC	No
	Work Permission of Female Spouses	E. 1990/30, K. 1990/31	02/07/1992	CNC	No
	Severance Payment for Female Employees	E. 2006/156, K. 2008/125	26/11/2008	CNC	No
	Right of Female Spouses to Use Their Premarital Family Name I	E. 1997/61, K. 1998/59	15/11/2002	CNC	Yes
	Right of Female Spouses to Use Their Premarital Family Name II	E. 2009/85, K. 2011/49	21/10/2011	CNC	Yes
	Rights of Children Born Out of Wedlock I	E. 1987/01, K. 1987/18	29/03/1988	CNC	No
	Rights of Children Born out of Wedlock II	E. 1990/15, K. 1991/05	27/03/1992	CNC	No
	Social Equality and the Right to Receive Health Benefits	E. 1990/27, K. 1991/02	19/08/1991	CNC	Yes

Source: Own Compilation; ANC = Abstract Norm Control; CNC = Concrete Norm Control.

All in all, we analysed eight rulings issued under the Constitution of 1961, 33 rulings issued under the Constitution of 1982 until the 2000s, and nine rulings issued after the constitutional reform of 2010, which substantially changed the modus operandi of the AYM. Compared to the overall 1:5 distribution between abstract and concrete norm review decisions, our sample is significantly lopsided in favour of abstract review cases, which represent almost half of the selected key decisions (24 out of 50). This, however, can be easily explained: We particularly looked for rulings which settled fundamental constitutional questions, relevant beyond the specific legal provision under review. This is more often the case in abstract than in concrete review decisions. We also included one decision under Art. 83-85 TA, regulating the conditions of loss of parliamentary immunity[296]. In this landmark ruling, dating from 1994, the borderline between legal and political argumentation is as evident as in some of the more prominent and supposedly much more 'politicised' party ban cases.

Regarding the acknowledged unconstitutionality rate, our sample is in line with the overall average for norm control decisions of roughly 50% (cf. Chapter II.1.2): in 29 of the selected 50 key cases, the AYM stated at least partial unconstitutionality, which represents an acceptance rate of 59%. It seems obvious, that rulings challenging the parliamentary majority by declaring void a law which has been recently enacted by it tend to be perceived as particularly relevant and may therefore be over-represented among the leading cases. We can show, however, that this logic of political confrontation between Parliament and Court does not always apply in Turkey – and that it is no precondition for a decision to be particularly relevant: 21 of the selected rulings strike down the unconstitutionality claim. Another common assumption holds that abstract norm proceedings are above all a weapon of the parliamentary opposition, asking the court to stop legislation enacted by the majority on constitutional grounds.[297] In the Turkish case, this does not always apply: Out of the 24 analysed abstract review cases, only 18 were brought before the AYM by the parliamentary opposition. The remaining six leading abstract review decisions were initiated by representatives of the political majority. In three cases, the Government addressed the Constitutional Court despite the law in question had been enacted by its 'own' parliamentary majority[298], in one

296 For details on the proceedings cf. Chapter I.3.4.

297 Cf., for the case of the BVerfG, Stüwe 2006, p. 219-221.

298 Cf. *Judicial Self-Restraint in Review of Statuatory Degrees* (E. 1993/33, K. 1993/40-1 (23/10/1993), III.2.13); *Constitutional Basis of Privatisation Law* (E. 1994/49,

case the initiator was the (formally neutral) State President[299], and in three cases, MPs from different parties, including members of the parliamentary majority, started the proceedings[300].

These findings, as well as the outlined selection criteria show that the political context in which the respective rulings were issued covers all possible government constellations, including CHP- and AP-led cabinets in the 1960s and 1970s, varying coalition governments of the 1980s and 1990s, as well as the AKP dominance since 2002. While we did not control for equal distribution of the rulings regarding the different political settings, the outcome is relatively well-balanced. If anything, cases decided during the first ten years of AKP rule (19) are slightly over-represented compared to the respective time span. This seems justified, because the establishment of the very stable one-party government under the leadership of Recep Tayyip Erdoğan marks a decisive turning point in Turkish political history, culminating in the current re-autocratisation process. As said before, it is one of the aims of this book to assess what role the AYM played within this process so far.

4. Qualitative Analysis of AYM Key Decisions

Which issues are discussed in constitutional court rulings is as least as important as how they are decided. In principle, almost any societal topic can be tied back to some constitutional question, if there is the political will to do so. As discussed in the Introduction, one important characteristic of courts in general and constitutional courts in particular is their reactiveness, i.e. they can only decide once a case is brought before them. And, equally important, most courts have no right to refuse a decision, as long as competences and procedures have been respected.[301] Both preconditions apply to the AYM. Hence, one has to keep in mind that the range of constitutional issues broached in the Court's adjudication and the frequency

---

K. 1994/45-2 (10/09/1994), III.2.12); *Freedom of Association and Assembly* (E. 1976/27, K. 1976/51 (16/05/1977), III.3.8).

299 Cf. *Headscarf Decision I* (E. 1989/01, K. 1989/12 (05/07/1989), III.3.3).

300 Cf. *Independence of Public Prosecutors* (E. 1970/39, K. 1971/44 (16/12/1971), III.2.5); *Right to Property of Foreigners* (E. 1986/18, K. 1986/24 (31/01/1987), III.3.5); *Amnesty for Certain Groups of Political Prisoners* (E. 1974/19, K.1974/31 (12/07/1974), III.3.12).

301 The political question doctrine applied by the US Supreme Court is one of the rare exceptions to this rule. Cf., for example, Barkow 2002; Piazolo 1994.

with which they are addressed does not necessarily reveal any strategic agenda of the justices. It rather shows how the other constitutional actors, in particular parliamentary parties and the executive, relate to the AYM and how they 'employ' it to their own ends. In addition, since the introduction of the individual complaint procedure, also individual citizens have an important impact on the agenda-setting of the AYM, as will be shown in the following sections of this chapter. In other words: It is hardly in the Court's power to judicialise political questions; instead it is the political stakeholders who cannot or do not want to exhaust their political means and opportunities and thus sidestep taking the legal path.[302]

One telling example of the political rather than judicial agenda-setting which heavily influenced the AYM adjudication dates back to the first years of the court's existence. As mentioned in the brief summary of the constitutional history of Turkey (Chapter I.1.1), from 1965 to 1973, the Workers' Party of Turkey (*Türkiye İşçi Partisi*, TİP) systematically initiated abstract norm control proceedings on various subject matters in its fight for the strengthening of representative democracy and the implementation of rule of law principles in Turkey.[303] This first ever socialist party to be represented in the Grand National Assembly, winning 3% of the votes in the elections of 1965 and 1969 respectively,[304] caused considerable tension with the overwhelming conservative parliamentary majority. As the party's few deputies naturally could not impose their views in disputes about legislative procedures or the substance of legislation, they repeatedly referred to the Constitutional Court for support. In the two terms of its presence in Parliament, the TİP submitted no less than thirty-nine norm controls to the AYM.[305] The scope of the challenged laws makes impressive reading: they included provisions relating to passports, criminal law and criminal procedures, elections, civil servants, the press, the police, employment, village life, municipal administration, Members of Parliament, political parties, trade unions, the right to strike, collective agreements, states

302 Cf. in this sense Hirschl 2004, p. 6; Hirschl 2007; Stone Sweet 2002; Shapiro / Stone Sweet 2002.

303 For the history of the Workers' Party of Turkey, cf. Aybar 2014; Ünsal 2002.

304 Due to the changed electoral provisions, the same amount of votes, which resulted in 14 parliamentary seats in 1965 only brought 2 seats in 1969.

305 As no official records were taken of all norm controls submitted by TİP, this list was compiled by the authors, based on the official collection of decisions (AKMD) and Öngel 2017.

of emergency and military courts.[306] In addition, the party applied to the Court regarding the unconstitutional use of parliamentary RoP and two laws aimed at amending the Constitution.

Even though the majority of the applications was rejected by the Constitutional Court, TİP's occasional judicial successes contributed substantially to the gradual liberalisation of the society and the state in Turkey. The significant impact of the party's challenge to the parliamentary majority by referring to the AYM became apparent after the military coup of 1970. When the putschists redesigned the political system and imposed constitutional amendments, they made sure that (leftist) opposition parties with too few deputies to form a parliamentary group could no longer apply to the AYM in order to make it an ally of its progressive political goals.[307] While counterfactual reasoning is always problematic, it seems worthwhile to consider how different the AYM's political role could have evolved, if TİP's strategy had succeeded over a longer period of time.[308]

Voting rights are another example which shows how important it is for the AYM to get an opportunity to decide on politically salient issues: when opposition parties appealed to the Court, it repeatedly defended the constitutionally guaranteed principle of proportional representation in Parliament against attempts of respective political majorities to exclude small opposition groups for the sake of parliamentary stability. Both under the Constitutions of 1961 and 1982, the AYM, when addressed, declared fundamental amendments of the election laws unconstitutional which would have severely damaged the multiparty system.[309]

In the following subchapter, we give an overview of the range of issues brought before the AYM over time. It goes without saying that this list is not exhaustive, but it covers all significant aspects of state organisation

306 Two key decisions initiated by TİP are analysed and documented in the book: *Crime of Stirring up Social Unrest* (E. 1963/193, K. 1964/9 (29/01/1964), III.3.10) and *Freedom of Association of International Organisations* (E. 1963/199, K. 1965/16 (16/03/1965), III.3.7); in both cases, the claim for unconstitutionality was rejected by the AYM.

307 Cf. Chapter I.3.1 for details on the (changed) Art. 149 of the Constitution of 1971.

308 In this context, it is hardly surprising that TİP was banned by the AYM in 1972 for "promotion of separatism and promotion of class dictatorship" (cf. Table 6).

309 Cf. E. 1968/15, K. 1968/13 (06/05/1968) (d'Hondt system with barring clause); E. 1995/54, K. 1995/59 (18/11/1995) (d'Hondt system with barring clause in constituencies).

and fundamental rights' protection consecutive generations of justices dealt with and thus shaped constitutional politics in Turkey. Two general trends stand out: On the one hand, there is a clear pattern of regularly disputed key issues, which play a dominant role in the Court's case law. On the other hand, there are obvious gaps, particularly regarding rare or completely absent adjudication on some fundamental rights enshrined in both the Turkish Constitutions of 1961 and 1982. Before going into more detail on this, the chapter starts with an assessment of the most prominent – and therefore potentially overrated – feature of Turkish constitutional adjudication: political party closure cases.

4.1 Political Party Ban Cases

The prohibition of political parties whose activities violate constitutional principles and thus pose a threat to the political system is generally justified as a classical tool of militant democracy.[310] This option exists in many countries, and it seems all the more legitimate, if – as it is the case in Turkey – its exercise is restricted to the sole competence of the constitutional court. In Turkey, however, the number and scope of party ban procedures significantly exceed the 'usual' extent of this practise.

Between 1962 and 2020, the AYM had to decide on a total of 49 applications to prohibit political parties.[311] Under the Constitution of 1961, six procedures were initiated which invariably led to the ban of the incriminated party. Since the Constitution of 1982 entered into force, 43 closure cases were opened; 20 of them resulted in the prohibition of the party in question. Hence, as Table 6 details, a total of 26 parties was banned from the political life of the country over a period of 60 years. Particularly during the 1990s and 2000s, almost one party per year was closed down on average. Even if no further bans have been stipulated between 2010 and 2022, Turkey still has the reputation to be "a graveyard of political parties"[312].

310 On party bans as an instrument of militant democracy, cf. Loewenstein 1937a; 1937b.

311 The number of party closure cases indicated in different sources varies considerably. All data given in this chapter are based on own research and calculation. According to these findings, two additional parties were banned prior to 1961 by ordinary courts.

312 Celep 2014, p. 373.

Table 6: Party Ban Decisions

Year	Name of the Party	Decision Number and Date of Publication	Reason for / Context of the Ban
26/01/1954	The Nation Party (*Millet Partisi*)	Prior to foundation of AYM	Banned by the Ankara Peace Court
27/05/1960	Democrat Party (*Demokrat Parti*)	Prior to foundation of AYM	Banned by the Ankara Civil Court of First Instance
1968	Workers-Farmers' Party (*İşçi-Çiftçi Partisi*)	E. 1968/31, K. 1968/44 (30/12/1968)	Formal deficiencies (not established in accordance with the law)
1972	National Order Party (*Milli Nizam Partisi / MNP*)	(E. 1971/01 (Parti Kapatılması), K. 1971/01 (14/01/1972)	Violation of laicism; acting against laicist order
1972	Turkey Progressive Ideal Party (*Türkiye İleri Ülkü Partisi / TİÜP*)	E. 1971/02 (Parti Kapatılması), K. 1971/02 (06/01/1972)	Formal deficiencies (party statute not in accordance with the law)
1972	Workers' Party of Turkey (*Türkiye İşçi Partisi / TİP*)	E. 1971/03 (Parti Kapatılması), K. 1971/03 (06/01/1972)	Promotion of separatism and promotion of class dictatorship
1973	Grand Anatolia Party (*Büyük Anadolu Partisi*)	E. 1972/01 (Parti Kapatılması), K. 1972/01 (23/03/1973)	Formal deficiencies (party did not act in accordance with the law)
1980	Turkish Labourers' Party (*Türkiye Emekçi Partisi / TEP*)	E. 1979/01 (Parti Kapatılması), K. 1980/01 (26/07/1980)	Promotion of separatism and promotion of class dictatorship
1984	Peace Party (*Huzur Partisi*)	E. 1983/02 (Parti Kapatma), K. 1983/02 (15/10/1984)	Formal deficiencies (party statute and party programme not in accordance with the law)
1992	Republican People's Party (*Cumhuriyet Halk Partisi / CHP*)	E. 1990/02 (Siyasî Parti Kapatma), K. 1991/02 (24/04/1992)	Formal deficiencies (party statute not in accordance with the law)
1992	Socialist Party (*Sosyalist Parti*)	E. 1991/02 (Siyasi Parti-Kapatma), K. 1992/01 (25/10/1992)	Promotion of separatism
1992	United Communist Party of Turkey (*Türkiye Birleşik Komünist Partisi*)	E. 1990/01 (Siyasi Parti Kapatma), K. 1991/01 (28/01/1992)	Promotion of separatism and class dictatorship
1993	Grand Anatolia Party (*Büyük Anadolu Partisi*)	E. 1992/03 (Değişik İşler), K. 1992/04 (30/01/1993)	Formal deficiencies (no regular participation in elections)
1993	People's Labour Party (*Halkın Emek Partisi / HEP*)	E. 1992/01 (Siyasi Parti Kapatma), K. 1993/01 (18/08/1993)	Promotion of separatism; danger for national unity

Year	Name of the Party	Decision Number and Date of Publication	Reason for / Context of the Ban
1994	Freedom and Democracy Party (*Özgürlük ve Demokrasi Partisi*)	E. 1993/01 (Siyasi Parti Kapatma), K. 1993/02 (14/02/1994)	Promotion of separatism
1994	Greens Party (*Yeşiller Partisi*)	E. 1992/02 (Siyasi Parti-Kapatma), K. 1994/01 (10/04/1994)	Formal deficiencies (party did not submit required financial reports)
1994	Democracy Party (*Demokrasi Partisi / DEP*)	E. 1993/03 (Siyasi Parti-Kapatma), K. 1994/02 (30/06/1994)	Promotion of separatism
1994	Socialist Turkey Party (*Sosyalist Türkiye Partisi*)	E. 1993/02 (Siyasi Parti-Kapatma), K. 1993/03 (09/08/1994)	Promotion of separatism
1995	Democratic Party (*Demokrat Parti 2*)	E. 1994/01 (Siyasi Parti-Kapatma), K. 1994/03 (15/02/1995)	Formal deficiencies (re-use of a banned party's name)
1997	Labour Party (*Emek Partisi*)	E. 1996/01 (Siyasî Parti Kapatma), K. 1997/01 (26/06/1998)	Promotion of separatism
1997	Revival Party (*Diriliş Partisi*)	(E. 1996/02 (Siyasi Parti Kapatma), K. 1997/02 (18/07/1997)	Formal deficiencies (action not in accordance with the requirements of the law)
1997	Socialist Unity Party (*Sosyalist Birlik Partisi*)	E. 1993/04 (Siyasi Parti-Kapatma), K. 1995/01 (22/10/1997)	Promotion of separatism (successor party of United Communist Party of Turkey)
1997	Democracy and Transformation Party (*Demokrasi ve Değişim Partisi*)	E. 1995/01 (Siyasi Parti-Kapatma), K. 1996/01 (23/10/1997)	Promotion of separatism
1998	Welfare Party (*Refah Partisi*)	E. 1997/01 (Siyasi Parti Kapatma), K. 1998/01 (22/02/1998)	Violation of laicism; acting against laicist order
2001	Democratic Mass Party (*Demokratik Kitle Partisi*)	E. 1997/02 (Siyasî Parti Kapatma), K. 1999/01 (22/11/2001)	Promotion of separatism
2002	Virtue Party (*Fazilet Partisi*)	E. 1999/2 (Siyasi Parti Kapatma), K. 2001/02 (05/01/2002)	Violation of laicism; acting against laicist order
2003	People's Democracy Party (*Halkın Demokrasi Partisi / HADEP*)	E. 1999/01 (Siyasî Parti Kapatma), K. 2003/01 (19/07/2003)	Promotion of separatism
2009	Democratic Society Party (*Demokratik Toplum Partisi / DTP*)	E. 2007/01 (Siyasi Parti-Kapatma), K. 2009/04 (14/12/2009)	Promotion of separatism

Source: Own Compilation.

Considering the frequency and also the huge impact on the political life in the country, it is little surprising that party prohibition rulings got more public and academic attention than any other single topic of the Court's adjudication. The issue has been repeatedly covered in Turkish judicial and social science literature as well as in international journals, focusing on various aspects, such as the (partially incoherent) legal basis of the rulings,[313] a comparative and/or in-depth assessment of specific decisions,[314] or the attitudes of individual justices in these cases.[315] Besides, several banned parties appealed to the ECtHR, thus generating international attention for their cases. The ECtHR not only found a violation of the prohibited party's rights in six out of eight proceedings.[316] It also comprehensively documented all procedures on the national and European levels, including English summaries of the AYM's decisions.[317] Further analysis on the Turkish party ban rulings was provided by the Venice Commission in 2009. In its Opinion, requested by the Parliamentary Assembly of the Council of Europe (PACE), the Venice Commission briefly reviewed several proceedings and came to the conclusion, that "(t)he practice of the Constitutional Court (…) shows that the Turkish constitutional and legal rules on the prohibition of political parties do not only make it too easy

313 For a comprehensive overview cf. Yazıcı 2012.

314 Cf., among others, Kogacioglu 2003 and 2004; Koçak / Örücü 2003; Güney / Başkan 2008.

315 Cf. Moral / Tokdemir 2017.

316 The following eight prohibited Turkish parties applied to the ECtHR: United Communist Party of Turkey, Freedom and Democracy Party, Democratic Party, Labour Party, Socialist Unity Party, Democracy and Transformation Party, Welfare Party, Virtue Party. The applicants of Virtue Party withdrew the case before it was decided; the ECtHR found the dissolution of Welfare Party justified. Cf. for details Akbulut 2010, p. 46-48.

317 The relevant ECtHR rulings are: Fazilet Partisi and Kutan v. Turkey App. No. 1444/02 (Eur. Ct. H.R. Apr. 27, 2006); Emek Partisi and Senol v. Turkey, App. No. 39434/98 (Eur. Ct. H.R. May 31, 2005); Democracy and Change Party v. Turkey, App. Nos. 39210/98 & 39974/98 (Eur. Ct. H.R. Apr. 26, 2005); Socialist Party of Turkey (STP) and Others v. Turkey, App. No. 26482/95 (Eur. Ct. H.R. Nov. 12, 2003); Refah Partisi (Welfare Party) and Others v. Turkey, 2003-II Eur. Ct. H.R. 269; Dicle for the Democratic Party (DEP) of Turkey v. Turkey, App. No. 25141/94 (Eur. Ct. H.R. Dec. 10, 2002); Yazar v. Turkey, 2002-II Eur. Ct. H.R. 395; Freedom and Democracy Party (OZDEP) v. Turkey, 1999-VIII Eur. Ct. H.R. 293; United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1; Socialist Party v. Turkey, 1998-III Eur. Ct. H.R. 1233.

to prohibit a political party but that these rules are also applied in a way incompatible with European standards."[318]

As sketched out in Chapter I.3.5, Art. 68 (4) TA stipulates a wide range of criteria which justify the prohibition of a political party. The constitutional amendments of 1995 and 2001 slightly raised the bar in this regard,[319] but the restrictions are still much severer and more comprehensive than comparable rules in other European countries. Most importantly, they are directly linked to the very provisions on the freedom of political parties. Whereas Art. 68 (2) TA stipulates that "political parties are indispensable elements of democratic political life", paragraph 4 of the same article immediately restricts this democratic principle, as parties "shall not be in conflict" with the fundamental characteristics of the Republic and the integrity of the state territory, laid down in Art. 2 and 3 TA. In addition, the Turkish law on political parties specifies these constitutional boundaries in an even more restrictive way.[320] Taking into consideration these massive legal limitations, the high number of party bans issued by the AYM seems hardly surprising.

It is equally true, that the Court took an activist approach in the matter: The party ban rulings are almost unanimously interpreted in the literature as deliberate 'political' interventions, aiming to control the development of party pluralism in the country. In this context, several authors implicitly or explicitly refer to the hegemonic preservation theory, introduced earlier in the book. According to this understanding, the Turkish justices deliberately "act to guard the regime against anti-establishment ideologies"[321] and play "a tutelary role in the Turkish political system"[322]. Hence, the frequent dissolutions of political parties which were perceived as a defiance to "the collectivist premises of the Turkish statist nationalist ideology",[323] as Dicle Koğacıoğlu puts it in her very insightful analysis of the party ban

318 Venice Commission 2009, para 102.
319 In particular, in 2001 a qualification was added in Art. 69 (1), limiting the prohibition to parties which are a "center for the execution of such activities" as mentioned in Article 68 (4). In addition, the voting rules at the AYM were changed in 2001, introducing the requirement of a 3/5 qualified majority for prohibition of a party (Art. 149 TA). (Cf. also Venice Commission 2009, para 83).
320 Cf. Venice Commission 2009, para 75.
321 Moral / Tokdemir 2017, p. 264.
322 Shambayati / Sütçü 2012, p. 109.
323 Kogacioglu 2004, p. 442.

cases, reflect a general, deeply anchored attitude of most Turkish justices in a particularly explicit way.

A closer look at the merits of the party ban decisions reveals how this state-centred, nationalist interpretation of the Turkish constitutional order translates into recurrent argumentative patterns. Whenever a prohibition was based on the programmatic aims of a party's political platform, the AYM stipulated the violation of one of the fundamental Republican principles defined in Art. 2 and 3 TA (cf. also Table 6). The most frequent reason to dissolve a political party concerns the accusation of separatism, understood as "activities that infringed the territorial integrity of the state and the unity of the nation".[324] This definition invariably incriminates all political movements associated to the representation of the Kurdish minority, irrespective of their specific political goals. Hence, two parties were banned for the mere support of the issue under the 1961 Constitution, and 11 more since 1982. In addition, in the cases of the Workers' Party of Turkey (*Türkiye İşçi Partisi / TİP*; banned in 1972), the Turkish Labourers' Party (*Türkiye Emekçi Partisi / TEP*) (banned in 1980) and the United Communist Party of Turkey (*Türkiye Birleşik Komünist Partisi*) (banned in 1992), the parties' socialist or communist orientation was interpreted as "promotion of class dictatorship", equally declared unconstitutional according to Art. 68 (4) TA.

As mentioned above, the ECtHR found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in all cases brought before it, in which the AYM had banned a political party representing Kurdish interests. The ECtHR's core argument, elaborated for the first time in its rejection of the prohibition of the United Communist Party of Turkey,[325] focuses on the importance of political parties for an open and necessarily controversial debate within any democratic society. The ECtHR implies that the AYM could have assessed Art. 68 TA less strictly, as long as the party in question did not approve of or use violence to achieve its aims. Even under the restrictive normative corset established by the Turkish Constitution, the ECtHR argues, the AYM was not forced to prohibit all pro-Kurdish parties, because the mere suspicion of separatism is "no justification for hindering a political group solely because it seeks to debate in public [the problems]

324 Güney / Başkan 2008, p. 273.

325 Cf. United Communist Party of Turkey and Others v. Turkey, 1998-I Eur. Ct. H.R. 1.

of part of the State's population and to take part in the nation's political life in order to find (…) solutions [to them]."[326]

The violation of "the principles of the democratic and laicist Republic", also mentioned in Art. 68 (4) TA, constitutes another main reason for the closure of political parties in Turkey. It is important to note, though, that there are considerably fewer bans referring to a violation of this constitutional principle. The National Order Party (*Milli Nizam Partisi / MNP*) was the first party to be dissolved by the AYM for its religious – Islamic – platform in 1972. Two further decisions, rendered for similar reasons, date from 1998 (Welfare Party (*Refah Partisi*)) and 2002 (Virtue Party (*Fazilet Partisi*)) respectively (cf. Table 6). Other than in its adjudication on banned parties representing the Kurdish minority in Turkey, the ECtHR did not find a violation of the ECHR in the AYM's closure of the Welfare Party, the first ever (co-)governing party to be banned. According to the European justices, the appraisal of violence as a legitimate political tool and the active promotion of religious law (Sharia) by prominent party members, documented in the AYM ruling, clearly violate Art. 68 and 69 TA and therefore justified the ban.[327]

In the most prominent party ban case so far, directed against the ruling Justice and Development Party *(Adalet ve Kalkınma Partisi / AKP)* in 2008, some Turkish justices proved that a more nuanced approach is possible even under the restrictive constitutional framework. Six out of 11 judges voted for the prohibition of the party, i.e. one less than the necessary 3/5 majority. Hence, the qualified majority requirement introduced in 2001 showed the intended effect: Whereas the governing party, which had won the parliamentary election one year earlier with 47% of the popular vote,[328] was described as "a centre for anti-laicist activities" in the ruling, it was still not closed. Instead, the AYM imposed financial sanctions on the AKP as a less severe consequence.[329] This decision is also remarkable for its extraordinary length: while party ban rulings generally count among the most detailed AYM judgements, the AKP ruling is particularly extensive. It covers 697 pages, only 42 of which, however, contain the merits of the decision.

326 United Communist Party of Turkey and Others v. Turkey, 1998-I Eur. Ct. H.R. para. 57.
327 For a detailed assessment of the ECtHR adjudication, cf. Akbulut 2010, p. 55-60.
328 Cf. http://electionresources.org/tr/assembly.php?election=2007 (last accessed: 31/08/2021).
329 E. 2008/1 (Siyasi Parti Kapatma), K. 2008/2, 30/7/2008 (24/10/2008).

Table 6 highlights another, often neglected aspect of the AYM's party ban adjudication: In nine of its 26 rulings closing down a political party, the Court did not put forward any 'political' or ideological claims at all. Instead, it focused on rather technical reasons, such as the re-use of a forbidden party name (Democratic Party (*Demokrat Parti 2*) in 1995) or a breach of financial obligations (Greens Party (*Yeşiller Partisi*) in 1994). The question, whether less draconic sanctions would have been an option in these cases, seems reasonable but cannot be explored here in further detail. At least, there is ample proof that the AYM did not automatically follow suit whenever the Chief Public Prosecutor requested to close a party: 23 of the 49 cases brought before the Court ended without a prohibition. Particularly during the first ten years after the re-start of its activity under the new Constitution following the 1980 military coup, the AYM rejected several party ban applications. More recently, the Court also dismissed some cases as obviously futile, without even deciding on the substance of the proceedings (cf. Table 7). And, as explained earlier, the justices did not ban the AKP in 2008, because they failed to reach the necessary 3/5-quorum.

Table 7: Rejected Party Bans

Date	Name of the Party	Decision Number and Date of Publication	Decision
1984	Supreme Mission Party *(Yüce Görev Partisi)*	E. 1983/01 (Parti Kapatma), K. 1983/01 (23/06/1984)	Rejection of the ban
1984	Our Party *(Bizim Parti)*	E. 1983/03 (Parti Kapatma), K. 1983/03 (25/09/1984)	Rejection of the ban
1984	Conservative Party *(Muhafazakar Parti)*	E. 1983/04 (Parti Kapatma), K. 1983/04 (21/10/1984)	Rejection of the ban
1984	New Order Party *(Yeni Düzen Partisi)*	E. 1983/05 (Parti Kapatma), K. 1983/05 (21/10/1984)	Rejection of the ban
1985	True Path Party *(Doğru Yol Partisi / DYP)*	E. 1984/01 (Parti Kapatma), K. 1984/01 (14/02/1985)	Rejection of the ban
1989	Flag Party *(Bayrak Partisi)*	E. 1988/01 (Siyasi Parti Kapatma), K. 1989/01 (22/06/1989)	Rejection of the ban
1989	Socialist Party *(Sosyalist Parti)*	E. 1988/02 (Siyasi Parti Kapatma), K. 1988/01 (16/05/1989)	Rejection of the ban
1992	Nationalist Task Party *(Milliyetçi Çalışma Partisi)*	E. 1991/01 (Siyasi Parti Kapatma), K. 1991/03 (21/03/1992)	Rejection of the ban
2000	Democratic Peace Movement Party *(Demokratik Barış Hareketi Partisi)*	E. 1996/03 (Siyasi Parti Kapatma), K. 1997/03 (02/06/2000)	Rejection of the ban
2005	Socialist Workers' Party of Turkey *(Türkiye Sosyalist İşçi Partisi)*	E. 2003/02 (Siyasi Parti Kapatma), K. 2004/01 (08/02/2005)	Rejection of the ban
2005	Justice Party *(Adalet Partisi)*	E. 2003/03 (Siyasi Parti Kapatma), K. 2004/02 (08/02/2005)	Rejection of the ban
2005	Justice Party of Turkey *(Türkiye Adalet Partisi)*	E. 2003/04 (Siyasi Parti Kapatma), K. 2004/3 (08/02/2005)	Rejection of the ban
2005	Grand Justice Party *(Büyük Adalet Partisi)*	E. 2003/05 (Siyasi Parti Kapatma), K. 2004/04 (08/02/2005)	Rejection of the ban
2005	Turkey Is Happy with Its Disabled People Party *(Türkiye Özürlüsü İle Mutludur Partisi)*	E. 2003/06 (Siyasi Parti Kapatma), K. 2004/05 (08/02/2005)	Rejection of the ban

Date	Name of the Party	Decision Number and Date of Publication	Decision
2005	Revolutionary Socialist Workers' Party *(Devrimci Sosyalist İşçi Partisi)*	E. 2003/07 (Siyasi Parti Kapatma), K. 2004/06 (08/02/2005)	Rejection of the ban
2005	Main Road Party *(Anayol Partisi)*	E. 2003/08 (Siyasi Parti Kapatma), K. 2004/07 (08/02/2005)	Rejection of the ban
2007	Turkey Is Happy with Its Disabled People Party *(Türkiye Özürlüsü İle Mutludur Partisi)*	E. 2002/05 (Siyasi Parti Kapatma), K. 2007/01 (not published in the R.G.)	Dismissal without decision on the substance of the proceedings *(Davanın düşmesine)*
2008	Rights and Freedoms Party *(Hak ve Özgürlükler Partisi)*	E. 2002/01 (Siyasi Parti Kapatma), K. 2008/01, (01/07/2008)	Rejection of the ban
2008	Justice and Development Party *(Adalet ve Kalkınma Partisi / AKP)*	E. 2008/01 (Siyasi Parti Kapatma), K. 2008/02 (24/10/2008)	Rejection of the ban, but financial sanctioning (50% of the state aid provided for the year 2008)
2009	Socialist Workers' Party of Turkey *(Türkiye Sosyalist İşçi Partisi)*	E. 2002/02 (Siyasi Parti Kapatma), K. 2009/01 (12/02/2011)	Rejection of the ban
2009	Justice and Development Party *(Adalet ve Kalkınma Partisi / AKP)*	E. 2002/03 (Siyasi Parti Kapatma), K. 2009/03 (07/10/2009)	Dismissal without decision on the substance of the proceedings *(Davanın düşmesine)*
2009	Communist Party of Turkey *(Türkiye Komünist Partisi)*	E. 2002/04 (Siyasi Parti Kapatma), K. 2009/02 (07/10/2009)	Dismissal without decision on the substance of the proceedings *(Davanın düşmesine)*
2011	Democratic People Party *(Demokratik Halk Partisi)*	E. 2003/01 (Siyasi Parti Kapatma), K. 2011/01 (12/03/2011)	Dismissal without decision on the substance of the proceedings *(Davanın düşmesine)*

Source: Own Compilation.

One side-aspect of the frequent party bans by the AYM are the often-drastic consequences for officials and members of the closed organisation. According to Art. 69 (9) TA, they are barred for a period of five years from founding or joining any political party. This temporal exclusion from political life starts "with the date of publication in the Official Gazette of the Constitutional Court's final decision". A consecutive question, related to this norm, concerns the possibility of the criminal prosecution of party members. As long as they are Members of Parliament, they enjoy criminal immunity. Immediately after the ban of the pro-Kurdish Democracy Party (*Demokrasi Partisi / DEP*) in 1994, this rule led to a fierce political conflict between the then Speaker of the Grand National Assembly, *Hüsamettin Cindoruk*, and the Senior Public Prosecutor at the State Security Court in Ankara (*Ankara Devlet Güvenlik Mahkemesi*), *Nusret Demiral*. While the prosecutor wanted to open court trials against the members of the DEP accused of terrorist actions, the head of Parliament insisted that the incriminated party members enjoyed immunity until the AYM's decision was finally published in the Official Gazette. The Court had engaged itself in this dispute by differentiating between "loss of mandate" (*üyeliğin düşmesi*) and "end of mandate" in its ruling.[330] But it had also stated that the AYM ruling had only a declaratory function (*açıklayıcı belirleme*) in the matter.[331] When the Senior Public Prosecutor announced that he was going to arrest the DEP-officials without waiting for the official publication of the AYM decision, the Speaker of Parliament threatened that in this case he would press criminal charges against the Senior Public Prosecutor. The conflict was ultimately resolved by the publication of the judgement on 30 June 1994.[332]

Summarizing the ample AYM adjudication on the prohibition of political parties analysed in this chapter, the following features stand out: above all, the Court merely reacted to the extremely restrictive approach of Turkish politics on this highly politicised matter, as it had to decide on the many cases brought before it by the Chief Public Prosecutor on behalf of respective political majorities. We could show that it did not automatically

330 E. 1993/3 (Siyasi Parti Kapatma), K. 1994/2 (16/06/1994), published in the Official Gazette 30/06/1994 (mükerrer), No. 21976, pp. 114-115.

331 Judge *Aliefendioğlu* found even this declaratory sentence too much and objected, stating that this issue concerns the enforcement of the judgement and it was not the task of the court to make a decision in this respect.

332 Cf. the report in *Cumhuriyet*, dated 18/06/1994. The question was finally settled by a constitutional amendment on 23/07/1995, which can be regarded as a direct reaction to the political quarrel in 1994.

comply to their allegations and rejected more than half of them for various reasons, particularly frequently in the 1980s and the 2000s (cf. Table 7). It is equally true, though, that all generations of AYM justices shared a very rigid position in cases concerning the political representation of the Kurdish minority in Turkey. Whenever they had to decide on the prohibition of a party accused of violating the constitutional principle of territorial integrity and national unity they declared a ban, often without an in-depth legal assessment of the programmatic goals or the actual actions of the incriminated party. The same holds true for the Court's invariable banning of leftist, let alone communist, parties.

However, we documented a more nuanced approach regarding parties with an Islamic background. Whereas the AYM fiercly defended the constitutional principle of laicism against any alleged public manifestations of religious belief in several key decisions analysed in Chapter II.4.3, it did not automatically prohibit all political parties supposedly 'acting against the laicist order' (cf. Table 7). In the light of these findings, the contextualisation of the party ban adjudication within the much broader spectrum of leading AYM norm control decisions on various constitutional issues is essential. As we will argue in the following chapters, judicial activism on the basis of a collective ideological conviction shared by most justices across all phases of the Court's existence does not offer a convincing explanation for the particular role the AYM played, and continues to play, within the Turkish political system – including its party ban adjudication.

4.2 State Organisation Issues

It is the very idea of constitutional jurisdiction to establish an independent institution protecting the principles of state organisation and mediating in potential conflicts between representatives of the constitutional institutions. In the case of the AYM, this core function is particularly exigent because of the continued political conflict about the foundations of the constitutional order as such. As discussed above, the AYM was mainly established as a tool to preserve the political interests and the societal dominance of the so-called Kemalist elite of the 1960s. Since the quasi-octroy of the new Constitution after the 1980 military putsch, it had to interpret (and defend) an institutional setting which included rather authoritarian elements and was heavily disputed from the start. Despite these difficult circumstances, the Court became a frequently approached arbiter in all sorts of state organisation disputes. 23 of the 50 key decisions under

scrutiny refer to respective issues. 15 of them are abstract norm proceedings, seven were brought before the AYM by other courts, and one case deals with the application for the annulment of a parliamentary decision (cf. Table 5). The AYM found that the majority of the norms under review partially or fully violated the constitution and therefore annulled (parts of) them (16:7). At least on first sight, this seems to be a telling indicator of the Court's critical distance towards the initiators of the challenged norms, i.e. the parliamentary majority in most of the proceedings.

The rulings analysed in this chapter can be roughly grouped into five thematic sets, covering several fundamental and often fiercely disputed aspects of the Turkish state under the rule of law. To begin with, we sampled some decisions on different topics which all share one aspect: in the merits, the justices refer to the principle of the state under the rule of law and its significance for the constitutional system of checks and balances in Turkey in a general way. The second sub-sample consists of four rulings, rendered between 1971 and 2011, which all deal with different aspects of the independence of the judiciary. The third topic included in the analysis focuses on the competences of the executive. In a series of decisions, the AYM dealt with the crucial question of decree power: Under which circumstances and to what extent is the Government entitled to take legislative action with the force of law? Executive decrees also play an important role in the fourth set of rulings, delimitating the space of government action during a state of emergency and the AYM's – initially very restricted – right to review emergency decrees. Under the heading "state security and terrorism", we also subsumed three rulings reviewing various aspects of anti-terrorism legislation. At the core of these decisions lies the fundamental question of the proportionality of executive measures defending state institutions against possible attacks by (so-defined) terrorists. The last thematic set consists of four rulings that deal with procedural aspects of parliamentary decision-making in a broad sense. One decision reviews the constitutionality of the removal of an MP's immunity, and three rulings revise the changes of the rules of the presidential elections and the head of state's term of office enacted by Parliament.

4.2.1 General Principles of Rule of Law and Separation of Powers

The AYM regularly refers to the principle of rule of law (*hukuk devleti*) in an abstract way, often emphasising the constitutive importance of constitutional review in this regard. One typical, repeatedly mentioned statement

to this effect originates from a ruling reviewing the constitutionality of the law on the Middle East Technical University in 1976:

> "As explained in various decisions of the Constitutional Court, the rule of law reflects a state which respects and protects human rights, which establishes and carries out an equitable legal order, which is loyal to legal norms and the Constitution and all the acts which are subject to judicial review. In fact, judicial review is the fundamental component of the principle of rule of law, which builds up a trust for other components of the state. Therefore, the only power which compels a state to stay within the frame of legality and legitimacy and which impedes acts not respecting human rights and not abiding by law and the Constitution, is the power of judicial review."[333]

The conviction that the judiciary plays a particularly important role in preventing other state institutions from overstepping their competences can be found in several AYM rulings. In the concrete norm procedure on the *Limits of Administrative Privilege in Prosecution*,[334] a majority of the justices emphasised that executive bodies – here: County and Province Boards – cannot claim judicial authority under any circumstances. While the Court unanimously accepted the specific system of intra-administrative disciplinary control of public servants as constitutional, because it is explicitly granted in Art. 129 TA and it is also in accordance with the tradition of Turkish state organisation, seven out of 11 justices stipulate that judicial appeal against decisions taken by administrative bodies must nevertheless be possible. Hence, if the Board issuing a disciplinary measure may conclude that "there is no need for trial", this violates the rule of law principle. The respective Art. 6 of the law under review was therefore declared unconstitutional.

This doctrinal approach of limiting executive power by referring to the rule of law principle was upheld and further developed in two other key decisions also analysed and documented in this book. In the concrete norm review *Stay of Execution and Freedom to Claim Rights*[335] the AYM found all provisions of the Banking Law unconstitutional which established particular rules to hold the Fund Board responsible, delaying or even circumventing the 'normal' provisions of administrative jurisdiction,

---

333 E. 1976/1, K. 1976/28 (16/08/1976); As this is the ruling's only paragraph of interest in the context of this study, it is not included in Part III.

334 Cf. E. 1991/26, K. 1992/11 (23/11/1992), III.2.1.

335 Cf. E. 2006/33, K. 2006/36 (10/01/2007), III.2.2.

particularly the right to defence and the right to legal remedies in case of accusation. This decision, dating from 2006, was taken by the smallest possible majority of votes (6:5), which might explain why the argumentation developed in the merits is touching on several rule of law aspects, including the freedom to claim rights, but neither precisely defines them nor thoroughly reviews the law in question in light of these principles.

In this regard, the abstract norm review decision on the *Limitation of Executive Influence on Selection Procedures*,[336] issued in 2009, is much clearer and more authoritative. The AYM unanimously declared that all provisions under review do violate the Constitution and are therefore annulled. In a nutshell, the justices stipulated that any legal provision regulating such a highly sensitive issue as the interception of telecommunication activities for the purpose of criminal investigation, has to be very specific and in accordance with the constitutional order as a whole. Hence, the eligibility criteria for the persons in charge of the interceptions have to be specified and their legitimacy has to be underlined by the direct responsibility of the Prime Minister. As the law under review does not fulfil these criteria, the respective provisions are unconstitutional.

Taking into account the emphasis the AYM repeatedly put on the respect of general rule of law principles, the rejection of the concrete norm proceding *Re-Organisation of the Turkish Statistical Institute*[337] in 2010 marks an abrupt turn in the Court's argumentation. By this law, the Government – supported by the legislative majority in the Great National Assembly – restructured the national office in charge of statistical data collection and publication. The change of personnel, including the president of the institution, was part of this policy. Art. 7 of the contested law therefore stipulated that the term of office of the sitting president would automatically expire once the new law entered into force. In addition, the new law included very precise and 'individualised' selection criteria for the new president. The submitting court claimed that these provisions violated the rule of law principle, according to which laws have to be general, objective and abstract. Besides, the removal of the head of the statistical institute required a personalised administrative act rather than a law, because individuals cannot initiate legal proceedings against a law. Consequently, the removed president was deprived of his constitutionally guaranteed right to legal remedies.

336 Cf. E. 2005/85, K. 2009/15 (03/04/2009), III.2.3.
337 Cf. E. 2008/105, K. 2010/123 (26/02/2011), III.2.4.

Whereas the merits of the AYM decision start with a fierce but abstract appraisal of the rule of law principle very similar to the one quoted above, ten out of 15 justices found no breach of this principle in the concrete case. The brief explanation of this surprising conclusion vaguely refers to the law's "purpose of serving public interest" and to the theoretical option of re-appointing the outgoing president to his old job or "to another office, equal or superior to (…) [his] former office" in case of (re-)application.[338] *Osman Alifeyyaz Paksüt*, one of the five dissenting justices, criticised the majority ruling for bluntly ignoring the violation of the constitutionally guaranteed rule of law principle. His dissenting opinion ends with the warning that the approval of the law in question "may lead to an application of the same method for hundreds of public officials too".[339] In hindsight, these words sound almost prophetic: During and after the state of emergency following the failed coup attempt of July 2016, thousands of purged public servants were deprived of their right to legal remedies for exactly the same reason. They could not initiate legal proceedings against their dismissal, because it was issued by an emergency decree which mixed a general legal provision with individual administrative acts against all persons listed by name in the appendix of the decree.[340]

4.2.2 Judicial Independence

As shown above, the AYM repeatedly emphasised the importance of an independent judiciary for the protection of the state under the rule of law in particular and the constitutional order in general. According to Ceren Belge's seminal study, the Court's adjudication in fact "consolidated and expanded (…) [the constitutional] guarantees [on this issue] during the 1960s and delivered more controversial rulings during the 1970s".[341] Out of the huge number of AYM decisions touching on different aspects of judicial independence, we included two decisions from this period into our sample and selected two more, dating from 1993 and 2011 respectively. All in all, these rulings seem to confirm the general impression that the AYM actively fostered the autonomy of the judiciary in relation to the other constitutional institutions, but they also show the

338 Ibid., p. 265.
339 Ibid., p. 266.
340 For details on this matter, cf. Göztepe 2018b, pp. 530-532.
341 Belge 2006, p. 668.

limitations of this approach. In particular, the highly security-centred state doctrine left its mark on the adjudication.

The ruling on the *Independence of Public Prosecutors*[342] from 1971 deals with two core aspects of any independent judiciary: The status of public prosecutors within the judicial system and the way how they are appointed. The abstract norm review was brought before the Court by a group of MPs who accused the amended Law on the High Council of Judges to violate the Constitution. They particularly criticised that the selection commission for public prosecutors was dominated by representatives of the executive, i.e. the Minister of Justice and public servants accountable to him, and thus lacked the constitutionally required independence. A majority of 10:5 justices not only shared this view and therefore declared the respective provision of the law unconstitutional, but they also developed a very plausible argumentation, why public prosecutors must be shielded from any external (political) pressure in the same way as judges: Even though they are not as independent in their decision-making, they still must be

> "provided with an environment in which they can fulfil their functions solely on the basis of legal standards and their own consciences and without worrying whether or not their actions run counter to the wishes of political forces".[343]

Over 20 years later, the AYM took a quite different argumentative approach on a very similar matter. Again, the parliamentary opposition had initiated an abstract norm review, claiming some provisions of the changed Law on the Appointment of Judges and Public Prosecutors to be unconstitutional. In this case (*Appointment Procedures of Judges and Public Prosecutors* the core question concerned the selection and appointment mechanism of judges: Before the amendment, the High Council of Judges and Prosecutors used to nominate those candidates fit to serve as judges; among them, available positions were distributed by lot, and finally the appointments had to be confirmed jointly by the Minister of Justice, the Prime Minister and the State President. The contested legal reform further enhanced the power of the High Council, which should confirm the appointment instead of the government members and the head of state. As a result, the political independence of the council members became

342 Cf. E. 1970/39, K. 1971/44 (16/12/1971), III.2.5.
343 Ibid., p. 270.

even more crucial, which, according to the initiators of the constitutional review, was not completely guaranteed.

The AYM rejected the abstract norm review by 8:3 votes in an unusually long decision, but it missed the chance to systematically answer the core question: What are constitutionally required and effective criteria and/or measures to protect the members of the High Council of Judges and Prosecutors from external influence? Instead, the justices recollected the historical foundations of judicial independence in Turkey in a very detailed and technical way, repeatedly emphasising its crucial importance for the constitutional system. However, the merits did not provide for any convincing argumentative link between this general principle and the concrete question at hand.

The remaining two cases of the set deal with even more fundamental threats to the constitutional principle of judicial independence. In 1975, the Court had to decide a concrete norm review targeting the *Legal Basis of the Formation of State Security Courts*.[344] The wording and the argumentation of the ruling clearly transmit how politically sensitive this issue was in the aftermath of the 1970 military coup. While the applying Diyarbakir State Security Court put into question the whole idea of specialised courts in charge of state security, criticising them as an "extraordinary judicial authority"[345] under the direct influence of the military, the AYM did avoid any discussion of their presumed unconstitutionality from the perspective of judicial independence. Instead, it meticulously reviewed the legislative process in both parliamentary chambers and rejected the resulting law on procedural grounds, stipulating:

> "As the unconstitutionality of Articles 1 and 6 of Law No. 1773 has been stated on procedural grounds, there is no need to consider the issue from a substantive point of view".[346]

Even this cautious strategy was obviously highly contested on the bench: Out of three procedural reasons of unconstitutionality claimed by the applicant court, two were dismissed by majority vote. In this regard, four of the 15 justices issued concurring opinions, one justice dissented. The final decision, stating a violation of the RoP in the Senate while debating the law in question, which ultimately led to its annulment, was taken by 9:6 votes.

---

344 Cf. E. 1974/35, K. 1975/126 (11/10/1975) III.2.6.
345 Ibid, p. 275.
346 Ibid, p.281.

36 years later, the ruling on *Unequal Treatment of Military and Civilian Judges*[347] argued much less cautiously and in a more determined tone. Two military courts had submitted a concrete norm control, claiming that the law on military judges dating from 1963 violated the constitutional principle of judicial independence in several ways. In a nutshell, they criticised that military judges were treated differently from ordinary judges in case of disciplinary proceedings against them, offering them fewer and less effective means of defence. The AYM not only endorsed this view and unanimously stipulated the annulation of the law, but it also underpinned its decision with a convincing argumentation. In the merits, the justices once more emphasised the crucial importance of judicial autonomy for the state under the rule of law and directly linked it to the individual independence and protection of judges. They then systematically subsumed the law in question under these principles and clearly showed why military institutions should be held accountable to the same standards as their civilian counterparts. It is obvious, that this determined and unanimous decision profited from the changed political background in Turkey: Compared to the 1970s, the Turkish military had lost most of its dominance in political life by 2011.

4.2.3 Decree Power

One of the most contentious issues of Turkish constitutional politics concerns the boundaries of executive law-making. The Constitutions of 1961 (after the amendments in 1971) and 1982 provided the Government with relatively broad competencies in this regard. Until the constitutional reform of 2017[348], Art. 91 (1) TA stipulated that the Grand National

347 Cf. E. 2010/32, K. 2011/105 (27/10/2011), III.2.8.

348 The constitutional amendments of 2017 not only transferred the decree power from the Council of Ministers to the State President, but also significantly enlarged its scope. Art. 91 was eliminated completely, and the new Art. 104 on duties and powers of the State President stipulates in paragraph 17: "The President of the Republic may issue presidential decrees on matters relating to the executive power. The fundamental rights, individual rights and duties included in the first and second chapters, and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by presidential decrees. No presidential decrees shall be issued on matters to be regulated exclusively by law embodied in the Constitution. No presidential decree shall be issued on matters explicitly regulated by law. In the case of a conflict between presidential decrees and the laws due to differences

Assembly could empower the Council of Ministers to issue decrees having the force of law (*Kanun Hükmünde Kararname*, KHK). This possibility was limited, however, in some ways: Decrees should not restrict constitutionally granted individual and political rights (Art. 91 (1)), and "the enabling law shall define the purpose, scope, principles, and operative period of the decree having the force of law" (Art. 91 (2)). The AYM was repeatedly approached by Members of Parliament to decide whether those conditions were met. The five most significant of these abstract norm proceedings, covering the time span from 1989 to 2011, are included in our selection of key cases. Three of them were initiated by the biggest opposition group[349], two even by parliamentary members of the Government coalition[350] who wanted to defend the legislative competences of the Great National Assembly against executive claims of law-making. It is also worthwhile mentioning that in two of these cases, the enabling laws were reviewed by the Court[351], while three applications targeted specific KHKs implemented by the Government.[352]

The decision on the *Hierarchy of Enabling Laws and Statutory Decrees*[353], rendered in 1989, set the tone for all following rulings on related issues. The applying SHP-deputies, representing the main opposition party, claimed that not only a recently implemented KHK should be annulled, but that the whole normative basis of this decree was unconstitutional. According to their argumentation, Art. 128 TA explicitly required a law to regulate the qualification and appointment conditions of civil servants, but instead these issues had been repeatedly regulated by decree. The AYM not only unanimously approved the claim of unconstitutionality in this concrete case, but it also based its decision on more general considerations, principally defining the functions and the limitations of executive law-making. A majority of 8:3 justices developed a two-step argumentation: (1)

---

in provisions on the same matter, the provisions of law shall prevail. In case the Grand National Assembly of Turkey introduces a law on the same matter, the presidential decree shall become null and void." Hence, the restrictions as to content (old Art. 91 (2) TA) do no longer exist.

349 Cf. E. 1989/04, K. 1989/23 (01/10/1989), III.2.9; E. 1988/62, K. 1990/03 (12/10/1990), III.2.10; E. 2011/60, K. 2011/147 (15/12/2011), III.2.13.

350 Cf. E. 1993/33, K. 1993/40-1 (23/10/1993), III.2.11; E. 1994/49, K. 1994/45-247 (10/09/1994), III.2.12.

351 Cf. E. 1988/62, K. 1990/03 (12/10/1990), III.2.10, E. 1994/49, K. 1994/45-2 (10/09/1994), III.2.12.

352 Cf. E. 1989/04, K. 1989/23 (01/10/1989), III.2.9; E. 1993/33, K. 1993/40-1 (23/10/1993), III.2.11; E. 2011/60, K. 2011/147 (15/12/2011), III.2.13.

353 Cf. E. 1989/04, K. 1989/23 (01/10/1989), III.2.9.

Even if the Constitution stipulates that a particular matter "may only be regulated by law", this could well be an enabling law, leaving room for executive decree(s) to fill in the details. (2) The enabling law, however, must give some convincing reasons why executive law-making is necessary in the concrete situation, and it must clearly define its limits. The key sentence reads:

> "It undoubtedly fits the aim of the constitution-maker to empower the Council of Ministers for enactment of KHK only in **important, compulsory and urgent cases**; and not to employ these means too frequently as this may result in delegation of legislative competences."[354]

In the case in question, the enabling law did not meet any of these criteria, hence the decree based on it was void.

One year later, the AYM further developed its doctrine on the constitutional limits of enabling laws. SHP-deputies had again submitted an abstract norm control, putting into question the constitutionality of the enabling law on administrative reform measures. In the decision T*ime Limits of Enabling Laws*, the Court annulled the law for two reasons: Whereas it provided some "terms of purpose, scope and principles" as required by Art. 91 (2) TA, these were not specific enough, but merely aimed at "formal compatibility with the conditions of the Constitution". In addition, the validity of the law covered a period of more than six years. Seven of the 11 justices on the bench stated that "the authorisation of the Council of Ministers for such a long term has the character of transfer of legislative powers".[355]

Two further rulings from the 1990s on the issue of KHKs are remarkable for different reasons. The decision *Judicial Emancipation in Review of Statutory Decree*[356] differs in form and content from all other rulings analysed in this book: The justices did not even tackle the question whether the decree on the establishment of the Turkish Telecommunication Agency violated the Constitution, because the executive had exceeded its legislative competencies. Instead, they solely focused on the question why the KHK should not enter into force before the publication of their final decision. In fact, this ruling established the AYM's competence to declare a stay of execution in order to prevent irreparable damage until a final decision has been rendered. For the first time since its establishment,

354 Ibid., p. 310 (emphasis in bold in the original).
355 E. 1988/62, K. 1990/03 (12/10/1990), III.2.10, p. 316.
356 Cf. E. 1993/33, K. 1993/40-1 (23/10/1993), III.2.11.

the Court attributed itself the "power of judicial legislation"[357] – which can (also) be understood as an alternative way to limit executive law-making.

The decision on the *Constitutional Basis of Privatisation Law*, rendered in 1994, was of equally fundamental importance for a different reason. In this case, the enabling law concerning the Government's privatisation plan was put into question by SHP-deputies for being too broad and unspecific. The AYM repeated its earlier argumentation, emphasising that the "principle of inalienability of the legislative function" of the Great National Assembly must be respected under all circumstances. Otherwise, "the executive organ occupies the space of the legislative organ and becomes superior to it, thus the separation of powers is breached."[358] As the enabling law in question was not found to be restrictive enough in this regard, it was declared unconstitutional by 7:6 votes. Even more important than this doctrinal consistency is the Court's argumentative move to justify the necessity of an enabling law in the first place. While there is no mentioning of privatisation legislation in the Constitution at all, the justices applied the article about nationalisation in analogy: if nationalisation measures require the authorisation by parliamentary law, they argued, this must apply to the reverse process of privatisation as well.

This series of AYM decisions, consistently reining in the executive by fostering the legislative authority of Parliament, abruptly ended in 2011, when the Court abandoned its long-standing doctrine without any argumentative explanation (*Judicial Self-Restraint in Review of Statutory Decrees*). Again, the main opposition party – then the CHP – had initiated an abstract norm review against a very far-reaching and unspecific enabling law. This time, the unconstitutionality claim was rejected by the AYM with 7:7 votes, which showed the deep divide among the justices. In the merits, it is clearly stated:

> "There is no regulation in the Constitution which entails an immediate, urgent, important and compulsory condition in order to issue (…) KHKs. Therefore, it is impossible to create new conditions not prescribed by the Constitution in constitutional review of statutory decrees and enabling laws; furthermore, to define what is "important", "urgent" and "compulsory" is not a function of the judicial body

357 Ibid., p. 318.
358 E. 1994/49, K. 1994/45-2 (10/09/1994), III.2.12, p. 322.

> which makes a constitutional review. In addition, it is evident that these terms are relative and of a subjective character."[359]

One can only speculate what brought about this complete doctrinal turnaround. In 2011 the political context had changed significantly compared to the first half of the 1990s, with a strong and stable AKP-Government being in place for over a decade. Hence, the tendency to comply with the executive's political programme may have grown in the meantime. As will be shown in Chapter II.4.3, however, the very same bench did not shy away from rendering 'government-unfriendly' decisions on other occasions. It is therefore important to keep in mind that all key cases on decree power, including the earlier ones, had been decided by very narrow majorities. Obviously, the constitutional limits of legislative competencies of the executive had always been fiercely contested among the justices, and the emphasis on separation-of-power-arguments had never been shared by all AYM members. From this perspective, the decisions before 2011 had created an impression of doctrinal consistency which did never fully represent the reality on the bench.

4.2.4 State Security and Anti-Terrorism

Taking into consideration the highly polarised and conflict-ridden setting of Turkish politics, repeatedly haunted by violent clashes and military intervention, it is hardly surprising that state security and anti-terrorism legislation plays a major role in AYM adjudication. The six selected key decisions cover two specific aspects of this broad topic: three of them deal with the fundamental question of executive decree power from a specific perspective, reasoning how the constitutionally guaranteed separation of power and state security interests should be balanced during a state of emergency. The other three rulings in this set gauge how far the Turkish state authorities may go when fighting perceived terrorist threats without violating the Constitution. In both regards, the AYM issued complex rulings over the years, which deserve a nuanced analysis.

The state of emergency, to be declared by the Council of Ministers (Art. 119 and 120 TA of 1982) or – since the constitutional reform of 2017 – the President of the Republic (new Art. 119 (1) TA), has been in place in some south-eastern cities of Turkey from 1978 to 2002 as well

359 E. 2011/60, K. 2011/147 (15/12/2011), III.2.13, p. 328.

as in the entire country between July 2016 and July 2018. It provides the Government or the President respectively with exceptional legislative competencies. Unlike in the case of 'ordinary' decree power sketched out in the previous Chapter II.4.2.3, no enabling law is needed; instead, enacted decrees must only be "submitted immediately to the Turkish Grand National Assembly for approval" (Art. 121 (1) TA 1982; Art. 119 (6) TA 2017). Additionally, Art. 148 (1) TA explicitly denies the Constitutional Court any right to review emergency decrees, be it in form or substance. The AYM justices nevertheless found a way to exercise some form of judicial review in this regard, which proved quite effective.

The three decisions analysed in this context, *Constitutional Review of Emergency Decrees I, II and III*,[360] were rendered in 1991 (January and July) and 2003 respectively. They basically dealt with the question whether the scope and content of executive law-making under the emergency regime were subject to any sort of constitutional restrictions at all. In both cases decided in 1991, the parliamentary opposition had submitted abstract norm proceedings, arguing that the emergency decrees in question violated Art. 121 (3) and 122 (2) of the Constitution, according to which only "matters necessitated by the state of emergency or martial law" could be regulated in emergency decrees. The applicants claimed that the prescribed measures did exceed the immediate scope of the emergency and therefore should have been regulated according to 'normal' decree-making rules, i.e. on the basis of an enabling law. The AYM essentially followed this argumentation and annulled both KHKs.[361] In 2003, it accepted a concrete norm review, initiated by the Fifth Chamber of the Council of State against an emergency decree issued in 1987 and amended in 1990, along analogue grounds.

In order to render these decisions possible despite the explicit inadmissibility of constitutional review stipulated in Art. 148 (1) TA, the justices developed a convincing argumentative pattern, which – if applied consistently – could have established a general doctrinal principle of AYM case law, far beyond the concrete issue of emergency law. The essence

360 Cf. E. 1990/25, K. 1991/01 (05/03/1992), III.2.14; E. 1991/06, K. 1991/20 (08/03/1992), III.2.15; E. 2003/28, K. 2003/42 (16/03/2004), III.2.16.

361 In the second decision (E. 1991/06, K. 1991/20 (08/03/1992), III.2.15), the emergency KHK was only partially annulled, though, because one of its provisions (Art. 8, prohibiting to sue state officials for any measures related to the emergency situation) was found in accordance with the limits of Art. 148 (1) TA by a majority of 6:5 justices. Cf. also Belge 2006, p. 684.

of the Court's constitutional reasoning is summarised the following key statement[362]:

> **"Pursuant to Article 148 of the Constitution KHKs that cannot be reviewed by the Constitutional Court are those which are enacted upon 'matters necessitated by the state of emergency'. The Constitutional Court must first of all inquire whether or not a state of emergency KHK bears these characteristics. If this is not the case, the Court is bound to review the constitutionality of these decrees."**[363]

Hence, emergency decrees brought before the Court have to be preliminarily reviewed in order to decide whether they are genuinely targeting emergency matters. Only if this is the case, their constitutionality cannot be reviewed, neither on the procedure nor on the merits. In the second ruling, issued only six months after the first one, this argument is repeated and even further elaborated:

> "(T)he Constitutional Court has to define the character of administrative regulations issued by legislative or executive bodies, when they are brought before the Court for constitutional review. This is because the Court cannot only rely on the name of a document to define its character. Therefore, it must elaborate on whether or not it is a real state of emergency KHK, which is excluded from constitutional review. If this is not the case, it must conduct a constitutional review."[364]

Building on this act of self-empowerment, the rulings define narrow constitutional boundaries for emergency measures. In case the purpose or the scope of the measures exceed the immediate necessities of the emergency situation, the KHKs are no longer exempted from procedural and substantial review by the Court. In this regard, both rulings from 1991 as well as the concrete norm proceeding decided over ten years later share a common reasoning and in parts even an almost identical wording. In particular, the first two paragraphs of the merits from the first ruling are repeated word by word in the ruling issued half a year later, and – in a less

362 The paragraph is highlighted in bold in the official text, published in the Official Gazette.
363 E. 1990/25, K. 1991/01 (05/03/1992), III.2.14, p. 331.
364 E. 1991/06, K. 1991/20 (08/03/1992), III.2.15, p. 340.

exact quote – in the ruling from 2003. However, any explicit reference to these citations is missing in the later decisions.[365]

The core argumentative pattern of all three rulings concerns the very purpose of an emergency regime in any constitutional democracy:

> "(…) the state of emergency does not imply arbitrariness in the regime, which in all democratic countries means to eliminate the legal system for good. The state of emergency is a regime that relies on the Constitution, that is enacted in accordance with the constitutional procedures, and that is under surveillance of legislative and judicial organs. Furthermore, the state of emergency should aim at protecting and defending the constitutional order. Despite the fact that it gives important competences to executive organs and that it restricts fundamental rights and freedoms, the state of emergency system is a 'legal regime' in democracies.[366]

Consequently, the emergency regime in Turkey is not to be considered as a status outside or beyond the Constitution. All constitutional principles, such as the state under the rule of law and the system of c, have to be respected even under these particular circumstances. If one concrete provision (here: Art. 148 TA), restricts the legislative and judicial control over executive action, it must be interpreted in accordance with the broader constitutional framework.[367]

Based on this fundamental understanding of the constitutional order as a whole, the justices stipulate that the right to issue emergency decrees "**is also limited by various relevant constitutional provisions"**[368]. In all three analysed rulings, the stipulation of unconstitutionality is justified by such limitations, be they the excessive duration of a restrictive measure or its extension to a region which is not covered by the initial emergency KHK. The justices also point out that, once the state of emergency is lifted, all issued emergency decrees are automatically void. Therefore 'ordinary', general laws cannot be amended by emergency decrees, since these amendments would also lose their validity once the KHK is no longer in force.

---

365 Cf. Chapter II.5.2 for an evaluation of this lack of self-referencing by the AYM.

366 E. 1990/25, K. 1991/01 (05/03/1992), III.2.14, p. 330; E. 1991/06, K. 1991/20 (08/03/1992), III.2.15, p. 336.

367 Cf. Göztepe 2018b, p. 527.

368 E. 2003/28, K. 2003/42 (16/03/2004), III.2.16, p. 346 (emphasis in bold in the original).

In sum, the analysed rulings clearly prove that the AYM – contrary to its often-publicised image as a defender of strong state authority at the expense of checks and balances and rule of law principles – quite effectively engaged in constitutional reasoning justifying a more liberal and anti-authoritarian interpretation of the Constitution during the 1990s and early 2000s. Similarly to the doctrinal development concerning ordinary decree power retraced earlier in this chapter, this trend was always highly disputed within the Court. All three decisions were taken by narrow majorities of 7:4[369] or even 6:5[370] justices, accompanied by up to five dissenting opinions. Hence, it took only small changes on the bench in the wake of the constitutional reform of 2010 to abruptly reverse the process.

This happened in 2014, when partially violent protests in several South Eastern Turkish cities entailed strict curfew measures by the regional authorities. These measures not only were announced without a time limit, but they even lacked any viable normative basis, because the Council of Ministers did not declare a state of emergency according to (then) Art. 120 TA.[371] Nevertheless, in 2015 the AYM rejected a series of individual complaints against this blatant violation of constitutionally guaranteed rights, declaring itself not competent to review emergency KHKs according to Art. 148 (1) TA.[372] This new attitude of self-restraint was upheld and even further developed during the emergency regime following the failed coup attempt in July 2016. In October and November 2016, the AYM rejected four abstract norm proceedings,[373] which claimed the unconstitutionality of several emergency decrees collectively dismissing hundreds of civil servants, without even handing down individual executive acts. These rulings contain "contradictory arguments in each paragraph":[374] On the one hand, they explicitly refer to former rulings on emergency KHKs, emphasising that "the principles of the constitutional state" must

369 E. 1990/25, K. 1991/01 (05/03/1992), III.2.14; E. 2003/28, K. 2003/42 (16/03/2004), III.2.16.
370 E. 1991/06, K. 1991/20 (08/03/1992), III.2.15.
371 Cf. Göztepe 2018b, p. 528.
372 Cf. 2015/15266 (11/09/2015); 2015/19545 (22/12/2015); 2015/19907 (26/12/2015); 2015/20218 (31/12/2015); 2016/43 (08/01/2016); 2015/20376 (20/01/2016); 2016/1652 (29/01/2016); 2016/1905 (03/02/2016); 2016/2602 (12/02/2016); 2016/3349 (24/02/2016); 2016/3646 (29/02/2016); 2016/3475 (29/02/2016); 2016/5993 (05/04/2016); 2016/9400 (23/05/2016).
373 Cf. E. 2016/166, K. 2016/159 (04/11/2016); E. 2016/167, K. 2016/160 (04/11/2016); E. 2016/171, K. 2016/164 (08/11/2016); E. 2016/172, K. 2016/165 (08/11/2016).
374 Göztepe 2018b, p. 530.

be respected even in times of emergency. On the other hand, they refuse to do exactly this. Instead of evaluating the decrees against the backdrop of the broader constitutional framework, the rulings content themselves with a very narrow interpretation of Art. 148 (1) TA. As a result, these decisions document a "first step towards self-abandonment of the Constitutional Court as guardian of the rule of law in Turkey".[375]

The second aspect of state security, as fiercely debated as the emergency measures, regards the fight against terrorism, which has always been closely linked to the Kurdish conflict. In April 1991, the Grand National Assembly had enacted an anti-terrorism-law which provided a very broad and contested definition of terrorism and a long list of anti-terror measures, extensively enabling state security forces in their fight against perceived terror-suspects. 14 of its articles were contested by the main opposition party SHP in an abstract norm proceeding for violating the principles of rule of law in general and Art. 10 (equality before the law), 17 (right to life) and 19 (right to liberty and personal security) TA in particular. Above all, the law's definition of terrorism was claimed to be unconstitutional, because it included too many and partially non-legal characteristics, such as actions which "give fright, or intimidate".[376]

In the unusually long ruling *Constitutionality of Anti-Terrorism-Law*), the AYM systematically reviewed each article of the law put into question by the applicants. Most importantly, the concept of terrorism and terrorists, detailed in the first two articles, was meticulously analysed in the light of existing legal definitions, particularly from criminal law. This partially almost linguistic examination came to the conclusion that, despite some non-legal terminology, "the definition of terror is sufficiently clear" and therefore in accord with the Constitution. However, some more concrete provisions of the anti-terrorism-law were found to be unconstitutional, such as special guarantees to enforcement officers, shielding them from prosecution for their actions in the fight against terrorism.[377] As a result, the law was partially annulled by 7:4 votes; the intensity of the dispute on the bench translated in ten dissenting opinions on different parts of the ruling.

---

375 Ibid., p. 531.

376 E. 1991/18, K. 1992/20 (27/01/1993), III.2.17, p. 356.

377 Due to the extreme length of the decision, only the fundamental constitutional reasoning of the AYM on Art. 1 and 2 of the anti-terrorism-law is fully documented in Part III of the book. For more information on the respective articles declared unconstitutional, cf. also Belge 2006, p. 684.

When the anti-terrorism-law was amended in 1996, 115 MPs under the lead of the main opposition party CHP, initiated another abstract norm review, particularly claiming the unconstitutionality of the (new) provision on the use of fire arms against terror suspects. The revised law permitted security officials to shoot to kill if a suspect did not immediately follow their warning to stop and attempted to use (any sort of) weapon. In the ruling *Right to Life of Terror Suspects*, ten out of 11 justices found this provision in violation with the right to life (Art. 17 TA), because "the armed forces are authorised to use their weapons even in cases which could be solved with other methods and less harmful interference".[378] Whereas this annulment was decided almost unanimously, the Court took over three years to render it, and the publication of the decision in the Official Gazette was delayed for another two years. Hence, the ruling took effect only in January 2001. This enormous delay devaluated the pro-rule-of-law-effect of the ruling to a certain extent.[379]

The last key decision in this set regards an amendment of the initial anti-terrorism-legislation: in 2010, the sentence "this article cannot be applied to children" was added to some previsions of the original laws in order to prevent underage terror suspects from being arrested, detained or tried according to the most severe regulations applicable to adult suspects and convicts. The Third Bakırköy Juvenile Court submitted a concrete norm review, claiming that this differentiation caused an unconstitutional "disproportionality between perpetrators who have just passed the age of 18 and those who are under the age of 18." Besides, it would encourage "terrorist organisations to employ children", and thus "the fight against terrorism will be weakened as the provisions in question will render acts unpunished".[380] In the decision *Criminal Responsibility of Children in Case of Terrorist Accusations*, rendered in 2012, the AYM unanimously rejected this application.[381] The 15 justices conclusively argued, why the principle of equality (Art. 10 TA) does not prohibit different treatment of different issues, but even encourages it:

---

378 E. 1996/68, K. 1999/01 (19/01/2001), III.2.18, p. 362.

379 Cf. Chapter I.4.3 for more detail about the consequences of delayed publication of norm control decisions in the Official Gazette.

380 E. 2011/26, K. 2012/41 (26/06/2012), III.2.19, p. 364.

381 This ruling proves, that under some circumstances, a decision rejecting the claim of unconstitutionality may well be in favour of protecting constitutional principles. Hence, the mere quantitative assessment of pro versus con decisions may be misleading.

> "Special features of circumstances of different individuals and communities may require different legal rules and implementations. If the same legal rules are applied to the same cases and different legal rules are applied to different cases, the principle of equality governed under the Constitution is not breached."[382]

The ruling even refers twice to the moral principle of a "well-civilised state" in order to emphasise how 'uncivilised' the abolition of special protection provisions for minors would be in this context. In fact, this concrete norm review application reveals the extent to which some judges of Turkish instance courts were willing to sacrifice basic rule of law principles for the sake of an authoritarian anti-terror-policy[383] long before the legislative and judicial understanding of terrorism drastically changed in the aftermath of the 2016 coup-attempt.

4.2.5 Presidency and Parliament

The decisions grouped under this heading are of key importance for two reasons. First, they concern one of the classic separation of power aspects, i.e. judicial review of parliamentary sovereignty and its limits. Second, a strong political undercurrent is more than obvious in all of them. We can therefore trace in an exemplary way, how the weaknesses of constitutional reasoning are directly linked to the degree of politicisation in AYM case law.

The ruling on the *Immunity of Members of Parliament*[384], rendered in 1994, once more depicts the political fight of the constitutional institutions against any attempts at Kurdish autonomy, even if no violent or terrorist action is involved. *Leyla Zana*, a Member of Parliamentfrom Diyarbakir, and seven other Kurdish deputies whose parliamentary immunity had been removed on request of the Chief Prosecutor's Office of the Ankara State Security Court, applied for the annulment of this parliamentary decision (Art. 85 TA) on procedural and substantial grounds. They claimed that Zana's statements during a journey to the USA, demand-

382 E. 2011/26, K. 2012/41 (26/06/2012), III.2.19, p. 365.

383 This application is in accord with Ceren Belge's observation, that during the 1990s, "a decade of grave human rights violations", only three concrete norm reviews on the subject were initiated "by lower courts from the Kurdish region". All of them were rejected on procedural grounds. Cf. Belge 2006, p. 685.

384 Cf. E. 1994/09, K. 1994/28 (21/03/1994), III.2.20.

ing full constitutional and legal rights for political parties representing Kurds, did not constitute the crime of undermining the unity of the State (Art. 125 Turkish Criminal Code) and therefore did not justify the removal of parliamentary immunity. In addition, the removal decision had been motivated politically rather than legally, as according deliberations and collective decisions on the voting of party group members showed.

The AYM justices rejected the application on procedural grounds unanimously, and on the merits with a 7:3 majority. The argumentative justification of this decision is very poor, though. Among other things, the justices explicitly stated that they were not entitled to evaluate evidence and hence could not decide whether *Zana* had actually committed a crime, but only whether the accusation was serious and substantiated enough to justify the removal of immunity. Nevertheless, in the following paragraph they concluded:

> "(…) when all acts of the perpetrator are considered, it is clear that she committed the crime ascribed to her.
> In the discussion of this case the Joint Committee included other cases in which Leyla Zana played a role, and concluded that she persistently attempts to disrupt the unity of the Republic of Turkey with her speeches and other activities."[385]

The Court's reasoning, why the well documented discussions and voting advice within several party groups and even the publicly recorded statement of the Prime Minister in advance of the plenary decision do not imply a political rather than judicial motivation of the vote in favour of the removal, is equally unconvincing. The justices seriously claimed that a "speech of the Prime Minister is a single expression of thought and it is not part of a debate".[386] As these examples clearly show, the AYM engaged in purely political instead of judicial reasoning, without even mentioning so much as a constitutional norm to support their argumentation in most of the ruling.

The three remaining decisions analysed in this set deal with another highly contested political issue, i.e. the mode of presidential elections. When the AKP majority in Parliament nominated its prominent party member and then Foreign Minister *Abdullah Gül* as new State President in April 2007, the CHP-led parliamentary opposition as well as the outgoing President *Ahmet Sezer* and the leaders of the Turkish military tried to pre-

385 Ibid., p. 381.
386 Ibid., p. 384.

vent his election in Parliament by all means.[387] As the AKP disposed of an absolute majority of seats in the Great National Assembly, but not of the two-thirds majority required in the first two rounds of voting according to (the then applicable version of) Art. 102 TA, it was clear that three ballots would be necessary in order to get *Gül* elected by absolute majority in the third round. Immediately after the first parliamentary vote on April 27, 2007, however, the CHP parliamentary group initiated an abstract norm review against the TBMM decision regarding the appropriate quorum required to proceed with the balloting. Only four days later, on May 1, the AYM stated a violation of Art. 96 (quorums required for sessions and decisions) and 102 TA, and therefore annulled the first vote on *Gül's* candidacy.

In a nutshell, the ruling *Parliamentary Procedure of Presidential Election*[388], rendered by a 7:4 majority concerning the preliminary examination and 9:2 votes on the merits, revolves around a rather technical question of parliamentary voting procedure, regulated in Art. 121 of the (then applicable) TBMM Rules of Procedure: Did the two-thirds-quorum only apply to the actual voting, or already to the decision about the starting of the voting process? In order to decide this question, the AYM had to justify why it was entitled to review this parliamentary decision in the first place. In general, procedural parliamentary decisions are not subject to judicial review, with the sole exception of formal amendments of the RoP (Art. 148 (1) TA). Hence, the justices explained on over eight pages of "preliminary examination", why the plenary decision to proceed with the presidential election process after stating the 'usual' one third-quorum of present deputies represented a *de facto* amendment of the RoP instead of an ordinary (possibly erroneous) procedural decision. This section of the ruling is partially unintelligible because of complicated and overlong sentence structures, unclear wording and missing argumentative coherence. As a result, the mainly politically motivated attempt at justifying judicial review despite the obvious lack of a respective constitutional provision can barely be hidden. Court President *Tülay Tuğcu* aptly addressed this unconvincing attempt in her dissention opinion to the ruling:

> „However, the Constitution does not foresee the constitutional review of violations of the Rules of Procedure and neither did it charge the Constitutional Court with such a review. (…) For this reason, it is

387 Cf. Bâli 2012, pp. 286-290.
388 Cf. E. 2007/45, K. 2007/54 (27/06/2007), III.2.21.

> considered impossible to review these decisions by making them fit to some names or attributes." [389]

After thus having 'fabricated' the basis for a decision on the merits, the AYM dealt with the question whether the two-thirds quorum of deputies required in the two first rounds of the election of the State President according to (then) Art. 102 (2) TA also applies to the decision to proceed with the first round of the election. Again, the argumentation in favour of this broad interpretation of Art. 102 (1) TA lacks any methodologically and/or normatively convincing structure. Other than justice *Haşim Kılıç*, who underpinned his dissenting opinion with elaborate references to the documented intentions of the constitution-makers as well as to the fundamental democratic functions of procedural quorums, the majority decision repeatedly asserts that the parliamentary voting procedure violated the constitutional provisions for the election of the State President without giving any legal explanation.[390]

As a result of this openly politically motivated ruling, the AKP Government decided to fundamentally change the rules of the political as well as the constitutional game: it called early elections, immediately proceeded to amend the Constitution, and after a landslide AKP victory in the snap election, had the constitutional amendments confirmed by public referendum. Part of the constitutional changes, accepted by referendum on 21 October 2007, concerned the election mode of the State President, who was to be elected by popular vote for the first time in 2014.[391] The two last rulings analysed in this chapter review the normative basis of this change, i.e. the *Constitutional Amendments Concerning the Presidential Election*[392] and the *Constitutionality of the New Presidential Election Law*[393]. In stark contrast to the first AYM decision on the subject, the justices clearly restrained themselves from any form of political activism in both cases.

---

389 Ibid., p. 398.

390 The AYM decision is documented in Part III in its entirety, including the dissenting opinions, in order to make transparent to the reader, why we qualify it as an exemplary case of political instead of legal reasoning.

391 The results of the referendum were published in Official Gazette 31/10/2007 (No. 26686). According to statement No. 873 of the Supreme Board of Election, the voter turnout reached 67.51%, out of which 69.95% voted yes and 31.05% voted no.

392 Cf. E. 2007/72, K. 2007/68 (07/08/2007), III.2.22.

393 Cf. E. 2012/30, K. 2012/96 (01/01/2013), III.2.23.

The difference is particularly striking in the abstract review proceeding on the constitutional amendment law, decided only two months after the previously analysed case on the parliamentary election procedure. (Then) State President *Ahmet Sezer* applied to the Court, supported by the main opposition party CHP, after his veto on the constitutional amendments had been overturned by the parliamentary majority. He claimed that the amendment law violated the Constitution on procedural and substantial grounds. Once again, the procedural problem concerned the modalities of the voting process in the TBMM, here in particular the required quorum of attending deputies during the second reading and the required qualified two-third majority for each round of voting during the first and second parliamentary readings as well as for the final adoption of the draft amending the Constitution. Despite the fact that the application was decided by the almost identical bench as the previous one, a majority of 6:5 justices came to a very different conclusion. In a relatively brief decision, they declared it beyond the Court's jurisdiction to review the constitutional amendment on procedural grounds. Based on Art. 148 (1) TA, limiting judicial review of constitutional amendments to their "form",[394] the Court declined any procedural examination, because the problem raised by the applicants did not count among the "exhaustive list of grounds"[395] for review enumerated in this article. Consequently, a review on the merits was denied by unanimous vote, and the application rejected.

Five years later, the opposition party CHP initiated abstract constitutional review proceedings against the new law on the Election of the President of the Republic, passed in January 2012 on the basis of the amended constitutional provisions. In what could be interpreted as a final attempt to influence the conditions of presidential elections in Turkey, the applicants mainly criticised the transitional provisions of the law, keeping the previous regulations of the presidential term in place until the retirement of the last President of State elected by Parliament in 2007.[396] According to the old, no longer valid version of Art. 101 TA, the President was supposed to stay in office for seven years, without the right to re-election. The applicants claimed that this violated the prevailing

394 The highly disputed limitations of judicial review in case of "unconstitutional constitutional amendments" are discussed in Chapter II.5.4.

395 E. 2007/72, K. 2007/68 (07/08/2007), III.2.22, p. 406.

396 *Abdullah Gül* had been finally elected by the parliamentary majority in a second attempt after the annulment of the first attempt by the AYM ruling.

constitutional provisions, which shortened the term of office to five years, but allowed the incumbent to run for a second term.

The AYM rejected the norm control insofar as the conditions applicable at the moment of the election of President *Gül's* election (in 2007) should stay in place until the end of his term of office, i.e. after seven years. However, he and his predecessors had to be granted the right to run for a second term, because an exclusion violated "their passive right to vote and the principle of equality". Besides, the incriminated provision, "which retroactively reactivates the abrogated constitutional prohibition of a second term, violates the will of the constitution-maker concerning this issue".[397] As a result, the law under review was found partially unconstitutional with 12:4 votes. The argumentation of this ruling is clearly based on constitutional reasoning, implying that the fierce political conflict about the constitutional institution of the presidency, in which the AYM had been involved in 2007, had finally been turned into a mainly judicially driven deliberation.

4.3 Protection of Fundamental Rights and Freedoms

In addition to their role as arbiters in state organisation conflicts, constitutional courts' other primary task concerns the protection of individual citizens and society at large against state intrusions into constitutionally guaranteed rights and freedoms. As discussed earlier, the AYM has a rather mixed record in this regard. There is a broad consensus in the literature that the Court's "role (…) in the preservation of the vision and the building up of a modern Turkey is regarded as perhaps more important than the protection of individual rights".[398] This was true in the first phase of its existence under the Constitution of 1961, when the 'hegemonic preservation'-idea fully applied, i.e. the justices were first and foremost supposed to foster the ideology of Kemalism, aiming at a strong, laicist, and nationalist state rather than a liberal, inclusive, and rights-based democracy. Since the new Constitution entered into force in 1982, the authoritarian, anti-liberal tendencies grew even stronger. When assessing AYM case law on individual rights and freedoms, one must therefore keep in mind the limitations to these rights imposed by the constitutional principles enshrined in the preamble and Art. 2 TA. In addition to the restric-

397 E. 2012/30, K. 2012/96 (01/01/2013), III.2.23, p. 410.
398 Örücü 2009, p. 196.

tive constitutional basis, the Court often lacked the mere opportunity to decide on respective issues. The purely reactive role of the judiciary branch is even more relevant in this regard because until 2012 Turkish citizens had no right to directly approach the AYM in cases of a perceived violation of their fundamental rights. It therefore depended on other state institutions, above all ordinary courts and the parliamentary opposition, to initiate concrete or abstract norm proceedings touching on related problems. The following analysis focuses on case law prior to the introduction of the individual complaint procedure, but we will occasionally highlight how the new type of proceedings impacted on the frequency and trajectory of fundamental rights' adjudication in Turkey.

The 27 key rulings analysed in the following chapter provide a robust overview of the AYM adjudication in several regards. Other than in the state organisation cases, concrete norm control proceedings largely prevail: only nine abstract norm reviews are among the selected decisions, and, even more revealing, all twelve included cases concerning gender equality were brought before the AYM by lower courts.

The analysis starts with a set of six rulings, which get right to the heart of the authoritarian tendencies of Turkish constitutional culture. We trace how the principles of laicism and nationalism, key parts of the six 'arrows' of Atatürkism,[399] shaped and limited the interpretation of freedom of religion and ethnic minority rights, both of which are equally stipulated in the Constitution. The three following thematic sets deal with 'classic' fundamental rights issues, i.e. freedom of association, freedom of speech and media, and prisoners' rights/fair trial guarantees. Not only are key rulings on these matters fewer in number, but there are even some individual rights which did not play any significant role at all in AYM case law until 2012: for example, we did not find key decisions on the inviolability of the domicile (Art. 21 TA), freedom of residence and movement (Art. 23 TA), or the right and duty of training and education (Art. 42 TA). By far, the most prominent aspect of AYM adjudication on 'classic' fundamental rights concerns equality before the law in general, and gender equality in particular. In the final set of key rulings, we assembled 12 rulings related to Art 10 TA (equality before the law). This brief analysis exemplifies several general characteristics of fundamental rights' adjudication in Turkey, most notably its many ambiguities.

399 Cf. Ahmad 1993, p. 63; Altunışık / Tür 2005 pp. 21-22.

4.3.1 Fundamental Rights vs. Principles of the Republic

Article 2 TA 1982[400] defines the "Characteristics of the Republic", according to which Turkey is "a democratic, laicist and social state governed by the rule of law within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." The sequence of the attributes enumerated within this article suggests that human rights play a rather subordinate role, ranking below public peace and national solidarity. Besides, further principles of Atatürkism are spelled out in the preamble, which can be employed to justify state measures infringing upon (instead of promoting) individual rights. This is particularly true for the concepts of laicism and nationalism. Laicism in this context does not mean a mere separation of state and religion or the strict neutrality of the state towards all religions. Instead, the Turkish state controls religion(s), primarily in order to fend off a particular form of traditional, 'anti-modern' Islam.[401] Regarding nationalism, "Turkish constitutionalism is obsessed (…) with the protection of the 'territorial and national integrity' of the republican state against its 'enemies', external as well as internal", as Turkish law professor Levent Köker put it.[402] The fixation on an imagined homogeneous nation also led to the elevation of 'Turkishness' above all other ethnic and/or religious identities in the country.

The first four rulings in this set are representative of how instrumentally the AYM interpreted the freedom of religion, guaranteed in Art. 19 TA 1961 and Art. 24 TA 1982 respectively, in the light of the laicism principle. In the two concrete norm proceedings *Religious Identity in ID Cards I and II*[403], brought before the AYM by a first instance civil court (1979) and the Council of State (1995), the justices had to decide on the (un)constitutionality of Art. 43 of the Law on Civil Registration, first enacted in 1972. Among other characteristics such as place and date of birth, gender,

400 In the Constitution of 1961, applicable for the first ruling of this set, Art. 2 stipulated the same fundamental principles in a slightly shorter version: "The Turkish Republic is a nationalistic, democratic, laicist and social state governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble."

401 Cf., for example, Özbudun / Genckaya 2009; Casanova 1994; Göztepe 2004.

402 Köker 2010, p. 332.

403 Cf. E. 1979/09, K. 1979/44 (13/03/1980), III.3.1; E. 1995/17, K. 1995/16 (14/10/1995), III.3.2.

parents' names, marital status, and profession, citizens are also requested to indicate their religion on this registration. The applying courts claimed that this obligation violated the freedom of religion, according to which "no one shall be compelled (…) to reveal religious beliefs and convictions" (Art. 24 (3) TA 1982).[404] In both cases, the AYM found no violation of the fundamental right by the smallest possible majority, i.e., 8:7 votes in 1979 and 6:5 votes in 1995. Whereas the reasoning followed very similar lines in both rulings, the 1995 majority decision did not refer to the previous decision at all, though it was briefly mentioned (among other AYM rulings on laicism) in the dissenting opinion by Court President *Yekta Güngör Özden*.

Both majority opinions essentially emphasise the strong link between the laicism principle of Art. 2 TA and the fundamental right of freedom of religion. This freedom can only be exercised within the limits of Art. 2 TA, "because the necessity to guarantee public order does not allow the freedom of religion to spill over from the individual's inner world and reach a level which causes social unrest".[405] While public order is no longer explicitly mentioned in Art. 24 of the Constitution of 1982, the justices nevertheless based their argumentation on this omnipresent key concept of AYM reasoning. Even more remarkable, the reference to public order in both rulings is far from the motivation indicated in the respective constitutional articles on religious freedom. Instead, it refers to the 'technical' necessities of public registration, stipulating that "(t)he State must be aware of the characteristics of its citizens. This requirement, to know the individuals of the society (…), is based on public order, public interest and economic, political and social requirements and imperatives."[406] Neither of the decisions answered the question of why the religious status of citizens should be essential in this context.

In addition to the public-order argument, both rulings made a distinction between the "indication" of a religious status and the "expression of religious beliefs and convictions". As long as the law under review merely entitles state authorities to demand an "indication", this was found to be in line with the laicism principle. Only if "coercion" were used to influence religious beliefs and practices would the law violate the con-

404 Art. 19 TA 1961 granted freedom of thought and faith in almost identical words.
405 E. 1979/09, K. 1979/44 (13/03/1980), III.3.1, p. 416.
406 E. 1995/17, K. 1995/16 (14/10/1995), III.3.2, p. 422.

stitutionally guaranteed freedom of religion.[407] While the AYM majority position did barely change in the 16 years between both rulings, the dissenting opinions prove that several justices were well aware of the obvious lack of consistent constitutional reasoning. Justice *Yekta Güngör Özden*, for example, sat on the bench in both cases and dissented twice. In 1979, he insisted that "laicist life is a holistic concept. It is impossible to follow the laicist principle in some laws, while not complying with it in others".[408] 16 years later (he had by then become Court President), he repeated the reasons for his earlier rejection of the majority decision and added, that "(r)eligion cannot be a legal measure of personal characteristics."[409] Two others of the seven dissenters[410] shared this reasoning and further disputed the distinction between indication of religion and expression of religious beliefs, because "(r)equiring individuals to disclose their religion, even if only for the civil register, amounts to compelling them to disclose their religious beliefs and convictions."[411]

A very different interpretation of the limits of religious freedom in Turkey can be observed in the highly disputed AYM decisions on the so-called headscarf ban. While the public "indication" of religion was declared in accordance with the laicism principle and even considered necessary for the sake of public order in the decisions on the Law on Civil Registration, the manifestation of religious belonging by wearing a headscarf was repeatedly found in violation with the Constitution. In a sequence of three[412] abstract norm review proceedings, the majority of AYM justices defended a very restrictive Kemalist understanding of laicism. This approach insisted on banning all signs of traditional Islam from public life and, even more importantly, from higher education and public service, in the name of political modernity and civilisation. In the late 1980s, i.e. long before the AKP came to power, growing societal resistance against this ideological position had already led to liberalisation attempts, including the amendment of respective legislation.[413]

---

407 E. 1979/09, K. 1979/44 (13/03/1980), III.3.1, p. 417.
408 Ibid., p. 420.
409 E. 1995/17, K. 1995/16 (14/10/1995), III.3.2, p. 427.
410 Only four of them wrote dissenting opinions.
411 E. 1995/17, K. 1995/16 (14/10/1995), III.3.2, p. 427.
412 The sample of key cases includes only the decisions rendered in 1989 and 2008, because the second ruling (E. 1990/36, K.1991/08 (09/04/1991)), issued in 1991, mainly reiterated the argumentation and the outcome of the 1989 decision.
413 The ideological dimension and the power-struggle behind the "headscarf cases", in which the AYM played a relevant part, are analysed in (among others)

In the first headscarf case (*Headscarf Decision I*), then-State President *Kenan Evren* initiated the abstract norm review of an amendment law, adding the sentence "[h]air and neck may be covered with a headscarf or türban because of religious beliefs" to the Law on Higher Education, which had previously prohibited just that by prescribing "contemporary dress and appearance" in schools and universities for personnel and students alike.[414] In the merits of the decision rendered in 1989, the AYM justices argued in an extremely intricate and somewhat redundant manner why this amendment law was unconstitutional. They did not define the limits of freedom of religion in the light of the laicism principle in this particular case, but instead unfolded an ambitious defence of the foundations of modern Turkish statehood in general. By referring at great length to Atatürk's reforms of the 1920s, they attributed an overarching importance to the principle of laicism, far beyond the mere separation of state and religion:

> "Laicism is a civilised lifestyle, which, by destroying medieval dogmatism, forms the basis of the concept of freedom and democracy, nation-state building, independence, national sovereignty, and the ideal of humanity which developed with the supremacy of reason and enlightenment of science. Modern science was born out of and developed with the downfall of the scholastic way of thinking."[415]

Consequently, the permission that Islamic women may cover their head with a scarf in classrooms and on university campus signified much more than a possible violation of the state's neutrality in religious matters. Out of this rather inoffensive form of public religious confession, the justices constructed a fundamental conflict between Islam and the principles of modern democracy and national sovereignty, claiming that

> "(t)he provision at issue violates the democracy principle because of the phrase 'because of religious beliefs'. National sovereignty is the basis of the democratic structure. The democratic order is the opposite of the sharia, which accepts religious rules as sovereign. A political system which emphasises religion cannot be democratic, only the laicist state can be democratic."[416]

Göztepe 2004; Benhabib 2010; Saygılı 2010; Korteweg / Yurdakul 2014; Steinsdorff / Petersen 2016.

414 E. 1989/01, K. 1989/12 (05/07/1989), III.3.3, p. 429.

415 Ibid., p. 432.

416 Ibid., p. 438.

Other than these detailed but nevertheless abstract considerations, which did not at all reflect on the concrete dimension of the headscarf as a religious symbol compared to the application of Sharia rules in court, for example, the importance of the constitutionally guaranteed freedom of religion (Art. 24 TA) is barely addressed in the ruling. The only justice who did vote against the annulation of the law under review emphasised this blatant argumentative imbalance in his dissenting opinion. According to *Mehmet Çınarlı's* reasoning, it is an integral part of Islamic religion that women may veil their head and neck. Hence, the prohibition of this practice does not represent a limitation of the freedom of religion which could be justified by Art. 14 TA, but a massive violation of this fundamental right, if it prevents students from taking part in higher education.[417]

Almost two decades later, the AYM had to deal with this issue again under quite different political circumstances. In February 2008, the parliamentary majority of AKP and MHP deputies amended Art. 10 (equality before the law) and Art. 42 (right and duty of education) of the Constitution in order to finally legalise the wearing of an Islamic headscarf in public institutions, particularly in schools and universities. The constitutional amendments were a direct reaction to the AYM's repeated annulment of legal changes to this effect by means of abstract norm review: the new constitutional provisions prohibited the exclusion of students from higher education on the basis of dress, explicitly referring to the fundamental rights of education and of equality before the law. The leading opposition party, CHP, initiated an abstract norm control against these amendments because they – if only indirectly – effected the unamendable principles laid down in Art. 2 TA, in particular laicism and "public peace and justice". Regardless of the substance of these claims, the AYM had to justify why it was entitled to review constitutional amendments in the first place. According to Art. 148 (2) TA, "the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot".

The *Headscarf Decision II* therefore begins with a detailed "examination of procedural conformity". After a short discussion, the justices rejected the applicants' allegations and explicitly stated that all procedural requirements were observed by the TBMM. Instead of rejecting any further consideration of the submitted norm control as inadmissible according to Art. 148 (2) TA at this point, the AYM nevertheless continued its exam-

417 Cf. ibid.

ination in order to find a reason for review on the substance.[418] In a somewhat-twisted reasoning, the justices tried to legitimise this strategy by declaring that the amendment laws should never have been proposed because they aimed at an unconstitutional constitutional amendment:

> "That a constitutional amendment that cannot be proposed has fulfilled the proposal majority required by Article 148 (2) cannot provide the grounds for giving effectiveness to a legally invalid legislative disposal passed only because of the power of numerical majority."[419]

In the following, the "constitutional amendment that cannot be proposed" was found unconstitutional after a long reasoning on the merits. The justices by and large reiterated the reasoning developed in the first headscarf decision in 1989, once again emphasising the fundamental and comprehensive concept of laicism enshrined in the Turkish Constitution. Compared to the previous ruling, this decision offers more legal reasoning and a clearer connection between the abstract deliberations and the concrete case at hand. It repeatedly and expressly refers to previous AYM rulings, including the 'headscarf'-adjudication and party ban cases, as well as to ECtHR adjudication on related issues. In addition, the legislators' motivation is analysed in some detail by quoting from the explanatory memoranda on the amendment laws. A majority of 9:2 justices finally stipulated that the parliamentary majority's proposition to amend the Constitution in the described way had been unconstitutional because it had indirectly intended to change the essence of the unamendable Art. 2 TA.

Both overruled justices explained their dissent in detailed individual opinions, mainly focusing on the missing justification of constitutional review on the substance. They emphasised the wide discretion of the legislator to adapt the Constitution to a changing societal reality, as long as procedural requirements were respected and the core principles excluded from amendment remained unchanged. In this regard, they particularly contested the extremely wide interpretation of Art. 2 TA by their colleagues on the bench. As Justice *Sacit Adalı* put it,

> "(t)he consequence [of this ruling] is that henceforth constitutional amendments, their proposal or suggestion will be impossible as the terms democracy, laicism, and sociability are wide enough and can be

418 The general significance of this act of self-empowerment by the AYM is discussed in Chapter II.5.4.

419 E. 2008/16, K. 2008/116 (22/10/2008), III.3.4, p. 452.

interpreted by the Constitutional Court to cover any kind of justification."[420]

Similar criticism was expressed in the aftermath of the decision by representatives of the Government as well as by public observers.[421] Beyond the disputable question of judicial self-empowerment, i.e., the fact that the AYM had quite openly ascribed to itself the right to substantial review of constitutional amendments, this decision was perceived by many as politically rather than judicially driven. In combination with the equally disputed ruling on the presidential election mode issued the previous year,[422] it reinforced the impression of an extremely active Court trying to block the political reform agenda of the AKP Government wherever possible by ostensibly legal means.[423]

Concerning the headscarf issue, this conflict was finally put to rest in 2014. An advocate who had been denied access to a family court hearing because of her headscarf, submitted an individual complaint to the AYM. She claimed that her fundamental rights of religious freedom (Art. 24 TA) and equality before the law (Art. 10 TA) had been violated. The Court decided the complaint on the merits and found a violation of both constitutionally guaranteed rights with a 15:2 (concerning Art. 10 TA) and 16:1 (concerning Art. 24 TA) majority.[424] The reasoning focused much less on the laicism principle than the previous abstract norm reviews; instead, the importance of religious freedom was emphasised. In addition to the Turkish Constitution, Art. 9 ECHR served as a major reference point. The justices repeatedly quoted from ECtHR rulings, stating that religious dress constitutes an integral part of the freedom of religion.[425]

Nationalism is the second "Characteristic of the Republic", laid down in the preamble and Art. 2 TA, which dominates many AYM rulings on fundamental rights and freedoms. Both decisions included in this set thoroughly illustrate how the justices have used this fundamental tenet of Turkish constitutionalism to limit certain constitutionally guaranteed

420 Ibid., p. 464.
421 Cf., for example, Shambayati / Sütçü 2012, pp. 118-119.
422 This decision was analysed in the previous Chapter II.4.2 and is documented in Chapter III.2.21.
423 The almost simultaneous party ban procedure against AKP (analysed in Chapter II.4.1) further added to the impression of an ideologically driven confrontation between the AKP Government and the AYM. Cf., for example, Bâli 2012, Köker 2010, Shambayati / Sütçü 2012.
424 Cf. E. 2014/256 (25/06/2014).
425 Cf. Steinsdorff / Petersen 2016, pp. 216-217.

rights. Similar to the very broad definition of laicism, the repeated and partially hyperbolic references to the Turkish nation and nationalism in the preamble of the Constitution allow room for a very extensive and flexible legal interpretation of the term. Its description in the preamble stretches from "the absolute supremacy of the will of the nation", to "the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values (and) nationalism" to the statement that "all Turkish citizens are united in national honour and pride, in national joy and grief". The discussion of the party ban rulings in Chapter II.4.1 highlighted how the AYM often invoked the imperative of territorial indivisibility to justify the exclusion of Kurdish parties from political life in Turkey. In the following cases, various aspects of the nationalism principle were used to restrict constitutionally guaranteed rights.

In 1986, 83 members of the parliamentary opposition submitted an abstract norm review proceeding (*Right to Property of Foreigners*) against a new law facilitating the purchase of real estate in Turkey for foreign states and their citizens, particularly from "Saudi Arabia, Kuwait, United Arab Emirates, Bahrain, Qatar, the Sultanate of Oman".[426] The law not only permitted to exempt these countries and their citizens from the international law principle of reciprocity, i.e. the necessity of comparable Turkish purchases in Arab countries in exchange, but it also empowered the Council of Ministers (instead of Parliament) to decide on the matter. The political motivation behind the submitted norm review was obvious: the applicants feared a sell-out of valuable building ground, particularly near the Bosporus, to rich Arab investors. The Court followed their claim, according to which both provisions violated the Constitution, and annulled the law by a narrow majority of 6:5 votes.

In terms of legal reasoning, this decision is problematic for two reasons. First, real estate purchases by foreign individuals[427] are covered by the fundamental right to property (Art. 35 TA), which can only be restricted in the interest of public order. As the justices themselves stated in the merits, "allowing foreigners to enjoy fundamental rights and freedoms like citizens is a well-established principle".[428] In order to legitimise the limitation of property rights in this particular case, the threat to public

426 E. 1986/18, K. 1986/24 (31/01/1987), III.3.5, p. 470.
427 Most of the discussion of the merits deals with states' rights to purchase real estate in Turkey. This question seems less problematic from a fundamental rights' perspective.
428 E. 1986/18, K. 1986/24 (31/01/1987), III.3.5, p. 471.

order should have been made as clear as possible. Instead – and this is the second weakness – the ruling merely refers to the territorial integrity of Turkey as one aspect of the principle of nationalism in a very abstract way, stating that:

> "The acquirement of real estate by foreigners cannot be considered as a mere question of property. Territory is an inalienable component of a State and a symbol of sovereignty and independence."[429]

The postulated 'symbolic' threat to the territorial integrity, sovereignty, or even independence of Turkey is not explained any further in the ruling. Nor do the justices identify any argumentative connection between the principle of nationalism, stipulated in the preamble of the Constitution, and the abstract constitutional principle of public order in this particular case.

In the ruling *Right of Minorities to Choose a Non-Turkish Family Name*, issued in 2011, the principle of nationalism is employed in a similar way for the sake of restricting fundamental rights. A first instance court had submitted a concrete norm review in the case of a Turkish citizen who wanted to change his family name to a word of Assyrian origin. According to Art. 3 of the applicable Law on Family Names, dating from 1934, "names of foreign races and nations, tribes, ranks, official duties, and names which do not comply with the general morality or which are disgusting or ridiculous, cannot be taken as family names". The submitting court claimed that this provision violates the right to equality before the law (Art. 10 TA), because it discriminates against 'foreign races and nations'. The AYM rejected this claim by the – once again – smallest possible majority of 9:8 justices.[430]

In the merits, the respective provision of the law is declared constitutional for two reasons: first, the justices give an abstract definition of equality before the law, emphasising that "(t)his principle envisages legal equality rather than *de facto* equality", i.e., "(d)ifferent circumstances may entail different legal rules and applications for some individuals or groups".[431] No explanation is given, however, for why in this concrete case choosing a family name originating from an Ayssrian word justifies different legal treatment compared to choosing a name nearer to the Turkish language. The second argument draws on possible functions of family

429 Ibid., p. 474.
430 Cf. E. 2009/47, K. 2011/51 (12/07/2011), III.3.6.
431 Ibid., p. 477.

names regarding national identity and/or unity, as well as preventing "confusion in official documents, ensuring the order of civil registry".[432] References to the nationalism principle and to public order arguments are amalgamated in the ruling in an opaque way, as the two quoted paragraphs show:

> "The legislator has developed a unifying and integrating understanding of national and lingual identity for citizens living in the same country, with the feeling of national belonging, which prevents any discrimination against minorities in terms of rights and freedoms.
> It is the legislator's aim to perceive the unity of the nation, ensuring the continuity of fellowship of people for common suffering and common gladness, of solidarity and prevention of alienation of individuals against each other. This competence encompasses the idea of public interest and public order, and gives the legislator a discretionary power on these matters."[433]

In the dissenting opinions to this decision,[434] both majority arguments are dismantled from a fundamental rights' perspective: according to dissenting AYM President *Haşim Kılıç* and Justice *Engin Yıldırım*, Art. 10 TA protects equal rights particularly for those who do not belong to the ethnic, religious or lingual majority, because

> "(n)on-discrimination against different ethnic and/or religious communities is essential in terms of constitutional unity. For constitutional rights to have a meaning, it is necessary that those who are not part of the majority enjoy the same rights that are claimed and enjoyed by the majority."[435]

AYM Vice-President *Osman Alifeyyaz Paksüt* added one more argument in favour of the law's unconstitutionality in his dissenting opinion by underlining that Art. 10 TA "explicitly forbids racial discrimination".[436] Therefore the linguistic 'Turkishness' of a name should not be used as a criterion for legal discrimination.

---

432 Ibid., p. 478.
433 Ibid.
434 The two most argumentatively convincing of the four dissenting/concurring opinions are translated in their entirety in Chapter III.3.6.
435 E. 2009/47, K. 2011/51 (12/07/2011), III.3.6, p. 479.
436 Ibid., p. 482.

4.3.2 Freedoms of Assembly and Association

The closely related freedoms of assembly and association play a core role in any pluralistic political system. One should assume that in a country as polarised and conflict-ridden as Turkey, constitutional adjudication on these classical political rights is rather frequent and prominent. But this is not the case; on the contrary, we found very few mentions of key rulings on these issues. Besides, two of the three decisions discussed in this set date back to the 1960s and 70s, i.e. they were issued under the Constitution of 1961, in a political environment very different from that of modern-day Turkey. As emphasised above, the AYM could only react to cases brought before it by political stakeholders or lower courts. The societal groups and individuals most affected by restrictions to their right to demonstrate or to organise in political associations did not have direct access to the Court until 2012.

The first decision analysed in this set is an abstract norm control initiated by the oppositional parliamentary group of the Workers' Party of Turkey (TİP) two years after the AYM had been created. The ruling *Freedom of Association of International Organisations*[437] concerns several provisions of the pre-constitutional Law on Associations, dating from 1938. Generally speaking, the restrictive character of the law is claimed to violate the (new) Constitution, particularly concerning the minimum age of 21 for membership in political parties (instead of 18), the prohibition of foreign organisations' offices in Turkey, and the prohibition of the engagement of associations in military training except by special permission of the Council of Ministers. The AYM rejected the unconstitutionality claim related to all three articles of the law under review. Regarding the minimum age requirement, the Court referred to the legislator's discretion to fix it; regarding the activities of foreign associations on Turkish soil as well as the prohibition of military training activities, it stipulated that the restrictive regulations were legitimate because they were in favour of public order. Whereas this decision might be justifiable from a legal point of view, the anti-liberal, authoritarian undertone of the argumentation is obvious. The justices emphasise "the dangerous role that many associations have played in our history" as well as the possible detrimental influence of the "countless associations all around the world", many of whom "could be very harmful for our country".[438] Consequently, the justices endorsed

437 Cf. E. 1963/199, K.1965/16 (23/09/1965), III.3.7.
438 Ibid., p. 485.

the legislator's strategy to restrict the freedom of association enshrined in the new Constitution (Art. 29 TA 1961) as much as possible for the sake of public order.

While in 1965 the consensus among the justices on this restrictive interpretation had been relatively broad,[439] the situation had changed significantly when an amendment law to the Law on Freedom of Assembly and Demonstrations was brought before the Court in 1976. Again, the core question focused on *de facto* restrictions of a *de jure*-granted fundamental right by means of administrative discretionary powers. In this abstract norm review case (*Freedom of Association and Assembly*)[440] initiated by the CHP group in the Senate, the main claim of unconstitutionality targeted the conditions under which the Government Commissioner could prohibit or delay public demonstrations because of supposed threats to public order. In particular, the amendment law listed possible "verbal assaults", issued by participants of the assembly or demonstration in question, as one of the reasons justifying the prohibition or delay of the event because they intended "to disrupt public peace and order". The AYM unanimously found that this provision violated Art. 28 TA 1961 (right to congregate and march in demonstrations) and Art. 11 TA 1961, protecting the essence of fundamental rights against infringement by legal restrictions. The vast majority of 13:2 justices also annulled three further articles of the amendment law, formulating additional preconditions for the admission of peaceful demonstrations, because they "open[ed] the possibility of subjecting the holding of assemblies and demonstrations to the will of the administrative authority and not to those who wish to assemble."[441]

Compared to the AYM decision *Freedom of Association of International Organisations* analysed previously, the merits of this ruling are not only remarkable because of the different outcome, but also because of the completely different method of constitutional reasoning. The justices argue in a very systematic way, referring to the motivation of the Constitutional Committee on the formulation of the articles in question. They even quote from the commission's report in 1961:

---

439 14:1 justices decided that the minimum age of 21 was in accordance with the Constitution, and 10:5 justices did not find a violation of the Constitution regarding the two remaining issues.

440 Cf. E. 1976/27, K. 1976/51 (16/05/1977), III.3.8.

441 Ibid., pp. 492-493.

> "On the one hand, the Constitution has established a broad list of individual rights and freedoms. On the other hand, it has indicated under which circumstances, upon which considerations and to what extent they can be restricted. And finally, in any case this restriction cannot go so far as to endanger the core of the rights and freedoms."[442]

In the following statement, the Court takes this fundamental commitment to the protection of the essence of fundamental rights as a yardstick when assessing the law under review. It specifies that neither a debatable term like "verbal assault", which was not even mentioned by the drafters of the Constitution nor a vague reference to the public order principle without further specification of its meaning in the concrete context, may serve as legitimate limitations to the exercise of constitutionally guaranteed fundamental rights and freedoms. The argumentative precision of this ruling in regard to the public-order-argument, omnipresent and most often very vaguely applied in AYM decisions, is particularly striking. The justices concede that Art. 11 TA 1961,

> "which establishes the limits of the restrictions concerning fundamental rights and freedoms which the Constitution provides to the legislator, contains general concepts - such as 'public order, national security' - that are open to subjective and broad interpretations according to individual views and opinions of the implementing authorities. This fact can lead to differing and arbitrary practices."[443]

In order to avoid an arbitrary application of these general concepts, the justices continue, the legislator must explain in detail how exactly they are to be understood in the concrete context of the law. If this interpretation is left to the executive and its administrative organs, as was the case in the law under review, this violates the spirit of the Constitution.

It is telling that this reasoning was developed by a new generation of justices. Compared to the bench that had rendered the decision on *Freedom of Association of International Organisations* over ten years earlier, 13 of the 15 justices had changed. Of the two 'veterans' *Muhittin Gürün* and *Lütfi Ömerbaş*, who had already participated in the previous decision, *Gürün* had been among the dissenters in 1965.

The third decision analysed in this set shows, however, that the precise logic of constitutional reasoning as well as the pro-rights-interpretation of

442 Ibid., p. 489.
443 Ibid., p. 492.

the Constitution documented in the decision on *Freedom of Association and Assembly* in 1976 did not develop into consistent AYM case law. After the 1980 military coup and the octroy of a new, less-liberal Constitution, the AYM justices obviously adapted to the new spirit of a more "authoritarian constitutionalism".[444]

In a concrete norm review case (*Duties of a Demonstration's Organisation Committee*)[445] brought before the Court by a criminal court of first instance in 2004, the new Law on Assemblies and Demonstrations passed in 1983 was claimed to be unconstitutional because it substantially restricted Art. 26 (freedom of expression and dissemination of thought) and Art. 34 (right to hold meetings and demonstration marches) of the 1982 Constitution. The central question of this decision was similar to the previous cases analysed in this set: did the limitations defined in the law under review obstruct the *de facto* exercise of the right to assembly to a degree which violated its essence? The law required that all (at least) seven members of the organisation committee responsible for a demonstration or assembly should be present in person at the event, otherwise the missing members would face criminal charges. The applicants of the norm review argued that this provision massively hindered the organisation of any demonstration because of the huge personal risks for the individuals in charge. The AYM rejected the claim of unconstitutionality with an 8:3 majority. The merits very briefly state that the provision at issue "aims at ensuring peaceful and orderly assemblies, establishes a limitation aiming for the protection of public order without infringing upon the essence of the right."[446] No further explanation on why the abstract public-order-principle prevails over the constitutional freedom in this particular context is added.

4.3.3 Freedom of Speech and Media

AYM adjudication regarding the classical political freedom of speech and media was almost inexistent until the individual complaint procedure was introduced in 2012. Even the very few abstract norm review cases on the issue we could identify do not directly target the freedom of media.

444 Isiksel 2013.
445 Cf. E. 2004/90, K. 2008/78 (05/07/2008), III.3.9.
446 Ibid., p. 498.

The first analysed ruling (*Crime of Stirring up Social Unrest*)[447] mainly concerns legal limitations of the individual freedom of thought and speech. Shortly after the institutionalisation of the AYM, the Workers' Party of Turkey (TİP), who's very active policy of applying to the Court in order to promote a more liberal interpretation of fundamental rights in Turkey has been sketched out above,[448] initiated an abstract norm review regarding some provisions of the Criminal Code. The TİP deputies claimed that two articles of this pre-constitutional law violated the freedom of thought, of arts and sciences and of the press (Art. 20, 21 and 22 TA 1961). They argued in particular, that the missing definition of the crime "to prompt hate and hostility among some social classes in a way that threatens public security" (Art. 312 (1) of the Criminal Code) might "cause arbitrary treatment or impediment of scientific research".[449] The AYM unanimously rejected the allegation of unconstitutionality. In the merits, the possible detrimental effects of this very vaguely formulated legal provision, which substantially restricted a fundamental right, are not even discussed. Instead, the Court declared the maintenance of public security and order to be the self-explicable top priority of all state actions:

> "To allow the prompting of hate and hostility among some social classes in a way that threatens public security means to give consent to chaos and turmoil among citizens, and this can never be accepted. The constitution-makers (…) aim at preventing a subversion of order and security."[450]

The second ruling in this set, concerning the *Press and Broadcasting Privilege*[451], was issued many years later, in 2000. It is also only indirectly linked to media freedom. From a political perspective, the most remarkable aspect of this case concerns the topic of the law under review: In March 1999, the TBMM had passed a Law on the Suspension of Sentences for the Crimes Committed by the Press, stipulating that all sentences of less than twelve years of imprisonment imposed on journalists who had been tried for having committed crimes "through TV or radio broadcasting or by press publications" were postponed; pending trials and convic-

447 Cf. E. 1963/193, K. 1964/09 (11/06/1964), III.3.10.
448 Cf. Chapter II.4.
449 E. 1963/193, K. 1964/09 (11/06/1964), III.3.10, p. 501.
450 Ibid., p. 502.
451 Cf. E. 1999/39, K. 2000/23 (10/12/2000), III.3.11.

tions were stopped. According to the explanatory memorandum of the law, quoted in the AYM ruling, the aim of this quasi-amnesty was

> "to render the press and human thought free, by removing obstacles to the freedom of press and by safeguarding it. Therefore, issuing provisions regarding a postponement of execution of sentences and trials concerning crimes committed by press or TV and radio broadcasting (…) has vital importance in terms of enabling and maintaining social peace."[452]

The parliamentary group of the Virtue Party (*Fazilet Partisi*, FP), a very conservative Islamist party to be banned two years later for violating the laicism-principle,[453] initiated an abstract norm review procedure against this law. The applicants claimed, that the privileged treatment of journalists violated the principle of equality (Art. 10 TA), because other individuals, such as researchers referring to media programmes in their publications or teaching, did not profit from the postponement in case they were sentenced for this reason. The AYM followed this argumentation and annulled the law in question, because "(t)here is obviously no good reason for this regulation which prescribes different sentences for those who commit similar types of crimes."[454] However, it postponed the entering into force of this decision for one year after its publication in the Official Gazette, in order to give the legislator time for passing an amended law to the same effect. Whereas this was only vaguely motivated by the 'standard' reference to "public order and public interest"[455], the concrete reason seems obvious: The annulment of a law which substantially liberalised some of the heavy restrictions of press freedom in Turkey would have stirred massive public protest in the political climate of the early 2000s.

The introduction of the individual complaint procedure in 2012 changed the AYM case law on media freedom significantly. According to the AYM's own statistics, between 2012 and 2021 the Court found a violation of the freedom of expression, guaranteed by Art. 26 TA, in 663 individual complaint cases decided on the merits.[456] Some of these decisions got major public attention, because the justices fiercely defended

452 Ibid., p. 504.
453 Cf. Chapter II.4.1, Table 6.
454 E. 1999/39, K. 2000/23 (10/12/2000), III.3.11, p. 506.
455 Ibid., p. 507.
456 Cf. https://anayasa.gov.tr/media/7734/bb_2021_tr.pdf (last accessed: 19/10/2021).

the fundamental right against the growing authoritarian tendencies of the AKP Government. In 2014, the AYM issued two key rulings in this regard: it declared unconstitutional the blocking of the twitter.com network and the website youtube.com, issued by Government authorities.[457] Whereas the official justification of the bans referred to the violation of personality rights and data protection obligations, they were perceived in public as a direct reaction to the dissemination via social media of corruption allegations against AKP leaders, including (then) Prime Minister *Recep Tayyip Erdoğan* and his family.[458] In two consecutive rulings, the justices not only annulled the executive measures, but they also emphasised the importance of free media for a democratic society and principally defined the essence of this fundamental right which, according to Art. 13 TA, may not be infringed upon by any legal restriction. In identical wording, both rulings stipulate:

> "In a democratic system media and public checks play an at least equally effective role and have at least equal importance as administrative and judicial review for ensuring that power is exercised within the legally permissible limits. Media functions as a public watchdog (…) and, as its capacity to accomplish its function depends on its independence, it is a vital freedom and applicable to everyone."[459]

4.3.4 Prisoners' Rights and Fair Trial

The rules of fair trial and the correct treatment of prisoners belong to the very core of fundamental rights guaranteed in any functioning state under the rule of law. Accordingly, Article 14 of the 1961 Constitution of Turkey prohibited ill-treatment and torture of prisoners and stipulated that "no punishment incompatible with human dignity shall be imposed". Additionally, Articles 30-34 TA 1961 listed the essential provisions of a fair trial. The current Constitution guarantees the same rights in very similar words in Art. 36 to 38 and 40 TA 1982. Art. 17 (3) TA not only

457 2014/3986 (02/04/2014) (Twitter ban: https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/3986; last accessed: 19/10/2021); 2014/4705 (29/05/2014) (Youtube ban: https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/4705?Dil=en; last accessed: 19/10/2021). Both rulings are accessible on the AYM's webpage, including an integral English translation.

458 Cf., for example, Rawlinson 2014.

459 2014/3986 (02/04/2014), para 38; 2014/4705 (29/05/2014), para 51.

explicitly prohibits torture and mal-treatment, but also any "penalties or treatment incompatible with human dignity". Despite the fact that these constitutional provisions were applicable for decades, they were never fully implemented by Turkish law enforcement institutions. This became painfully obvious in several rulings handed down by the ECtHR since the 1990s against Turkey for violating prisoners' rights.[460] Nevertheless, until 2011 the AYM did not issue one single decision finding a violation of the constitutional principles of fair trial or fair treatment of prisoners.[461]

As described in the case of other fundamental rights' issues, this inactivity can be partly explained by the lack of cases brought before the Court. The protection of defendants' and prisoners' rights is even particularly difficult to achieve by means of abstract constitutional review proceedings: The violation typically occurs when existing laws are applied by state organs, such as the police, the prosecution or prison wards. Thus, even if the law itself may not be unconstitutional, its implementation can well be. Yet these infringements are beyond the reach of abstract constitutional review since those who are invested with the power to initiate these proceedings are themselves responsible for the alleged violations. Besides, until 2011 the Turkish trial courts did not initiate any concrete norm controls on the matter, either. This reluctance can be best explained by the heavily state-centred legal culture in Turkey, according to which the repressive state security apparatus used to be (and partially still is) beyond judicial control.[462] As will be shown below, the AYM case law on the matter changed most significantly in quantity and quality since the introduction of the individual complaint procedure in 2012.

At some rare occasions, the AYM nevertheless dealt with the question of fair trial and prisoners' rights even before this big change, as the selected key decisions prove. Three of the four documented rulings, though, do

460 According to own calculations by the authors, based on the ECtHR Reports *Violations by article and by respondent state 1959-2015*, Annual Report 2015, pp. 200-201 (https://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf; last accessed: 19/10/2021) as well as *Violations by article and by country 1999-2003*, Annual Report 2003, pp. 114-115 (https://www.echr.coe.int/Documents/Annual_report_2003_ENG.pdf; last accessed: 19/10/2021), the ECtHR issued 402 rulings against Turkey under Article 3 of the ECHR, for violating the prohibition on torture and inhuman or degrading treatment with respect to detainees between 1992 and 2011. Among the first cases which received much international attention were *Aksoy vs Turkey* (21987/93, 18/12/1996) and *Aydin vs Turkey* (23178/94, 25/09/1997).

461 The authors conducted a thorough search of all issues of the Official Gazette.

462 Cf., among others, Arslan 2007; Ergül 2005.

not explicitly evoke the respective rights, but rather address the problem indirectly by referring to other constitutional provisions, such as equality before the law or parliamentary procedure. This circumventive approach is particularly obvious in two abstract norm control decisions rendered in 1972 and 1974. Both rulings are frequently mentioned in the literature as key cases, because for once the AYM "extended protection to left-wing political groups and prevented the militarisation of the criminal justice system".[463]

The first decision of this set (*Death Sentence*) is one of the most complex and incoherent of our sample.[464] Following the indirect military intervention into Turkish politics in March 1971, all organisations and activists labelled as leftist were subject to repression. Among other measures, the death penalty which had not been implemented since the 1960 coup, was reinitiated.[465] In the following months, a series of political trials against left-wing activists led to hundreds of convictions, among which the case of three popular leftist activists stood out as particularly dramatic. *Deniz Gezmiş*, *Yusuf Aslan* and *Hüseyin İnan*, leaders of the "People's Liberation Army of Turkey" (THKO) were condemned to death by the Ankara Martial Law Command's First Military Court in October 1971. Unlike several other death sentences which were converted to imprisonment, this decision was approved by the Second Chamber Military Court of Appeals and supported by the majority of both chambers of the TBMM.

In March 1972 CHP deputies, which formed the largest parliamentary opposition group at the time, appealed to the AYM as a last resort to prevent the execution of the death sentences. They initiated abstract constitutional review proceedings against the law which enforced the execution of the death sentences and claimed that it violated several articles of the Constitution, mainly concerning the functions and procedural rules of the TBMM. The CHP also requested a stay of execution of the law. The AYM confirmed the claim of unconstitutionality and annulled the law by a majority of 10:5 votes. This decision, however, resulted only in a short adjournment of the execution of the three convicts, because the TBMM quickly "healed" the flaw of unconstitutionality by re-deliberating and

463 Belge 2006, p. 680.

464 The decision E. 1972/13, K. 1972/18 (24/07/1972) is documented in Chapter III.3.12 in its entirety, including the dissenting opinions, in order to make transparent to the reader, why we qualify it as an exemplary case of political instead of legal reasoning.

465 Cf. Ahmad 1993, pp. 149-151.

re-voting the respective law, after which the executions finally took place on May 6 1972. Thus, even if the ruling can be interpreted as an attempt to defend the life and the rights of three individuals against unfair and unhuman punishment by repressive state authorities, it ultimately failed. As the analysis of the Court's reasoning reveals, this limited effect can be mainly explained by a lack of determination and argumentative coherence on the part of the justices.

One telling indicator of the discord on the bench is the number and scope of dissenting opinions, unusual even by AYM standards. While ten of the 15 justices voted in favour of the annulment, only four of them supported the whole ruling without voicing their (partial) dissent. In addition to one collective dissenting opinion, in which five justices rejected the majority opinion on the whole, four more dissenting opinions were issued: Five justices articulated their dissent regarding parts of the ruling in varying coalitions, formulating three different dissenting opinions, while justice *Şahap Arıç* added his partial dissent in a separate opinion. In sum, the five dissenting opinions are significantly longer than the majority decision itself and – what is even more revealing – one separate opinion displays a far more convincing judicial argumentation than the main ruling.

A reconstruction of the argumentation developed in the preliminary examination, the merits, and the multiple dissenting opinions shows how difficult the justices must have found it to reach a collective decision at all. Clearly, in the extremely politicised post-coup atmosphere the ruling would be perceived as either supporting the repressive parliamentarian majority in its determination to silence the political left or as taking sides with the oppressed political opposition. In this situation, the Court tried to avoid any argumentation on the substance and restricted itself to a discussion of purely procedural aspects.

In the preliminary examination, the justices deliberated at some length on the question of their own competence. This dispute revolves around the distinction between the words "law" (*kanun)* and "decision" (*karar*), both used in Art. 64 (1) of the 1961 Constitution in order to define the competences of the TBMM. Whereas it was clear that the AYM could review laws (Art. 147 (1) TA 1961), its competence to review decisions was a matter of interpretation. Art. 64 (1) TA 1961 stipulated that both chambers of Parliament had the right "(…) to *decide* on the execution of death penalties given by the courts" [emphasis added]. Hence, the Court could only review this decision, if it was interpreted as a law and not a resolution/decision, the latter being explicitly excluded from constitutional

review. The majority opinion held that the constitutional expression was a mere "feature of wording because of a concern for avoiding repetition and because any disposal of legislation shall be a result of a decision".[466] This argument was also underpinned by some technical considerations regarding the procedure of passing the concrete decision prescribed in the Constitution, which was identical to the one for regular laws but different from the one for resolutions. 13 out of 15 justices shared the majority opinion on this particular issue; only two suggested to take refuge in a sort of self-inflicted 'political question doctrine' by declaring the Court incompetent on the matter at hand.

The second issue discussed in the preliminary examination concerned the narrow timeframe within which the AYM had to decide on the (un)constitutionality of the enforcement law.[467] As the implementation of the death penalty would obviously be irreversible, the justices faced a dilemma. On the one hand, they needed time to properly consider the delicate issue at hand, involving "the matter of life and death of three persons",[468] as the ruling repeatedly emphasises. On the other hand, the competence to suspend the implementation of a law under constitutional review was not granted to the AYM by the Constitution nor by the Rules of Procedure of the Court. Nevertheless, the applicants had applied to the Court requesting a stay of execution. Clearly, this measure would have provided the most effective protection for the life of the three prisoners, because once the implementation of the law had been officially suspended, the AYM instead of the TBMM would have been in charge of any further action on the matter.

These decisive consequences of the ruling explain why the stay of execution dilemma is the most fiercely debated aspect of the decision. Whereas the majority opinion states that the AYM was not entitled to declare a stay of execution, it explicitly refers to the controversial debate during the Court's deliberation and lists three different "justifications for the dismissal" of the request in what can only be interpreted as an attempt

466 E. 1972/13, K. 1972/18 (24/07/1972), III.3.12, pp. 510-511.

467 In order to provide their decision before the definite implementation of the law, which would result in the hanging of the convicted, the AYM administration had even reduced the timespan of ten days prescribed in Art. 33 (2) of the Rules of Procedure of the Constitutional Court of 1962 between the sending out of the agenda for the deliberation of the case and the first day of deliberation. This gave the justices even less time to familiarise with the application, as was criticised in several dissention opinions.

468 E. 1972/13, K. 1972/18 (24/07/1972), III.3.12, p. 526.

of self-persuasion. One justification criticises the fact that the AYM does not have the right to declare a stay of execution itself and appeals to the political authorities – such as the President of the Republic or the TBMM – to act respectively instead. This request reveals the inner conflict of the justices, who were convinced that the (politically motivated) death sentences were in violation of fundamental rights guaranteed by the Constitution, but refrained from taking the responsibility to stop their execution.

Only six of the 15 justices were determined to take more effective action than a mere appeal to other political actors. Building on the same core arguments – i.e. the high priority of the right to life and the irreversibility of the execution of the law – three different minority opinions argued in favour of a declaration of a stay of execution. While two of them were composed of moral and openly political considerations, justices *RecaI Seçkin*, *KanI Vrana* and *Şevket Müftügil* offered a convincing legal reasoning. At the core, they suggested an analogy argument: The constitutional provision precluding a declaration of stay of execution (Art. 148 TA 1961) concerned classical abstract review proceedings of "laws prescribing objective and general rules", whereas in concrete review proceedings, touching upon individual rights, the submitting courts were obliged to wait for the decision of the AYM before deciding the case in question (Art. 151 TA 1961). Thus, the "stay of execution of a law enforcing a finalised death sentence because of constitutional review proceedings is a normal and even compulsory consequence of the right to life, which is among the fundamental rights in the constitution of a democratic state under the rule of law".[469]

This argumentation culminated in a direct appeal to the AYM majority: "It is among the duties of the Constitutional Court to pass judgement on this problem which has been resolved through the spirit of our Constitution and not by the wording of case law".[470] This exemplary piece of constitutional reasoning, which was principally shared by up to ten justices,[471] proves that the AYM was on the brink of handing down a fundamental and sustainable decision in favour of the protection of prisoners' rights in 1972. Why it ultimately failed to do so is difficult to reconstruct from

469 Ibid., p. 536.

470 Ibid.

471 Six justices openly opted in favour of a stay of execution decision in three different dissenting opinions. In addition, four justices supported the argument in principle in their „justification" of the majority decision, which they finally shared.

the text of the ruling. What is striking, though, is the fact that even the six justices who clearly opted for this solution were unwilling or unable to unite, but stated their common opinion in three separate dissenting opinions.

Once a majority of nine justices had rejected the request to declare a stay of execution, the Court tried to find the smallest common denominator in order to force the TBMM to, at least, reconsider its original approval of the death sentences. Hence, the merits mainly focus on procedural aspects pertaining to the process in which the law had been passed. This decision-making had deviated substantially from the ordinary procedure of enacting laws and disregarded some urgency provisions in both chambers. The AYM found that these procedural errors substantially violated "important and essential formal provisions"[472] and consequently declared the unconstitutionality of the law enacting the death sentences. Even this well justified decision was vetoed by five justices, who's legally unsubstantiated dissenting opinion displays an openly political motivation.

In sum, this key ruling reflects the difficult self-positioning of the AYM in the first phase of its existence in an exemplary way: It did not act as a determined defender of individual rights, but rather as a well-intentioned but internally discordant and highly politicised institution mirroring the political and societal cleavages of the time.

The ruling *Amnesty for Certain Groups of Political Prisoners*[473], rendered two years later, was situated in the same political context and displays similar patterns of political rather than legal reasoning. The Law on Amnesty for some Crimes Due to 50th Anniversary of the Republic had been subject to fierce struggles between the two chambers of the TBMM: The post-coup hardliners in Parliament were determined to exclude all prisoners of the left-wing opposition from the amnesty. They finally succeeded by adding Art. 5A to the law, specifying that those groups of convicts who had been tried for politically motivated offenses were not eligible for early release.[474] The parliamentary opposition in the National Assembly initiated abstract constitutional review proceedings, arguing that this article of the amnesty law violated the constitutional principle of equality

472 E. 1972/13, K. 1972/18 (24/07/1972), III.3.12, p. 522.

473 Cf. E. 1974/19, K. 1974/18, (12/07/1974), III.3.13.

474 In detail, the law enumerated "actions governed under Articles 141, 142, 146, 149 of the Turkish Criminal Code [of 1929] and paragraph B of Article 148 of the Military Criminal Code; crimes under Article 414(2) of the Turkish Criminal Code and Article 416(1); paragraph (D) of Article 1" to be excluded from the amnesty.

guaranteed by Art. 12 TA 1961. It also claimed that the voting procedures in the National Assembly when passing the amnesty law had violated Art. 92 (5) TA 1961.

As in the *Death Sentence* ruling two years earlier, the AYM annulled the contested provision of the amnesty law on procedural grounds, but avoided discussing the substance of the case. Besides, the inconsistent voting pattern in different parts of the decision reveals multiple cleavages within the Court: Each of the four sub-decisions of the ruling is supported by a different coalition of justices. The only unanimous decision within the ruling stated that there is no necessity "to handle the issue of unconstitutionality in terms of substance"[475], because the incriminated article of the amnesty law was to be annulled on procedural grounds. The remaining parts of the ruling were consistently supported by five justices and rejected by three others,[476] while the seven remaining justices joined the majority only partially. As a result, two sub-decisions were passed by 9:6 and one by 11:4 justices. The picture is further complicated by no less than nine dissenting opinions added to the main ruling, eight of which are signed by one justice each, and one has no signature at all.[477]

While the content analysis cannot elucidate why the minority positions were not co-ordinated, the quantity and the variety of dissenting opinions definitively disprove the often-propagated image of the Court as a homogenous political actor. The impression of internal heterogeneity and dissent is further confirmed by a comparison of the voting behaviour of the 12 (out of 15) justices who had already participated in the *Death Sentence* ruling two years earlier:[478] Only six justices showed a consistent voting pattern, whereas the rest of the bench took different sides in varying coalitions. Four of the five justices[479] who dissented in 1972 because they did not want to annul the enforcement law even for procedural reasons, also participated in the *Amnesty for Certain Groups of Political Prisoners*

475 E. 1974/19, K. 1974/18, (12/07/1974), III.3.13, p. 547.

476 Justices *Şahap Arıç*, *Ihsan Ecemiş*, *Halit Zarbun*. Justice *Arıç* and Justice *Zarbun* were already among the dissenters in the *Death Sentence* decision, while *Ihsan Ecemiş* had then supported the majority decision.

477 The most plausible explanation for this anonymous dissenting opinion is a technical error, which is a further sign for the incoherent decision-making process.

478 Justice *Recai Seçkin* died in 1972, Justice *Fazıl Uluocak* left the bench in 1973 and Justice *Ziya Önel* did not participate in the decision E. 1974/19, K. 1974/18, (12/07/1974) for unknown reasons.

479 Justices *Fazıl Uluocak*, *Şahap Arıç*, *Halit Zarbun*, *Lütfi Ömerbaş*, and *Ahmet H. Boyacıoğlu*.

ruling. Only two[480] of them dissented again; the other two voted with the majority in 1974. Furthermore, justice *Muhittin Gürün*, one of the six[481] justices who had manifested their rights-protecting attitude in 1972 by opting for a stay of execution of the law under review, voted against the inclusion of left-wing political prisoners into the amnesty law in 1974.

A closer look at the merits and at the large number of dissenting opinions confirms major cleavages among the justices: approximately half of the 15 justices form two opposing camps with distinct political agendas translated – more or less convincingly – into judicial reasoning. The rest of the justices on the bench is less predictable, aligning with one of the camps from case to case. In the following, the opposing positions are retraced by comparing the majority opinion and the best-grounded dissenting opinion, signed by Justice *Şahap Arıç*.

The complex procedural questions considered in the merits revolved around the voting mechanism in the National Assembly after the Senate had rejected the original draft of the amnesty law. While voting on the version prepared by the conciliation committee of both chambers, the deputies proceeded in a way which the applicants of the norm review assumed to violate Art. 92 (5) TA 1961. In a nutshell, the AYM had to interpret the meaning of the word "text" as used in the Constitution: Did it refer to the whole draft or to the wording of each separate article of the draft? By applying semantic and teleological methods of interpretation, the majority opinion convincingly concluded that the parliamentary voting procedure did violate constitutional provisions in multiple ways. While this conclusion should have resulted in the unconstitutionality of the whole amnesty law, the decision was explicitly limited to the contested Art. 5A. The decision of only partial annulment, without a convincing legal reason, can be understood as a strategic move. If the entire amnesty law had been declared unconstitutional, a new law could have been enacted by the TBMM, eliminating procedural errors but still excluding political prisoners from the amnesty. Hence, political prisoners profited the most from a ruling annulling only Art. 5A, because in this case the amnesty had to be implemented according to the original law, minus the discriminating provision.

The political strategy behind the legal reasoning of the majority decision is mirrored in the dissenting opinion of *Şahap Arıç*, one of the determined

480 Justices *Şahap Arıç*, and *Halit Zarbun*.

481 Justices *Avni Givda*, *Recai Seçkin* (died in 1972), *Ahmet Akar*, *Kani Vrana*, *Muhittin Gürün*, and *Şevket Müftügül*.

post-coup hardliners among the AYM justices. He interpreted the term "text" in Art. 92 (5) TC differently, deducing the National Assembly's right to vote separately on each proposition of the three versions of the amnesty law. *Arıç*'s last line of defence in favour of the original amnesty law concerns the date of entry into force of the AYM decision: If the Court's majority was – erroneously, according to his point of view – convinced of the unconstitutionality of the law in the first place, it should have annulled the entire law rather than one article because then "the legislative assembly would have been given the opportunity to act according to its will and the internal consistency of the Law on Amnesty could have been preserved"[482]. From the perspective of consistent legal argumentation, *Arıç* certainly had a point in this regard. His conclusion to instead postpone the entry into force of the AYM ruling until after the implementation of the unamended amnesty law, however, reveals his rather politically inspired determination to maintain the punishment of leftist activists. As this suggestion did not find majority support on the bench, the ruling which only partially annulled the law under review entered into force immediately and resulted in several political prisoners profiting from the general amnesty.

The two remaining rulings in this set were handed down almost forty years later, in a completely changed political and institutional context. Both decisions were initiated by penal courts, whose judges finally did what Turkish courts had not done in decades: They asked for concrete norm review, arguing that the laws they had to apply violated prisoners' rights or the constitutional principle of a fair trial.

In 2012, the AYM rendered its first ever concrete norm review decision concerning Art. 17 TA 1982, guaranteeing the right of personal inviolability and corporeal and spiritual entity of the individual (*Treatment of Prisoners and Visiting Rights*)[483]. The submitting court claimed that the Law on Execution of Sentences and Security Measures violated this provision, because it massively restricted the right of prisoners to receive visitors. According to Art. 83 (1) of the law in question, a list of no more than three visitors could be authorised in addition to legal representatives, spouses and relatives. Besides, the names on the list could only be changed in "urgent cases", a term defined by the prison management without any possibility of appeal. The submitting court held that the provision, coupled with its restrictive interpretation by the responsible state authorities, led to

482 E. 1974/19, K. 1974/18, (12/07/1974), III.3.13, p. 552.
483 Cf. E. 2012/07, K. 2012/102 (05/07/2012), III.3.14.

the social isolation of prisoners and therefore impeded their rehabilitation. The AYM rejected the norm review by a majority of 10:3, stipulating that the provision did not violate the constitutional rights of prisoners. The merits display an almost complete lack of in-depth constitutional reasoning, weighing individual rights against the security interests of the national correctional system. One single paragraph addressed the problem of conflicting rights, stating that:

> "(…) the execution of the sentence aims on the one hand at deterring the prisoner from committing another crime, and on the other hand at respecting their rights to improve their corporeal and spiritual existence by enabling them to communicate with the outside world and to rehabilitate socially. Nevertheless, it is evident that the right to have visitors has been restrained (…) for the purpose of protection of and order in prisons. Therefore, there must be a reasonable balance between the right to have visitors, security and order of prisons and the right of prisoners to develop their corporeal and spiritual existence".[484]

How exactly this "reasonable balance" could be reached and what it should look like is not explained at all in the majority opinion. As in several other cases of our sample of key decisions,[485] the dissenting opinion, signed by the three justices who claimed that the provision under review did violate the Constitution, offered a much more detailed and more convincing legal argumentation. It explicitly referred to the "condition of proportionality" which should guide the constitutionality considerations: "While it would be possible to restrict the right to change the list of visitors often in terms of security and order of prisons, a complete prohibition to change (…) is a disproportional measure" and thus violates the Constitution.[486]

The second concrete norm review on a related issue, initiated some months earlier, was decided by the AYM in a very similar manner: 13:2 justices rejected the unconstitutionality claim in the case *Unequal Standards in Military and Civilian Criminal Law*[487] without any in-depth constitutional reasoning, thus reinforcing the Court's traditional image of an uncritical supporter of authoritarian statehood. The submitting court had asked for annulment of a provision of the Military Criminal Code, according to

484 Ibid., p. 561.
485 Cf. Chapter II.5.4 for similar examples.
486 E. 2012/07, K. 2012/102 (05/07/2012), III.3.14, p. 562.
487 Cf. E. 2011/98, K. 2012/24 (16/02/2012), III.3.15.

which burglary committed by military personnel was to be punished more severely than analogue crimes according to the Civilian Criminal Code. The claimed violation mainly targeted the principle of equality before the law (Art. 10 TA 1982), but fair trial provisions were also at stake: The law discriminated against military staff in case of criminal prosecution for a 'common' offense, unrelated to the specifics of the military profession, thus violating their right of a fair trial.

In the merits, the AYM did not even consider this constitutional problem. After an abstract reference to the state under the rule of law and a brief recapitulation of the principle of equality, it substantiated its rejection of the concrete unconstitutionality claim in one single paragraph. The justices emphasised the discretionary power of the legislative in terms of "trial modalities, determination of punishable acts, punishment length and forms",[488] and the different legal status of military personnel and civilians, which justified different legal treatment. No judicial arguments were developed to underpin the relevance of this general difference in the particular case of criminal prosecution. The merits merely refer to the closeness of collaboration and co-existence within the military, which required a high amount of mutual trust. Justice *Engin Yıldırım* pinpointed the weakness of this reasoning in his dissenting opinion. He wrote:

> „There are of course differences between military personnel and civilians, but where fundamental rights and freedoms are concerned, these differences should not be used to create inequalities to the detriment of military personnel".[489]

As these two concrete norm review decisions rendered in 2012 prove, the AYM did not immediately seize the opportunity to develop a rights-protecting doctrine once the penal courts started to submit respective cases. Against this backdrop, the introduction of individual complaint proceedings had a ground-breaking effect: Ever since, the huge majority of individual applications considered by the AYM concerned the right to fair trial and prisoners' rights. While the problem of overlong trial proceedings – often resulting in an extremely long detention of suspects before a final ruling is rendered[490] – takes the lion share of these cases, the AYM had to concern itself with all sorts of related issues, including allegations of ill-treatment of prisoners and even torture. According to the Court's own

488 Ibid., p. 563.
489 Ibid., pp. 564-565.
490 For details on this problem cf. Göztepe 2015.

statistics covering the first seven years of individual complaint decisions, 53% of all rulings which stated a violation of at least one constitutional right were related to fair trial and prisoners' rights. This equals a total of 4.250 cases, 2.339 of which concerned the right to a trial within a reasonable time.[491]

Of course, this quantitative boost of adjudication does not necessarily induce a qualitative change of the Court's approach to the topic. An explorative look into two examplary individual complaint decisions rendered in 2014, though, suggests a substantial transformation in the way of constitutional reasoning, if not in the outcome of the rulings. One of them[492] deals with the individual complaint of a prisoner involving constitutional problems very similar to those discussed in the *Treatment of Prisoners and Visiting Rights* ruling analysed above. The second one, which was qualified by the AYM itself as a "leading decision", set the precedent for a series of subsequent decisions concerning the violation of the right to personal liberty and security and the right to be tried within a reasonable time (Art. 19 TA).[493]

In the complaint of a convict serving a six years-term in a high security prison, the supposedly arbitrary limitation of the number of books he was allowed to keep in his cell was in conflict with his freedom of expression and dissemination of thoughts (Art. 26 TA). As the relevant legal provisions do not indicate a maximum number of books, but only generally refer to the ratio between the number of detainees and the number of library books and, above all, to the need to keep order in the cells, the AYM had to find a 'reasonable balance' between the conflicting norms. Whereas the outcome of the ruling is the same as in the *Treatment of Prisoners and Visiting Rights* case, the constitutional reasoning leading to this unanimous decision[494] could hardly differ more. The justices upheld the traditional state-centred approach of the AYM and did not find a violation of the prisoner's right in the restrictive public-order-policy of the prison authorities. But they based this decision on a differentiated

491 Cf. https://www.anayasa.gov.tr/media/6136/bb_statistics_2019-2.pdf, Tables 10 and 12 (last accessed: 19/10/2021).

492 Cf. 2013/1821 (30/01/2015).

493 Cf. 2013/8694 (23/07/2014) (English translation provided on the homepage of the AYM:"http://constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication/judgment/2013-8694.pdf. (last accessed: 07/12/2021))

494 For the examination of individual applications, the AYM formed two parallel sections of seven justices each; cf. Chapter I.5.1. This decision was rendered by a panel of five justices of the First Section.

assessment of the principle of proportionality stipulated in Art. 13 TA, repeatedly referring to the AYM's own former case law as well as to several rulings of the ECtHR. These abstract considerations were then systematically applied to the case at hand. The justices basically argued, that in prison the restriction of individual freedoms is an inherent part of the very logic of punishment, and that state authorities have the discretion to decide how far exactly these restrictions should go, as long as the essence of fundamental rights is respected.[495]

The 'prototype'-decision on overlong procedure, rendered in July 2014, partially deviates from this state-centred, uncritical defence of the public order-argumentation for the first time, if only by the small margin of a 3:2 majority. The concrete circumstances of the complaint filed by a defendant, whose case was still pending, because his murder sentence had been reversed and reaffirmed repeatedly by various courts, are rather complex. The general importance of the case lies in the AYM's argumentation, why it found "the detention being in excess of reasonable duration"[496] and thus stipulated a violation of Art. 19 TA. According to this deliberation, the only justification for prolonged detention "in spite of the presumption of innocence (…) is a public interest which has precedence over the right to personal liberty and security enshrined in Article 19 of the Constitution"[497]. The justices held that the obligation to define such public interest in each individual case lies with the trial courts, and that the justification must provide relevant and sufficient reasons for the prolongation of detention. After quoting and evaluating the – very vague and almost identical – wording of the repeated justifications for prolongation of detention given by the different courts involved in the case at hand, the AYM ruling reached a straightforward conclusion:

> "The duration of 3 years and 5 months when the applicant was deprived of his freedom cannot be evaluated as reasonable based on justifications that are irrelevant and insufficient."[498]

This bluntly stated demand for a differentiated argumentation justifying the prolongation of detention in every single case, striking a 'reasonable balance' between the restriction of fundamental rights and state claims of

495 Cf. 2013/1821 (05/11/2014).
496 2013/8695 (08/09/2014), V. judgement.
497 2013/8695 (08/09/2014), para. 35.
498 2013/8695 (08/09/2014), para. 51.

upholding public order, set a precedent for many subsequent individual complaint rulings regarding prisoners' rights and fair trial.[499]

4.3.5 Equality Before the Law and Gender Equality

Equality before the law is the only fundamental right that has always played a major role in AYM adjudication. More particularly, various aspects of gender equality have come into the Court's focus since the late 1980s. We therefore put a special emphasis on this issue and have selected 12 key decisions from a huge number of cases, trying to retrace if and how the AYM developed a doctrinal position on the subject. Interestingly enough, all analysed rulings were initiated by concrete norm review requests. Instance courts were obviously more receptive to the possibility of individual rights being violated in this regard than in other areas of fundamental rights and freedoms. Most of the key rulings date from the 1990s and early 2000s, which reflects the modernisation and liberalisation tendencies in Turkish society at that time, resulting in a growing awareness to (gender in)equality. Generally speaking, the constitutional framework of women's rights has always been rather progressive in Turkey, but traditional family values and religiously inspired moral principles have nonetheless persisted. The AYM had to navigate within this conflicting context when deciding on the cases brought before it.

In order to cover the whole range of decisions related to Art. 10 TA (equality before the law), we focused on five recurring aspects of the case law: first, three rulings related to violence against women will be analysed, discussing the moral dimension of 'appropriate' female behaviour in a very conservative way, while the next two decisions dealing with the legal consequences of adultery by male and female spouses approach the moral dimension from a much more progressive angle. Two more rulings discuss the rights of married women in the working world in a rather ambiguous way, and the fourth sequence of decisions in this set concerns the issue of family names; here, public order arguments and a traditionalist family

499 Cf., among others: 2014/2159 (16/10/2014); 2013/8437 (30/12/2014); 2014/4246 (06/05/2015); 2014/328 (17/07/2014); 2013/6437 (17/07/2014); 2013/6149 (06/03/2014); 2012/1303 (21/11/2013); 2012/1137 (02/07/2013); 2012/239 (02/07/2013); 2013/843 (03/04/2014); 2012/999 (09/01/2014); 2012/521 (02/07/2013); 2014/2275 (23/07/2014); 2013/2056 (03/04/2014); 2013/1782 (17/07/2014); 2013/1420 (17/07/2014); 2013/776 (20/03/2014); 2013/496 (03/04/2014); 2012/899 (09/01/2014).

concept clearly prevail over gender equality. The last three decisions do not focus on gender equality, but on children's rights and the social security of different professional groups. In all three cases, the AYM developed a consistently pro-rights reasoning.

The just measure of punishment for crimes committed against women is a recurrent issue in AYM adjudication. In 1988, the Antalya Second High Criminal Court requested to annul Art. 438 of the Turkish Criminal Code, dating from 1926, according to which "(i)n the case of rape and abduction crimes being committed against a woman whose profession is prostitution, the punishment may be mitigated by up to two-thirds." In the ruling *Mitigation of Sentence for Rape Crimes*[500], a majority of 7:4 constitutional justices did not find that this provision violated the rule of law principle in general or the right of equal treatment (Art. 10 TA) in particular. The extensive merits start with the Court's standard definition of equality before the law, abstractly emphasising that different legal rules may be applied to persons in different situations.[501] In the case under consideration, this unequal treatment is justified by distinguishing between different categories of women according to their moral value. The whole reasoning revolves around one core statement, which is repeated in several variations:

> "The harm suffered by a prostitute when she is raped or abducted cannot be counted equal to the harm suffered by a chaste woman exposed to the same crime. In the case of a chaste woman being raped or abducted, her honour is stained and discredited irreparably. However, there it is not possible to claim and acknowledge that a prostitute suffers in the same way."[502]

In addition, the justices postulate that

> "acts of rape and abduction are crimes against chastity. For this reason, the Turkish Criminal Code does not regulate these kinds of crimes under 'Offenses against Persons" but under "Offenses Against Chastity and Family Order'. (…) This is because when rape or abduction result in death or injury to the victim the act is not against the right to life and physical integrity of the victim but against her chastity."[503]

---

500 Cf. E. 1988/04, K. 1989/03 (10/01/1990), III.3.16.
501 For a general evaluation of this recurring definition cf. Chapter II.5.3.
502 E. 1988/04, K. 1989/03 (10/01/1990), III.3.16, p. 569.
503 Ibid., p. 572.

Both key terms of the ruling, honour and chastity, define moral rather than legal categories. Therefore, the decision's motivation is solely based on a conservative understanding of moral values which clearly cannot be deducted from the wording of the Turkish Constitution. Three of the four justices who did not agree with the majority ruling criticised this disregard of basic constitutional principles for the sake of a moral devaluation of "prostitutes" in two elaborate dissenting opinions. AYM Vice-President *Yekta Güngör Özgen* emphasised the moral dimension of the question too, but he came to a very different conclusion. He pointed out that since 1926, when the incriminated Criminal Code provision had come into force, "customary norms and old value judgements" had changed. In the Turkey of the late 1980s, "such a provision has an insulting substance to our respectable women".[504] Justices *Necdet Darıcıoğlu's* and *Servet Tüzün's* dissent is based on a more legally motivated argumentation. They call the distinction between chaste women and prostitutes "ridiculous and brutal" because

> "women's unchaste lives do not render acts of rape against them legitimate. Moreover, earning their living by prostitution does not remove or affect the ownership of their bodies. (…) prostitutes are also human beings; they have been bestowed with dignity and honour, which all members of humanity have been endowed with."[505]

Ten years later, a similar issue was brought before the AYM, and again the majority of justices did not find that the Constitution had been violated. In the concrete norm review case *Mitigation of Sentence for Honour Killings*[506], the submitting court claimed that Art. 462 of the Criminal Code violated the right to equal treatment before the law (Art. 10 TA), among other provisions, because it granted a reduction of punishment for attempted murder from a life sentence to 4-8 years of imprisonment (one eighth of the original sentence) if the perpetrator and victim belonged to the same family and the victim was caught having illegitimate sexual intercourse. In the merits of the decision, supported by seven out of 11 justices, the core problem of a priori privileging some criminal offenders over others due to supposedly morally justifiable motives is never addressed. Instead, the Court's standard definition of legal equality, legitimating unequal treatment if there are "justifiable reasons regulating different legal

504 Ibid., p. 576.
505 Ibid., p. 577.
506 Cf. E. 1997/45, K. 1998/48 (22/11/2003), III.3.17.

rules for some citizens",[507] is repeated. Hence, the justices argue, it is at the discretion of the legislator to define what reasons justify preferential treatment for certain defendants.

Once again, the dissenting opinion – this time jointly rendered by all four dissenting justices – discusses the constitutional dimension of the problem more convincingly. According to it, the provision under consideration is unconstitutional for two reasons. First, the dissenters emphasise the seriousness of any attempt at murder which cannot be attenuated *a priori* because of certain (moral) motives:

> "To legitimise an offence against the right to life – which (…) has a privileged position among all other rights and freedoms – by means of offering a remarkable mitigation in favour of an offender cannot be accepted: even if the reason for the offence is related to the protection of honour, or personal dignity."[508]

Second, they find a violation of gender equality because the mitigation of punishment is not attributed to all family members in the same way: whereas the law mentions husbands and wives as well as brothers and sisters as possible perpetrators pretending to save the honour of the family, brothers are not listed as possible victims. Consequently, witnessed illegitimate sexual intercourse only justifies the privileged treatment of an offender if the sexual act was 'committed' by a female family member.

In the ruling *Increase of Sentence in Domestic Violence Cases*[509], the problem of violence within families presents itself from the opposite perspective: in 2005, 34 courts from different regions submitted concrete review requests to the AYM because they found that the newly amended Art. 86 (3) of the Turkish Criminal Code violated, among other rights, the equality before the law principle (Art. 10 TA). According to the incriminated provision, which concerned "malicious harm" inflicted on a person, "punishment may be increased by half without consideration of any complaint" if the offence was directed towards a family member. The purpose of this provision is to condemn domestic violence with particular strength, and to prosecute it even if the victim did not bring forward a complaint or withdrew it after the case had been opened.

The AYM rejected the norm review for procedural and substantive reasons: first, it stated that the submitting courts partially did not have

507 Ibid., p. 584.
508 Ibid., p. 585.
509 Cf. E. 2005/152, K. 2008/37 (29/03/2008), III.3.18.

the right to appeal and therefore rejected their application on procedural grounds. Second, it unanimously stipulated that the increase of the punishment by half for family members does not violate the principle of equality. By a 7:4 majority the Court also approved the constitutionality of the provision according to which the complaint of the victim is not necessary in case of domestic violence. The constitutional reasoning of this decision is very similar to that of the two other rulings regarding violence against women and/or family members under consideration in this set of decisions, even if the outcome seems more liberal and rights-protecting. Regarding the equality claim, the Court once more repeated that different legal treatment is in order if the *de facto* situation is different. Here, it claimed, violent offences within the family, particularly against weaker members, justify discrimination against the perpetrator when compared to 'ordinary' offenders who lack family ties with their victims. In addition, the majority decision emphasises the obligation of the state "to protect the mental and physical existence of the individual, the cornerstone of the family, from all threats, dangers and violence."[510]

The following two decisions – *Equal Treatment of Spouses in Case of Adultery I and II*[511] – are closely connected and must be analysed together. In both rulings, the AYM not only decidedly advanced gender equality, but it also confronted Parliament for not reacting appropriately to the Court's adjudication. Both cases were brought before the justices by instance courts, claiming that the Criminal Code (TCK) provisions stipulating legal sanctions for adultery violated Art. 10 TA: while Art. 440 TCK foresaw "imprisonment for between six months and three years" for any "adulterous woman", the same punishment was to be imposed on a husband only if he "keeps an unmarried woman in order to live in a relationship with her in his marital home or publicly somewhere else" (Art. 441 TCK). The first concrete norm control proceedings on this matter, initiated in 1996, targeted the unequal treatment of female and male spouses. In its decision, the AYM unanimously declared Art. 441 TCK unconstitutional, giving a remarkably progressive explanation, which is in sharp contrast with the traditional, moral-based approach towards gender roles displayed in the first three rulings analysed in this set:

510 Ibid., p. 592.

511 Cf. E. 1996/15, K. 1996/34 (27/12/1996), III.3.19; E. 1998/3, K. 1998/28 (13/03/1999), III.3.20.

> "Gender cannot be a reason preventing equality before the law. However, with regard to gender-based distinctions it is important whether these have been established to protect women or to privilege men. In the first case it would constitute a distinction objectively required by nature and functional properties, while in the second case it would constitute a privilege based solely on gender despite all other conditions being equal."[512]

In order to avoid a legal gap "that could threaten public order", the Court delayed the effective date of its ruling for one year after its publication in the Official Gazette to give Parliament time to amend the incriminated provision. As this did not happen before the annulation of Art. 441 TCK became valid, male adultery was no longer punishable at all, while female spouses having sex out of wedlock were still threatened with imprisonment according to Art. 440 TCK. Unsurprisingly, this situation was brought before the AYM in another concrete norm control application in 1998. The Court repeated its previous reasoning on the matter in the second ruling, emphasising that adultery by men and women should be treated equally. It therefore annulled Art. 440 TCK, too, this time even without delay.[513] Consequently, adultery ceased to be a criminal offence for both sexes, primarily because the TBMM had not succeeded in amending the Criminal Code provisions as suggested by the Court. Because of this undesired side-effect, two justices dissented from the second ruling.

In both *Adultery* rulings, the AYM explicitly based its reasoning on international conventions "prohibiting gender-based discrimination" and did not at all refer to traditional family values or moral categories like chastity, as it did in the cases on *Rape Crime* (III.3.16) and *Honour Killings*(III.3.17). After extensively quoting from the Universal Declaration of Human Rights and the ECHR, the Court comes to the conclusion that,

> "(t)here is no essential difference between Article 10 of the [Turkish] Constitution (…) and these international agreements, which, although they can only be considered in a constitutional review without forming its basis, prohibit gender-based discrimination or inequality. In these international agreements, which reflect the common ideals of

512 E. 1996/15, K. 1996/34 (27/12/1996), III.3.19, p. 600.
513 Cf. E. 1998/3, K. 1998/28 (13/03/1999), III.3.20.

> the humanity of all Nations, the principle of equality is the common starting point for the enjoyment of rights and freedoms."[514]

The application of international standards of gender equality in Turkey played an equally important role in the decision *Work Permission of Female Spouses*[515] in 1990. In this concrete norm review, the submitting court requested the annulment of Art. 159 of the Turkish Civil Code, according to which a wife had to ask for her husband's permission before taking up employment. The AYM unanimously confirmed that this provision was unconstitutional, because it violated the "principle of 'gender equality' (…) universalised by international covenants that count as law with respect to Turkish national law".[516] The merits of this ruling mainly consist of a long, partially repetitive narrative, tracing the inferior position of wives in regard to their husbands back to "eleventh century Chinese philosophy", "medieval Europe", and the French Civil Code initiated by "Napoleon Bonaparte".[517] Within this historical panorama, family laws in other European countries such as France, Germany, and Switzerland are repeatedly mentioned. Through these comparisons, the Court justifies why the provision under review is no longer compatible with the principle of equality of Art 10 TA:

> "Gains of women within social and economic life in the aftermath of World War II brought new interpretations of the equality of men and women to the agenda. The family model based on the dominance of the husband had been reconsidered in grand civil laws in the West. With this, all inequalities were abandoned and a new family model based on the legal equality of the spouses was established".[518]

Concordantly, the justices argue, the Turkish Civil Code should be adapted accordingly, because Turkey belongs among the community of civilised Western societies. The ruling also refers to the planned modernisation of the Civil Code, initiated in 1984 but not yet finalised in 1990. As the AYM "does not have the authority to scrutinise and annul (…) all the provisions of the Civil Code that lead to inequality between the spouses

514 E. 1996/15, K. 1996/34 (27/12/1996), III.3.19, pp. 602-603; E. 1998/3, K. 1998/28 (13/03/1999), III.3.20, p. 608. The paragraphs referring to international law are identical in both rulings, but the justices did not indicate this self-citation.
515 Cf. E. 1990/30, K. 1990/31 (29/11/1990), III.3.21.
516 Ibid., p. 619.
517 Ibid., p. 618.
518 Ibid., p. 613.

in family law and grant the husband superiority", but only those brought before it, the justices underline that the elimination of "all inequalities in family law (…) is an obligation falling within the discretion of the legislator."[519]

Considering this vigorous plea in favour of gender equality as well as the equally progressive reasoning in both *Adultery* rulings, the AYM's pro-rights doctrine concerning gender equality seemed quite consolidated by the late 1990s. However, the concrete norm review decision *Severance Payment for Female Employees*[520], rendered a decade later, points in a very different direction. In this decision handed down in 2008, unequal treatment of spouses in labour law was claimed to violate Art. 10 TA by an Izmir labour court. The contested provision foresaw that women may get severance payment if they terminate their work contract within one year after marriage. No comparable norm existed for husbands, because it exclusively targeted married women who gave up their professional career in order to take care of husband and family. The submitting court argued[521] that the fundamental reform of the Turkish Civil Code in 2002 had abolished several provisions based on a traditional family model, attributing "the duty of maintaining the family to the husband and the duty of care of home and home services to the wife".[522] Instead, they asserted, the reformed legal concept of family life was based on the principle of gender equality:

> "That is to say, rights and duties of men and women have become equal, women are no more subordinate to their husbands in terms of their rights. Therefore, now it is evident that one cannot allege that marrying leads to a force majeure to terminate the contract of employment, relying on the grounds that women have duties of home care and they must adopt the place of residence chosen by their husbands."[523]

The submitting court consequently claimed that the provision in question was not only in conflict with the reformed family concept, but it also violated the constitutional right of equality before the law.

---

519 Ibid., p. 614.
520 Cf. E. 2006/156, K. 2008/125 (26/11/2008), III.3.22.
521 The judicial referral of the submitting labour court is documented in its entirety in the English translation of the decision (cf. Chapter III.3.22), because its argumentation is more elaborated and more coherent than the constitutional reasoning of the merits.
522 E. 2006/156, K. 2008/125 (26/11/2008), III.3.22, p. 624.
523 Ibid.

The AYM barely engaged in an evaluation of the labour court's detailed argumentation, and only very briefly touched upon the question of gender equality at all, merely repeating its standard statement about Art. 10 TA allowing for the different treatment of different situations. The remainder of the merits focuses on Art. 41 and 50 TA, which stipulate the protection of families and of "minors, women and persons with physical or mental disabilities", particularly regarding working conditions. The majority opinion even refers to international provisions for the protection of women in labour law, ignoring the fact that these regulations aim to strengthen the rights of professionally employed women. Instead, the justices (erroneously) deduct that female spouses should have particular rights to withdraw from professional employment in order to stay home and do family work. They further emphasise a Turkish "'doctrine' of family law", according to which "there exists an obligation to protect women, to strengthen relations between family members and to create order and harmony in conjugal communities."[524] As a result, the provision at issue

> "could not violate the Constitution since it aims at protecting the unity of the family, and the position of female employees who terminate labour contracts at their own request by considering the extent and importance of the variety of tasks they have to perform when they enter a conjugal community."[525]

The common dissenting opinion of the two female justices clearly addressed the contorted logic of this reasoning. After generally supporting the legal opinion of the submitting court, they directly criticised the majority decision by stating:

> "(…) attempts to protect women with the help of traditional means may increase inequality between men and women; thereby (…) *de facto* existing inequalities between men and women (…) are further deepened. This should be perceived as an urgent constitutional problem. In our age women should be protected by the Constitution in order to give them an equal position to men, and not by traditional approaches."[526]

The persistent tension within the Constitutional Court of a rather progressive legal concept of gender equality versus a very traditional (and

524 Ibid., p. 629.
525 Ibid.
526 Ibid., p. 630.

sometimes openly reactionary) moral understanding of family values in general, and the 'virtues' and 'duties' of married women in particular, can also be traced in the two decisions dealing with the *Right of Female Spouses to Use Their Premarital Family Name I* and *II*.[527] The issue was first brought before the AYM in 1997, shortly after the law on family names dating from 1926 had been amended. This reform had been enacted in anticipation of the major revision of the Civil Code in 2001, and allowed wives to use their premarital name, though they still had to accept their husbands' as their common family name. The submitting court claimed this provision was unconstitutional because it perpetuated the masculine dominance in Turkish family law, something also enshrined in several other regulations of the Civil Code.

Eight of the 11 AYM justices rejected the request for annulment. Their argumentation in the merits consists of two short statements, both unrelated to the core question of equality before the law: first, the justices defined their specific understanding of Turkish "'family law' doctrine", which basically consists of the conviction

> "that women were created differently from men, that protection of women against social realities and obligations is necessary, that strengthening family bonds is crucial, that providing order and harmony and preventing duality in the family are required."[528]

The second argument follows directly from this defense of traditional family hierarchy, submitting the wife to the "protection" of her husband and holding her responsible for creating familial "harmony", which means to avoid conflict by subordination. Against this backdrop, they argue, it is logical that only the husband is entitled to pass down his family name to the next generation:

> "By inheritance of the family name from generation to generation, unity and integrity of a family will endure. The legislator has given priority to one of the spouses so as to enable the unity of family. Public interest, public order and some necessities prove that it is rather preferred that the surname should be conveyed by the men."[529]

527 Cf. E. 1997/61, K. 1998/59 (15/11/2002), III.3.23; E. 2009/85, K. 2011/49 (21/10/2011), III.3.24.
528 E. 1997/61, K. 1998/59 (15/11/2002), III.3.23, p. 633.
529 Ibid.

The passing mention of public order and "some necessities" without any argumentative link to the concrete constitutional problem at hand was harshly criticised in the dissenting opinion, signed by all three justices who found the incriminated provision to violate Art. 10 TA. According to them, a regulation that "facilitates male superiority over women" cannot be justified by the mere mentioning of "abstracts concepts" without giving any "concrete facts of a violation of public order or harm of public interest".[530] The dissenters further claimed that in the absence of any substantiated constitutional reasoning on why the premarital name of women should not become the family name, this provision also violates Art. 13 TA, guaranteeing the essence of fundamental rights.

Ten years after the rejection of this concrete norm control application,[531] the same issue was again brought before the AYM: in 2009, three instance courts urged the Constitutional Court to reconsider its previous ruling on the matter, emphasising that two constitutional amendments had since strengthened women's rights,[532] and that in its decision *Ünal Tekeli v. Turkey* the ECtHR had found the Turkish law on family names to violate Art. 14 ECHR (protection from discrimination).[533] Despite these developments, the AYM adhered to its earlier position and reconfirmed the constitutionality of the law. Compared to the first decision, though, there was even more obvious dissent on the bench, as the ruling was supported by the smallest possible majority of 9:8 justices. Of the 11 justices who had issued the first decision in 1998, only two were still in office, one of whom – *Haşim Kılıç* – supported the majority twice, whereas *Fulya Kantarcıoğlu* was among the most articulate dissenters both times. The generational change at the AYM had apparently increased the number of justices with a more progressive approach to family law and the rights of married women, but just over half of the justices still held on to the traditionalist family concept developed by their predecessors.

The constitutional reasoning of the majority decision in *Family Name II* is very similar to that of the *Family Name I* ruling, but its argumentation is slightly more detailed. The AYM majority obviously strived to avoid part

530 Ibid., p. 636.

531 According to Art. 152 (4) TA, "no allegation 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". Cf. also Chapter I.4.2.

532 In 2004 and 2010 (which was planned, but not yet enacted at the moment of the concrete norm control application).

533 Cf. *Ünal Tekeli* v. Turkey App. No. 29865/98 (Eur. Ct. H.R. Nov. 16 2004).

of the criticism issued by the dissenting justices ten years earlier. Again, the female premarital name as family name is excluded mainly for the sake of "public interest and public order requirements". However, these requirements are at least briefly substantiated, namely:

> "keeping civil registration records properly, preventing any confusion in official documents, defining the descent, and notably protecting the unity of the family and strengthening family bonds."[534]

In the next paragraphs of the merits, this seemingly rational approach emphasising administrative needs is superposed by a more moralist and emotional argumentation. The AYM majority not only displays its highly traditional concept of the family, but it attributes an almost nationalistic significance to it, indirectly implying that European values are secondary to Turkish ones in this regard:

> "The family, which enables the transmission of distinguishing qualifications of nations, value judgments, belief and thought patterns, and continuance of intergenerational relations, reflects features of all societies from past to present through the roles and functions it undertakes. In this respect, strength and perception of the family within society vary from society to society. The family, the basic element of society, is a sacred foundation where love, respect, tolerance and other humanitarian and moral values, traditions, customs, language, religion and other features are practiced and passed on to next generations."[535]

The hints at historically grounded national differences and the importance of "customs, language, religion" may also be understood as a justification for why the majority ruling does not take the relevant ECtHR decision *Ünal Tekeli v. Turkey* into any closer consideration.

As in several other rulings analysed in this book, the merits' blind spots are extensively addressed in the dissenting opinion(s): in this case, the eight dissenting justices wrote three separate statements which share similar arguments.[536] They all found the incriminated provision in violation of the constitutional right to equal treatment of spouses, and they all mainly

534 E. 2009/85, K. 2011/49 (21/10/2011), III.3.24, p. 640.

535 Ibid., pp. 640-641.

536 While the Court's Vice-President *Osman Alifeyyaz Paksüt* and Justice *Engin Yıldırım* each wrote separate dissenting opinions, six other justices jointly expressed their disagreement with the majority decision in one very elaborate argumentation. All three dissenting opinions are (in slightly abbreviated form) included in the documentation of the ruling in Chapter III 3.24.

referred to the ECtHR ruling *Ünal Tekeli v. Turkey* to justify this position. A substantial part of this European decision (i.e., paragraphs 55 to 68) is even directly quoted in the dissenting opinion collectively issued by six justices. Besides, the dissenters more generally mentioned "developments in international law abolishing the laws which prevent men and women from benefiting from the same rights", and also quoted the adjudication of the Federal German Constitutional Court (BVerfG) on the matter of family names in some detail.[537]

Both *Family Name* decisions and the respective dissenting opinions once more display the major conflict within the Court: relatively progressive notions of individual equality rights clash with a traditionalist interpretation of family values. In line with similar changes of doctrine regarding other heavily disputed fundamental rights issues analysed earlier in this Chapter,[538] the introduction of the individual complaint procedure decisively effected the way in which the justices deal with this conflict, too. Only two years after the second *Family Name* decision, the AYM finally stated the unconstitutionality of the contested provision of Turkish family law. In this constitutional complaint decision, rendered in 2013,[539] its reasoning is primarily based on the international conventions and the ECtHR adjudication on the matter which the Court had almost completely ignored in the merits of the second concrete norm review ruling. Interestingly enough, four of the five justices who decided in favour of the possibility to use the wife's premarital name as family name in the individual complaint proceedings had also been on the bench two years earlier. In the norm control decision on the same issue, however, only two of them[540] had already supported this interpretation of the principle of equality, while the other two[541] had earlier voted in line with the majority.

In one of its first individual complaint rulings,[542] the AYM stated that the Turkish Parliament had violated its obligation to implement decisions from the Strasbourg Court because it had not changed the incriminated

537 E. 2009/85, K. 2011/49 (21/10/2011), III.3.24, p. 647.
538 Cf., among others, the key decisions on *Freedom of Speech and Media* (analysed in Chapter II.4.3.3) and on *Prisoners' Rights and Fair Trial* (analysed in Chapter II.4.3.4).
539 Cf. 2013/2187 (19/12/2013).
540 Justices *Serruh Kaleli* and *Zehra Ayla Perktaş*.
541 Justices *Mehmet Erten* and *Burhan Üstün*.
542 Following the 2010 constitutional reform, the AYM started to accept individual complaints as extraordinary legal remedy on 23 September 2012 and rendered its first decisions in 2013.

law as demanded in the ECtHR ruling *Ünal Tekeli v. Turkey*. The justices therefore based their decision on Art. 23(4) of the UN International Covenant on Civil and Political Rights in combination with Art. 16(1g) of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to which Turkey had adhered in 2003 and 1986 respectively, instead of on Art. 187 of the Turkish Civil Code. They argued that, according to Art. 90 (5) TA, the national regulation had been "implicitly abrogated"[543] by these international treaties. Despite some logical flaws in the constitutional reasoning,[544] this ruling can well be assessed as ground-breaking. It was followed by further constitutional complaint decisions to a similar effect,[545] and it also successfully prevented further complaints of Turkish women to the ECtHR on the matter.

The promotion of a traditional family model exclusively consisting "of a married man and a woman and their children"[546] also played an important role in the AYM decisions on *Rights of Children Born Out of Wedlock I and II*, handed down in 1987 and 1991.[547] In these rulings, however, the balancing of family values enshrined in Art. 41 TA and the principle of equality stipulated in Art. 10 TA led to a different result compared to the one in the *Family Name* cases.

Both concrete norm review requests targeted an improvement of the legal situation of children born out of wedlock. In the first case on the issue, the discrimination against illegitimate children in regard to some inheritance rules (which dated back to the Turkish Civil Code of 1926) was claimed to be unconstitutional. According to the incriminated civil law provisions, offspring born out of wedlock could well inherit from their fathers if they had been officially recognised by them or paternity

543 2013/2187 (19/12/2013), para. 44.

544 The legal term "implicit abrogation" refers to the invalidity of a norm which is supplemented by a different provision. In this case, even if the change is not made explicit, the former norm implicitly ceases to be applicable. In the case at hand, though, the reference to this methodological tool is logically flawed: while the incriminated norm – Art. 187 of the Turkish Civil Code – is unconstitutional, it had not been abrogated. Instead, it still applied in the case of married women who did want to take the surname of their husbands since Parliament had not passed an alternative norm. Logically, the international treaties on which the AYM based its ruling could only legitimate the unconstitutionality claim, but they could not supplement the national provision.

545 Cf. 2013/4439 (06/03/2014); 2014/5836 (16/04/2015).

546 E.1987/1, K. 1987/18 (29/03/1988), III.3.25, p. 667.

547 Cf. E.1987/1, K. 1987/18 (29/03/1988), III.3.25; E.1990/15, K. 1991/5 (27/03/1992), III.3.26.

was otherwise established, but they could only get "half of what a legitimate child or their descendant inherits" (Art. 443 (2) Turkish Civil Code). The AYM annulled this provision by a 6:5 majority because it violated several articles of the Constitution, in particular Art. 10 TA. Whereas no explicit, methodologically underpinned balancing of constitutional rights was undertaken in the merits, the main argument was clear from the start:

> "To be legitimate or to be illegitimate is not something a child can influence. Even intolerance of society against extramarital relations and counting them as undermining the conjugal community cannot legitimise applying different status provisions on children who do not have any role within and fault for those relationships. (…)
> To make a distinction between them and to maintain medieval thoughts does not correspond to the facts of our era."[548]

Even the AYM majority did not see a constitutional problem in the political aim of the provision under review, i.e., to contain extramarital sexual relations by legally discriminating against potential offspring, but the justices rejected the idea of doing this exclusively at the expense of the rights of the child. Instead of developing a systematic constitutional reasoning of its own, the majority opinion mainly lists several different views on the matter, introduced by expressions such as "(t)hose who demand (…) argue as follows" or "(a)ccording to the view of supporters of a different view".[549] In addition, it refers to changing historical conditions, international law and treaties, as well as to the Swiss Civil Code, which had served as a model for the Turkish Civil Code in many regards. After this eclectic conglomeration of different positions and arguments, the justices finally state:

> "We do not agree with the opinion that affiliation of children born out of wedlock with their fathers causes an increase of extramarital relationships to the detriment of the family. Allowing children born out of wedlock to affiliate with their fathers legitimately or illegitimately is a measure to protect children who have a very bad position within the society although it is not their fault and this may not increase extramarital relationships. (...) Opinions that hold that the provision at issue prevents extramarital relationships, and that in case

548 E.1987/1, K. 1987/18 (29/03/1988), III.3.25, p. 656.
549 Ibid.

> of absence of this provision these kinds of relationships may increase, are baseless and incoherent."[550]

The jointly composed opinion by four of the five dissenters[551] displayed very similar arguments, but draws the opposite conclusion:

> "The provision of the Turkish Civil Code, which has been annulled by majority of votes, was an important provision that prevented adultery and an increase of children born out of wedlock."[552]

In both opinions, the unequal treatment of children based on the legality of their parents' relation is not primarily seen as a fundamental rights' problem. Instead, the political effectiveness of the provision under review is assessed differently. Whereas five justices did believe in its deterrent effect on the frequency of extramarital parenthood, six did not. It is only because of this skepticism that a narrow majority on the bench did not put the constitutional protection of traditional family values above the equal treatment of children born in and out of wedlock.

When this problem came before the AYM again four years later, it confirmed its earlier line of argument and annulled the provision at issue as unconstitutional. This time the justices decided almost unanimously[553] and their constitutional reasoning is more systematic and coherent. The change of tone might be partly explained by a major change on the bench: between 1987 and 1991 seven of the 11 justices were replaced.[554] While two of the four remaining Court members had been among the dissenters in 1987, they had objected the unconstitutionality vote only for procedural reasons, not on the grounds.[555] Consequently, the most ardent defenders of traditional family values at the expense of the principle of equality, including the former President and Vice-President, had left the Court.

---

550 Ibid., p. 666.

551 Two more dissenting opinions, each signed by one justice, mainly focus on procedural questions. Both are also translated in Chapter III.3.25.

552 E.1987/1, K. 1987/18 (29/03/1988), III.3.25, p. 667.

553 The only dissenting justice, *Erol Cansel*, was also convinced of the unconstitutionality of the provision under review, but he criticised the majority ruling for not being far-reaching enough. Cf. the dissenting opinion to E. 1990/15, K. 1991/05 (27/03/1992), III.3.26.

554 President *Orhan Onar*, Vice-President *Mahmut C. Cuhruk*, *Yılmaz Aliefendioğlu*, *Muammer Turan*, *Selahattin Metin*, *Vural F. Savaş* and *Ahmet Oğuz Akdoğanlı* had left the AYM.

555 *Yekta Güngör Özden* and *Mustafa Şahin*.

In the case *Rights of Children Born Out of Wedlock II*, the submitting civil court of first instance claimed the unconstitutionality of Article 292 of the Turkish Civil Code, which stipulated that "a child born in a relationship of individuals who are not allowed to marry, or born out of adultery of married men and women, cannot be officially recognised." In this provision, the underlying constitutional problem of distinguishing between legitimate and illegitimate children was more obvious than in the norm on different inheritance rights. The core question of whether moral standards may legitimate different legal treatment of certain groups of people (here: children conceived and/or born in a legally recognised marriage or in an act of "adultery") also played a core role in the key decisions on *Mitigation of Sentence for Rape Crimes* (III.3.16) and *Mitigation of Sentence for Honour Killings* (III.3.17) analysed earlier in this Chapter. While in these decisions, handed down at approximately the same time period, the AYM majority did attribute different rights to different categories of women, distinguishing between "chaste" and "unchaste" ones, the justices did not follow this line of argument in the case of children's rights, but stipulated a violation of the principle of equality.

As in *Rights of Children Born Out of Wedlock I*, the statement of unconstitutionality was mainly based on two arguments: first and foremost, the impossibility to be recognised as legitimate deprives some children, who are not responsible for their legal status, of fundamental rights. They are "held accountable for their mother's and father's faults and insulted within society."[556] Secondly, this unequal treatment cannot be justified in any plausible way because it "does not enable protection of public morality". Even if "the institution of marriage stands above all", it does not excuse "such discriminatory act".[557]

Compared to the first ruling on the matter, the second annulment decision is based on a more elaborate reasoning, applying different methodological tools. The merits quote from the explanatory memorandum to Art. 292 of the Turkish Civil Code and from a preliminary draft of the 1961 Constitution in order to reconstruct the legislators' intentions behind the provision under review. In addition, extensive references to international treaties such as the UN Convention on the Rights of the Child are made, and even a quote from a BVerfG decision on a similar question is used to substantiate the AYM decision. As a result, the legal distinction between legitimate and illegitimate children is found to violate several

556 E. 1990/15, K. 1991/05 (27/03/1992), III.3.26, p. 676.
557 Ibid., p. 677.

provisions of the Turkish Constitution (Art. 5, 10, 12, and 41 TA), and also to breach international constitutional standards to which Turkey, being a "civilised country", should adhere:

> "Civilised countries have abolished all inequalities between legitimate and illegitimate children. They have also removed any discrimination between children in international treaties which could be defined as meta-constitutional norms."[558]

Some paragraphs later, this line of argumentation is repeated and further underpinned by explicitly referring to the Swiss 'model' of the Turkish Civil Code:

> "Modern and well-civilised countries have already abolished the distinction between legitimate and illegitimate lineage. Switzerland, from where the provision at issue was imported, also abolished this distinction by an amendment in 1978."[559]

The last ruling in this set deals with a different aspect of equality before the law, concerning legal discrepancies in health insurance provisions for various professional groups. The Turkish Court of Cassation requested the annulment of Art. 34(4) of the Insurance Law, limiting the payment of health benefits for employees in case of continued illness to 18 months. According to the submitting court, this provision violated the right to equality before the law because in the respective norms regulating health insurance conditions for civil servants and for self-employed workers, no such temporal limitation existed. In its decision *Social Equality and the Right to Receive Health Benefits*[560], handed down in 1991, the AYM confirmed this claim and annulled the incriminated provision by 10:1 votes. The eleven justices on the bench were identical to those who should decide the case *Rights of Children Born Out of Wedlock II* some months later.

This particular constellation of justices may at least partly explain the systematic and coherent constitutional reasoning developed in the merits. First of all, the Court summarised its doctrinal approach to the principle of equality in a particularly precise manner, explicitly referring to its "well-established case law"[561] on Art. 10 TA. According to this doctrine, unequal legal treatment can be justified either by "(s)ome specific circumstances of

558 Ibid., p. 676.
559 Ibid., pp. 678-679.
560 Cf. E. 1990/27, K. 1991/02 (19/08/1991), III.3.27.
561 Ibid., p. 684.

status or position of individuals or communities" and/or by "compelling grounds, which rely on the differences in legal statuses, the interest of the public, or other justified reasons".[562] Secondly, the justices formulate a clear limit to these legitimate restrictions: "Differences in legal positions may legitimise different regulations only in terms of issues other than the right to life."[563]

In the remainder of the merits the justices argued that the Turkish state, which is constitutionally obliged to guarantee the right to life and the right to protect corporeal and spiritual existence (Art. 17 TA), must provide the legal basis for continued health insurance benefits for all its citizens alike.

The merits refer to "relevant international conventions" stipulating the social responsibility of the state, particularly Art. 13 of the European Convention on Social Security ratified in 1989, among other arguments. According to this reasoning, the temporal restriction of health insurance benefits for employees does not only violate the principle of equality (Art. 10 TA), but also affects their right to social security granted in Art. 60 TA. While the limitation of both constitutional rights may be justified by legitimate reasons – such as legal differences, general economic stability, or the financial capacities of insurance companies (Art. 65 TA) – the right to life always prevails:

> "Hence, the State cannot issue any regulations which remove the right to life by restrictions applied in economic and social fields."[564]

All in all, this ruling set standards beyond the concrete question of continued health insurance benefits: it belongs to the most progressive, pro-rights-oriented decisions within our whole sample. And, what is even more important, its merits follow a clear, logical structure of constitutional reasoning, filling the gap between abstract constitutional principles and the concrete case in an exemplary way.

5. *The Constitutional Reasoning of the AYM – General Characteristics*

The in-depth analysis of the fifty selected decisions in Chapter II.4 has unfolded a great richness of constitutional problems and judicial argu-

562 Ibid.
563 Ibid.
564 Ibid., p. 686.

ments. What stands out, though, is the lack of a clear rationale behind the Court's adjudication. Contrary to the oft-repeated description of the AYM as a homogeneous actor, single-mindedly pursuing its mission as "guardian of the regime"[565] in close ideological alliance with the so-called "Kemalist elite", we found an oftentimes deeply divided Court issuing sometimes unpredictable and frequently incoherent decisions. At the same time, we also documented several examples of systematic and even strategic constitutional reasoning using 'classical' legal methods of argumentation that followed a clear doctrinal strategy. In light of these disparate and partially contradictory results of the case-by-case analyses, the overall evaluation of the Court's adjudication must proceed in a differentiated and cautious manner. In the following, we will focus on four dimensions which allow for generalisable conclusions, answering the questions which guided the content analysis.[566]

To begin with, some typical structural features of AYM rulings will be assessed from a comparative angle. We show how inconsistencies in form and language impair the accessibility of the published decisions and thus tend to weaken the trust in their general reliability. Core elements of constitutional reasoning are evaluated in Chapters II.5.2 and II.5.3 where we highlight methods and patterns of argumentation repeatedly used in the merits and deduct crucial legal concepts as well as (moral) values on which the AYM has frequently based its decisions. In the last part of this comparative discussion some specific characteristics of Turkish constitutional adjudication will be summarised: unexpected turns in the interpretation of certain constitutional norms, sudden and unexplained doctrinal changes, and argumentative gaps dominate part of the case law. Furthermore, the frequent and extensive dissenting opinions deserve particular attention as they are excellent indicators of the politically dynamic and often highly controversial context in which the AYM operates.

5.1 Formal, Structural and Linguistic Incoherencies

Court decisions are a highly standardised text type for which clear formal structures and precise terminology are of utmost importance. Even though this "formal rigidity"[567] makes rulings less accessible, particularly

565 Shambayati 2008, p. 99.
566 Cf. Chapter II.1.
567 Jakab et al. 2017a, p. 25.

for non-lawyers, it enhances their authority and consequently, their political and/or societal impact in the long run. Precision in form and structure demonstrates that the decision follows generally accepted and predetermined rules and is led by norm-based principles of legal argumentation. As discussed earlier, this also applies to constitutional court rulings despite their often more lenient legal framing. Against this backdrop, AYM rulings display an astonishing lack of formal, structural, and linguistic consistence.

In general, all AYM norm control rulings share a common structure, which is very similar to that of comparable constitutional court decisions in other European countries. As documented in Table 10,[568] they always begin with an enumeration of the legal and constitutional provisions in question, followed by a summary of the argumentation of the submitting parties/courts, and the explanation of the case. The argumentative portion usually consists of the admissibility examination ("preliminary examination") and the merits, in which the actual constitutional reasoning is developed. In the conclusion, the final outcome of the ruling is documented, indicating the individual votes of all participating justices. In our sample of key rulings, however, we discovered several breaches of this scheme without any apparent explanation; for example, there are typically some formal inadvertencies such as miscounted or altogether missing (sub-)headings and incorrect terminology.[569] While such minor errors may not affect the general perception of reliability of the Court's adjudication too much, we also found some quite substantial formal and structural deficiencies, which certainly do.

One particularly confusing example containing numerous structural ruptures is the *Death Sentence* decision rendered in 1972.[570] The whole ruling lacks a clear formal organisation; one attempt at structuring the argumentation is suddenly interrupted by another logic, e.g., subchapters a) and b) are followed by chapters 5) and 6). The content analysis of this decision in Chapter II.4.3.4 revealed that these formal inconsistencies mirror major argumentative breaches and therefore can be interpreted as an indication of the justices' inner conflict between legal and political reasoning.

568 Cf. Chapter III.1.

569 All formal deviations and/or errors in the analysed rulings are highlighted in the footnotes of the edited translations in Part III.

570 Cf. E. 1972/13; K. 1972/18 (24/07/1972), III.3.12.

The ruling on *Judicial Emancipation in Review of Statutory Decrees*[571] provides another example of how incoherence in substance may translate into structural inconsistencies. As mentioned in the analysis of the case in Chapter II.4.2.3, this decision completely deviates from the standard format of abstract constitutional review proceedings: the provisions alleged to be unconstitutional are not reviewed on procedural or substantive grounds at all. No reasons are given for this complete neglect of the form – and in this case, also the substance – of a 'regular' constitutional review decision. Instead, the Court literally repeats the applicants' request for a stay of execution of the KHK in question in one short paragraph labelled "reasoning of the application". In the next paragraph, it accepts this claim by the smallest possible majority of 6:5 votes, without any explanation of its own reasoning. The whole text consists of only a few lines. While this *de facto* declaration of a stay of execution did establish an important precedent, the incoherent form of the decision (as well as the narrow majority) certainly impaired its perception as a landmark ruling.

The perceived reliability and authority of the AYM case law tends to be similarly weakened by a series of editorial oversights, which particularly characterise the older AYM decisions. On the relatively rare occasions when the Court directly quotes from its own former decisions, it mostly does so without making the reference explicit. In the decision *Constitutional Review of Emergency Decrees II*,[572] for instance, the first two paragraphs of the merits are a word-by-word repetition of the respective paragraphs in the first ruling on the topic (*Constitutional Review of Emergency Decrees I*),[573] issued six months earlier. Any indication, however, that this is a self-reference, is missing. A similar form of carelessness is displayed in the decision *Religious Identity in ID Cards II*.[574] In this ruling, the Court cites several paragraphs from the dissenting opinions of its first decision on the same subject (*Religious Identity in ID Cards I*) when summarising the argumentation of the applicants.[575] Despite using exactly the same words, no indication of this quote is given. In other cases, there may well be quotation marks at the beginning of a sentence or paragraph, but no ending quotation marks.[576] In the already mentioned *Death Sentence Decision*, one

571 Cf. E. 1993/33, K. 1993/40-1 (23/10/1993) III.2.11.
572 Cf. E. 1991/06; K. 1991/20; (08/03/1992), III.2.15.
573 Cf. E. 1990/25; K.1991/01; (05/03/1992), III.2.14.
574 Cf. E. 1995/17; K. 1995/16; (14/10/1995), III.3.2.
575 Cf. E. 1979/09; K. 1979/44; (13/03/1980), III.3.1.
576 E. 1972/13; K. 1972/18; (24/07/1972), III.3.12, p. 514.

paragraph is set in quotation marks but the source is not mentioned, and it is therefore unclear to which of its former rulings the AYM wants to refer.[577]

In addition, a certain imprecision in language and phrasing is characteristic of several rulings analysed in Chapter II.4. While a complicated sentence structure may be regarded as a common feature of legal texts far beyond the Turkish case, some particularities stand out. For instance, the AYM occasionally uses Ottoman terms to this day, adding the contemporary expression only in brackets.[578] This practice dates back to the language reform during the early days of the Turkish Republic. While the preservation of these archaisms might be explained as a stylistic element of legal language, some literally unintelligible phrases in the published version of the decisions may not. Similar to the structural inconsistencies which mirror the unintelligibility of argumentation, these linguistic lapses primarily occur in particularly controversial rulings, when political or moral divides on the bench are obvious. For example, some paragraphs of the 2007 ruling annulling the election of State President *Abdullah Gül* by the AKP majority in Parliament, in which the AYM based its majority decision on a rather incoherent reasoning, are hardly understandable. The Turkish text is very opaque, as the following single sentence from the procedural examination proves, even in its tentatively smoothed English translation:

> "Hence, by amending, with regard to the first ballot, by the parliamentary decision at issue, Article 121 of the Rules of Procedure, which, as it was concluded because of the referral to Article 102 of the Constitution, provides that in the first ballot the quorum and required majority for the presidential election are the 367 members who constitute two-thirds of the total number of members of the TBMM, it was accepted that concerning the quorum, in accordance with the general rule established in Article 96 of the Constitution, the 184 votes that constitute at least one-third of the total number of members of the TBMM were sufficient."[579]

---

577 Either: E. 1971/41; K. 1971/67 (15/01/1972); or: E. 1971/37, K. 1971/66 (04/04/1972); none of these rulings are documented in Part III.

578 Cf. E. 2006/156; K. 2008/125 (26/11/2008), III.3.22.

579 E.2007/45, K. 2007/54 (27/06/2007), III.2.21, p. 396: "Böylece, Anayasa'nın 102. maddesine yapılan gönderme nedeniyle, Cumhurbaşkanı seçimine ilişkin toplantı ve karar yetersayısının ilk oylamada TBMM üye tamsayısının üçte ikisini oluşturan 367 olduğunu öngördüğü sonucuna varılan İçtüzüğün 121.

Another drastic case of unintelligible wording can be found in the first ruling on equal legal treatment of *Children Born out of Wedlock*[580], issued in 1987. As analysed in Chapter II.4.3, the constitutional reasoning of this decision is rather weak and incoherent. These deficiencies in terms of content are mirrored by the similarly incoherent language: the legal definition of an illegitimate child, for example, is tautologic and cannot be translated in a way that makes any sense.[581]

It is important to note that over time, the number and scale of the obvious flaws in structure, form, and language of the AYM rulings diminished. This does not only apply to our sample of cases, but it also stands out when comparing a broader range of decisions issued before and after the late 1990s. The improvement is undeniably linked to the overall professionalisation of the Court's internal decision-making process, detailed in Chapter I.5.2. The constitutional reform of 2010 marks a decisive step forward in this regard too, principally concerning the newly established individual complaint proceedings. From the start, this category of rulings has been structured more clearly and written in a more precise legal language than norm control decisions.[582] The most obvious structural reform concerned the numbering of paragraphs. This technique is used by courts in various countries and judicial branches in order to structure the rulings. While individual complaint proceedings have been structured accordingly since 2012, the often longer and verbosely written norm control rulings used to lack any similar guidance for the reader. Only in 2015, paragraph numbering was introduced in norm control decisions as well.[583]

---

maddesi dava konusu Meclis kararına ilişkin birinci oylama yönünden değiştirilerek toplantı yetersayısı konusunda, Anayasa'nın 96. maddesindeki genel kural doğrultusunda TBMM üye tamsayısının en az üçte birini oluşturan 184 oyun yeterli olduğu kabul edilmiştir".

580 Cf. E 1987/01, K. 1987/18 (29/03/1988), III.3.25.

581 The original sentence reads: "Aralarında kanunun tanıdığı bir evlilik bağı kurulmayan kadınla erkeğin ilişkilerinden dünyaya gelen çocuk, evlilik dışı, diğer bir deyimle sahih olmayan nesepli çocuktur." As this phrase is tautologic, the approximate English translation provided in Chapter III.3.25 had to be significantly shortened.

582 Cf. Göztepe 2015, p. 510, fn. 46.

583 The first norm control decision which displays paragraph numbering dates from July 2015 (E. 2015/4, K. 2015/61 (15/7/2015).

5.2 Methods and Patterns of Argumentation

The questionnaire developed by Jakab, Dyevre, and Itzcovich in order to compare leading cases of different constitutional courts includes a whole battery of questions regarding "Arguments in Constitutional Reasoning".[584] When taking this list as a reference point for the analysis of AYM key decisions, we realised that several of the enumerated argumentative patterns cannot be found at all: the range and depth of constitutional reasoning displayed by the Turkish justices is obviously more restraint than that of their homologues in some of the countries included in the comparative analysis by Jakab et al. On the following pages the methods and patterns of argumentation most frequently used in AYM rulings are briefly recollected. We particularly assess which techniques of judicial text interpretation were applied, if and how the gap between general constitutional principles and the concrete case at hand was bridged, and how convincingly the justices substantiated their reasoning by referring to precedent and/or external sources.

One of the recurring findings of our text analyses concerns the lack of systematic methodical interpretation of the norms under consideration. As repeatedly pointed out in Chapter II.4, several key rulings are not based on doctrinal argumentation at all. Instead, some rather abstract reflections about general constitutional principles such as equality before the law, the state under the rule of law, or – vaguest of all – public order,[585] remain unrelated to the case at hand. As a result, no verifiable reasons are given for the concrete decision of (un)constitutionality and the interpretation of the constitutional norm(s) appears unsystematic or even arbitrary. There are, however, also some examples of a more scholarly approach in which judicial subsumption methods are applied in a comprehensible way. They demonstrate that all generations of Turkish constitutional justices were well aware of the classical methods of legal argumentation. It would certainly have enhanced the legitimacy and, in the long run, the authority of the AYM as a reliable guardian of the democratic constitutional order, if these basic principles of constitutional reasoning had been applied more regularly and in a more predictable manner.

The following quote from the decision on *Hierarchy of Enabling Laws and Statutory Decrees*, issued in 1989, documents a model case of systematic

584 Cf. Jakab et al. 2017c, p. 801-806.
585 For details on these constitutional principles, cf. Chapter II.5.3.

legal reasoning, lending credibility to the decision, whatever its outcome might be:

> "Before we handle the question of whether Article 1 is unconstitutional, it is necessary to examine if the KHK is based on this enabling law. This means to solve the problem with reference to the legal source and to determine its validity. The method that will help solve this problem is to consider it as two distinct problems: whether or not the subjects regulated by this KHK can be regulated by KHK in principle; whether or not this KHK is covered by the enabling law. If requests are accepted after having dealt with the matter, to scrutinise a subsequent matter may be unnecessary. If annulment of the KHK by reason of those violations is found impossible, Article 1, which is the main cause for annulment, should be analysed in terms of merits."[586]

A different methodological strategy of interpretation was meticulously applied in the 1992 decision *Constitutionality of Anti-Terrorism Law*[587]. In order to decide on the constitutionality of the (very broad) concept of terrorism used in the law under consideration, the terms 'terror crime' and 'terrorism' are traced through all respective norms of Turkish penal legislation. The merits compare these definitions with the concept of the contested Anti-Terrorism Law in a structured and detailed way. Irrespective of the fact that the majority decision finally stipulated that there was no violation of the Constitution despite the very vague and broad wording of the term, the argumentation is at least based on verifiable criteria of legal interpretation.

At some other occasions,[588] the AYM justices explicitly developed "teleological/purposive arguments referring to the purpose of the text" or "the purpose of the Constitution-maker"[589]. In the ruling on *Limits of Administrative Privilege in Prosecution*, when no explanation could be reconstructed "as to why this provision was integrated in the 1982 Constitution, neither in preparatory documents nor in legislative texts"[590], even the unsuccessful but systematic search documented in the merits enhanced the persuasiveness of the decision.

---

586 E. 1989/04, K. 1989/23 (08/10/1989), III.2.9., p. 309.
587 Cf. E. 1991/18, K. 1992/20 (27/01/1993), III.2.17.
588 Cf., for example, E. 1990/15, K. 1991/05 (27/03/1992), III.3.26; E. 1994/49, K. 1994/45-2 (10/09/1994), III.2.12.
589 Jakab et al. 2017c, p. 803.
590 E. 1991/26, K. 1992/11 (23/11/1992), III.3.2.1, p. 248.

As repeatedly highlighted in the case-by-case analyses of the key decisions, the dissenting opinion(s) sometimes display more elaborate patterns of legal interpretation than the merits. One particularly striking example in this regard is the politically highly contested decision to annul the parliamentary election of State President *Abdullah Gül* in 2007. While the very long and verbose explanations of the majority decision lack any clear argumentative structure,[591] the dissenting vote by Court President *Haşim Kılıç* interprets the constitutional provisions on which the TBMM majority based the election procedure in a very concise way. *Kılıç* reconstructs the intentions of the Constitution-makers in 1961 and the reasons for the changes introduced in 1982 by directly quoting from the constitutional committee's documents which prepared the final version of the provision under review. Based on this information, the dissenter convincingly argues why he thinks that the AKP majority in parliament was entitled to proceed with the voting and did not violate the Constitution by doing so.[592]

Another classical method of legal argumentation concerns analogy building, where a concrete case is decided by applying a norm or decision which does not explicitly cover the specific problem in question but may be adapted to it in a logically convincing way. This technique is particularly important in constitutional law because of the general character of most of its norms. Consequently, the application of a particular constitutional provision may be verified in the light of the broader context of the constitutional order. Likewise, the constitutional order at large may serve as reference point in the absence of a specific norm applicable to a concrete case. Judging by our sample of key rulings, the AYM rarely applies this pattern of constitutional reasoning, but when it does, this significantly enhances the argumentative quality of the decision.

The rulings concerning the constitutionality check of statutory decrees (KHK), and of emergency KHKs more specifically are exemplary in this regard. As shown in some detail in Chapter II.4.2.3, the Court was repeatedly asked by members of Parliament to define the boundaries of the extensive executive law-making competencies stipulated in the Constitution of 1982. The AYM developed a consistent legal argumentation on the matter[593] by limiting the decree power in light of the general constitutional principle of parliamentary sovereignty. Following a similar logic,

591 Cf. Chapter II.4.2.5.

592 Cf. E. 2007/45, K. 2007/54 (27/06/2007), III.2.21.

593 In 2011, however, the AYM abandoned its consistent method of constitutional reasoning on the issue in an abrupt change of doctrine.

the justices also enlarged their own competences in the rulings on the *Constitutional Review of Emergency Decrees I-III*. Whereas Art. 148 (1) TA explicitly exempts emergency KHKs from judicial review, they argued that even this provision cannot justify a neglect of the fundamental principles of rule of law enshrined in the Turkish Constitution. Instead, the Court must have the right to verify whether the legal measures mandated by the decree in question actually fall within the limits of the emergency situation. In cases where the executive exceeded its competences in this regard, the constitutional standards for ordinary decrees should apply, i.e., the AYM may review the KHK on the merits as well.[594]

In the ruling *Constitutional Basis of Privatisation Law*,[595] which also deals with the limits of decree power, the Court used an even more specific analogy argument, and it is the only one of the 50 key decisions which explicitly mentions this method of interpretation. In this case, decided in 1994, the justices declared the unconstitutionality of the law by which the TBMM empowered the Government to fulfil its privatisation plans in a series of statutory decrees. In the absence of any constitutional provisions on privatisation issues, the AYM referred to Art. 47 TA regulating the nationalisation of private property,[596] arguing that privatisation can be conceptualised as the opposite of nationalisation. The Court majority further reasoned that if nationalisation can only be implemented by parliamentary law, an analogue legal basis is needed for acts of privatisation.

In addition to these methods of legal interpretation, the persuasiveness of constitutional reasoning substantially depends on how a particular decision is embedded in the overall doctrinal orientation of the Court's adjudication. References to former rulings are crucial in this regard: by quoting from their own case law, the justices increase the traceability and the consistency of their constitutional reasoning. Although the AYM did occasionally use this form of self-affirmation in the analysed key decisions, it did not employ it in a systematic and purposeful manner. Most often no references are given at all, even if the Court had previously dealt with a similar case.

The ruling on *Religious Identity in ID Cards II*, rendered in 1995, is one particularly striking example for this surprising lack of self-referencing. Despite the fact that the Court had decided the exact same problem sixteen

---

594 For a more detailed explanation cf. Chapter II.4.2.4. This doctrinal position, however, was given up in 2015, as explained in Chapter II.5.4.

595 Cf. E. 1994/49, K. 1994/45-2 (10/09/1994), III.2.12.

596 In 1999, the words "and privatisation" were added to Art. 47 TA.

years earlier, the second ruling does not refer at all to this precedent. This is even less comprehensible as the Court majority stuck to its earlier line of argumentation. Only justice *Yekta Güngör Özden*, who dissented both times, briefly mentioned his previous argumentation from the *Religious Identity in ID Cards I* decision among other references.[597]

The rulings defining the limits of executive law-making power, highlighted earlier in this chapter as an example of consistent constitutional reasoning, also lack any self-referencing. This is particularly unfathomable, because the topic and the argumentation of all five analysed rulings are very similar and the justices furthermore used near-identical wording to define the necessary conditions for the constitutionality of KHKs. In the decision *Hierarchy of Enabling Laws* (1989) they limited the executive law-making power to "important, compulsory and urgent cases";[598] in *Time Limits of Enabling Laws*, rendered only one year later, "immediate, urgent, important, and compulsory" reasons were postulated,[599] and in 1994 the merits of *Constitutional Basis of Privatisation Law* stipulated that only "serious, urgent and necessary"[600] conditions justified executive law making. Even when the Court drastically changed its doctrine on the matter in 2011 (*Judicial Self-Restraint in Review of Statutory Decrees*), the adjectives "immediate, urgent, important and compulsory"[601] were again employed to define the scope of executive law-making competences. The abandonment of the long-standing restrictive interpretation of this power, however, was not mentioned at all, and neither was the former case law on the matter. The AYM's haphazard approach to the argumentative pattern of (self-)referencing is similarly obvious in the rulings on emergency decrees, where all three analysed rulings on the subject again use almost identical argumentation and wording, but these commonalities are never made explicit.

In some analysed key decisions, however, the AYM justices did refer to precedent, albeit sometimes in an erroneous or technically incomplete form.[602] In the decision *Rights of Children Born out of Wedlock I*, we even found a reference to "general common doctrinal opinion", but without any specification as to the source of this doctrine.[603] One or several refer-

597 Cf. E. 1995/17, K. 1995/16 (14/10/1995), III.3.2.
598 E. 1989/04, K. 1989/23 (08/10/1989), III.2.9, p. 310.
599 E. 1988/62, K. 1990/03 (12/10/1990), III.2.10, p. 315.
600 E. 1994/49, K. 1994/45-2 (07/07/1994), III.2.12, p. 323.
601 E. 2011/60, K. 2011/147 (15/12/2011), III.2.11, p. 328.
602 For details, cf. Chapter II.5.1.
603 E. 1987/01, K. 1987/18 (29/03/1988), III.3.25, p. 662.

ence numbers of former rulings are occasionally indicated in the merits without further explanation of the content or the argumentative importance of these quotations.[604] Only in two of the key rulings could we identify explicit word-to-word citations from earlier decisions.[605] As in other aspects of the AYM's constitutional reasoning, dissenting opinions were sometimes more precise in self-referencing than the merits supported by the majority on the bench. In both decisions on the *Right of Female Spouses to Use their Premarital Family Name*, for example, the dissenters built their argumentation on former AYM decisions on gender equality, among other sources, referring to them in some detail.[606]

A related and equally important argumentative strategy concerns references to other "(n)on-legal (moral, sociological, economic) arguments, (r)eferences to scholarly works, references to foreign (national) law".[607] Most of these elements of constitutional reasoning cannot be found at all in the analysed key rulings. While moral values are repeatedly introduced as guiding principles of decision making, no concrete references are given to underpin their legitimacy.[608] The only argumentative pattern which is used with some regularity concerns references to international law and decisions of international courts, foreign national law, and national apex courts. Even if these international sources are quoted much more frequently in the adjudication of many other constitutional courts,[609] the AYM has been referring to them increasingly since the 1990s: we counted a total of 19 decisions with at least one reference to international sources among the 50 analysed key cases, only four of which occurred in rulings rendered before 1992 (cf. Table 8). This finding is in line with the fact that in 1987 Turkish citizens were allowed to appeal to the ECtHR in cases of individual rights' violations and that the Turkish state acknowledged the binding force of the European Court's rulings two years later (25 September 1989). Hence, particularly European law and ECtHR adjudication became increasingly relevant for the AYM to either show that it was

604 Cf. particularly *Headscarf Decision I* (III.3.3), *Headscarf Decision II* (III.3.4; reference to an extensive number of AYM decisions), *Right to Property of Foreigners* (III.3.5).
605 *Constitutionality of Anti-Terrorism Law*, III.2.17, and *Children Born out of Wedlock I*, III.3.25.
606 E. 1997/61, K. 1998/59 (15/11/2002), III.3.23; E. 2009/85, K. 2011/49 (21/10/2011), III.3.24.
607 Jakab et al. 2017c, p. 803.
608 For details, cf. Chapter II.5.3.
609 Cf. for example Slaughter 2000.

in dialogue with external law regimes or to strengthen its own position in a self-affirmative way.[610]

Above all, the justices repeatedly emphasise that Turkey is part of the international community and therefore has to respect its rules. The ruling *Equal Treatment of Spouses in Case of Adultery I* is typical in this regard. After generally stating that "(g)ender-based discrimination is also prohibited by international human rights agreements that our country is party to"[611], the Preamble, Art. 2, 7, and 16 of the UDHR, the Preamble and Art. 14 of the ECHR and Art. 1, 2, 5, and 15 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are quoted in great detail. This abundant referencing serves the double purpose of first introducing international norms into Turkish constitutional adjudication and, in a second step, building the Court's argumentation on them by stating:

> "There is no essential difference between Article 10 of the [Turkish] Constitution (…) and these international agreements, which, although they can only be considered in a constitutional review without forming its basis, prohibit gender-based discrimination or inequality."[612]

610 Turkey's adherence to the ECtHR regime was announced in the Official Gazette on 21/04/1987 and 27/09/1989; cf. also Steinsdorff / Petersen 2016.
611 E. 1996/15, K. 1996/34 (27/12/1996), III.3.19, p. 600.
612 Ibid., p. 601.

Table 8: International References in Key Decisions

Set	Chapter	E. / K. Number	Date	International References
II.4.2.1 State under the Rule of Law Principle	III.2.1	E. 1991/26, K. 1992/11	23/11/1992	/
	III.2.2	E. 2006/33, K. 2006/36	10/01/2007	UDHR
	III.2.3	E. 2005/85, K. 2009/15	03/04/2009	/
	III.2.4.	E. 2008/105, K. 2010/123	26/02/2011	/
II.4.2.2 Judicial Independence	III.2.5	E. 1970/39, K. 1971/44	16/12/1971	/
	III.2.6	E. 1974/35, K. 1975/126	11/10/1975	/
	III.2.7	E. 1992/39, K. 1993/19	17/10/1995	/
	III.2.8	E. 2010/32, K. 2011/105	27/10/2011	/
II.4.2.3 Executive Law-Making Power	III.2.9	E. 1989/04, K. 1989/23	08/10/1989	/
	III.2.10	E. 1988/62, K. 1990/03	12/10/1990	/
	III.2.11	E. 1993/33, K. 1993/40-1	23/10/1993	/
	III.2.12	E. 1994/49, K. 1994/45-2	10/09/1994	/
	III.2.13	E. 2011/60, K. 2011/147	15/12/2011	/
II.4.2.4 Emergency Powers and Anti-Terrorism Legislation	III.2.14	E. 1990/25, K. 1991/01	05/03/1992	ECHR
	III.2.15	E. 1991/06, K. 1991/20	08/03/1992	ECHR
	III.2.16	E. 2003/28, K. 2003/42	16/03/2004	/
	III.2.17	E. 1991/18, K. 1992/20	27/01/1993	ECHR
	III.2.18	E. 1996/68, K. 1999/01	19/01/2001	ECHR, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe), Recommendation No. 87: Regulating the Use of Personal Data in the Police Sector (by the Committee of Ministers at the Council of Europe)
	III.2.19	E. 2011/26, K. 2012/41	26/06/2012	UDHR, ICCPR, ICESRC, UNCRC, Beijing Rules

Set	Chapter	E. / K. Number	Date	International References
II.4.2.5 Parliamentary Sovereignty	III.2.20	E. 1994/09, K. 1994/28	unpublished	The Situation of Kurds in Iran, Iraq and Turkey (Briefing of CSCE of May 17, 1993)
	III.2.21	E. 2007/45, K. 2007/54	27/06/2007	/
	III.2.22	E. 2007/72, K. 2007/68	07/08/2007	/
	III.2.23	E. 2012/30, K. 2012/96	01/01/2013	/
II.4.3.1 Fundamental Rights vs. Principles of the Republic	III.3.1	E. 1979/09, K. 1979/44	13/03/1980	/
	III.3.2	E. 1995/17, K. 1995/16	14/10/1995	/
	III.3.3	E. 1989/01, K. 1989/12	05/07/1989	/
	III.3.4	E. 2008/16, K. 2008/116	22/10/2008	Leyla Şahin v. Turkey Case, Dahlab v. Switzerland Case and Refah Partisi v. Turkey Case of the ECtHR
	III.3.5	E. 1986/18, K. 1986/24	31/01/1987	UDHR, Treaty of Lausanne
	III.3.6	E. 2009/47, K. 2011/51	12/07/2011	Art. 8 (ECHR) in jurisdiction of the ECtHR
II.4.3.2 Freedom of Association	III.3.7	E. 1963/199, K. 1965/16	23/09/1965	/
	III.3.8	E. 1976/27, K. 1976/51	16/05/1977	/
	III.3.9	E. 2004/90, K. 2008/78	05/07/2008	UDHR
II.4.3.3 Freedom of Speech and Media	III.3.10	E. 1963/193, K. 1964/09	11/06/1964	/
	III.3.11	E. 1999/39, K. 2000/23	12/10/2000	/
II.4.3.4 Prisoners' Rights and Fair Trial	III.3.12	E. 1972/13, K. 1972/18	24/07/1972	
	III.3.13	E. 1974/19, K. 1974/31	12/07/1974	/
	III.3.14	E. 2012/07, K. 2012/102	06/10/2012	/
	III.3.15	E. 2011/98, K. 2012/24	19/05/2012	/
II.4.3.5 Equality before the Law and Gender Equality	III.3.16	E. 1988/04, K. 1989/03	10/01/1990	CEDAW, UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
	III.3.17	E. 1997/45, K. 1998/48	22/11/2003	/

Set	Chapter	E. / K. Number	Date	International References
II.4.3.5 Equality before the Law and Gender Equality	III.3.18	E. 2005/151, K. 2008/37	29/03/2008	/
	III.3.19	E. 1996/15, K. 1996/34	27/12/1996	UDHR, ECHR, CEDAW,
	III.3.20	E. 1998/03, K. 1998/28	13/03/1999	UDHR, ECHR, CEDAW
	III.3.21	E. 1990/30, K. 1990/31	02/07/1992	UDHR; ECHR; CEDAW; German, Swiss and French Civil Code; German Constitution; European Social Charter; Helsinki Final Act of Organisation for Security and Cooperation in Europe, Charter of Paris for a New Europe
	III.3.22	E. 2006/156, K. 2008/125	26/11/2008	European Social Charter; CEDAW and the following ILO-Conventions: Convention concerning the Employment of Women on Underground Work in Mines of all Kinds, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention concerning Discrimination in Respect of Employment and Occupation, Convention concerning Minimum Standards of Social Security, Convention concerning Employment Policy
	III.3.23	E. 1997/61, K. 1998/59	15/11/2002	/
	III.3.24	E. 2009/85, K. 2011/49	21/10/2011	UDHR, ECHR, CEDAW, ICESCR, ECtHR decisions: Ünal Tekeli v. Turkey and Burghartz v. Switzerland, Recommendation No. 1271 of 28/05/1985 and Resolution No. 37 by the Council of Europe
	III.3.25	E. 1987/01, K. 1987/18	29/03/1988	/
	III.3.26	E. 1990/15, K. 1991/05	27/03/1992	ECHR, UNCRC, United Nations Charter, FrenchRevolutionary Declaration of the Rights of Man and of the Citizen (1789)
	III.3.27	E. 1990/27, K. 1991/02	19/08/1991	ECHR, European Convention on Social Security (CETS No. 078)

Source: Own Compilation.

This pattern of constitutional reasoning, in which the Court refers to international treaties in order to add authority to its interpretation of respective provisions in the Turkish Constitution, can be found in several of the analysed rulings.[613] In the ruling *Severance Payment for Female Employees*, the justices even misused international law to underpin their opinion, which actually ran contrary to the intention of the quoted conventions. In order to justify the constitutionality of the Turkish Labour Code provision encouraging female spouses to quit paid employment in favour of their family duties, they referred to international conventions deliberately aiming at fostering women's rights on the job market:

> "Provisions that are aimed at protecting female employees can also be found within international conventions and regulations. These can be exemplified as: the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the European Social Charter of 1961, the Convention concerning the Employment of Women on Underground Work in Mines of all Kinds No. 45 of 1935, the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value No. 100 of 1951, the Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958, the Social Security (Minimum Standards) Convention No. 102 of 1964, the Employment Policy Convention No. 122 of 1964, which were ratified by Turkey as well."[614]

The ambiguity of self-affirmative references to international law is further highlighted by the fact that the majority decision and the dissenting opinion(s) sometimes build their opposed argumentation on the same international sources. In the *Headscarf Decision II* for example, the merits, which declare unconstitutional the constitutional amendment lifting the headscarf ban, refer to three ECtHR decisions on related questions (*Leyla Şahin vs. Turkey*, *Dahlab vs. Switzerland* and *Refah Partisi vs. Turkey*) in order to show that its argumentation is in conformity with international law standards. Justice *Sacit Adalı* equally quoted these ECtHR decisions in

613 Cf. *Stay of Execution and Freedom to Claim Rights* (E. 2006/33, K. 2006/36 (10/01/2007), III.2.2); *Right to Life of Terror Suspects* (E. 1996/68, K. 1999/01 (10/01/2001), III.2.18); *Mitigation of Sentence for Rape Crimes* (E. 1988/04, K. 1989/3 (10/01/1990), III.3.16); *Severance Payment for Female Employees* (E. 2006/156, K. 2008/125 (26/11/2008), III.3.22).

614 E. 2006/156, K. 2008/125 (26/11/2008), III.3.22, p. 621.

his dissenting opinion, claiming that they justify the abolishment of the headscarf ban in Turkey instead.[615]

An explicit dispute about the accurate interpretation of international law in general, and ECtHR adjudication in particular, is documented in the decision *Right of Female Spouses to Use Their Premarital Family Name II*. The majority decision, supported by nine of the 17 justices, refers to Art. 16 UDHR, Art. 10 of the International Covenant on Economic, Social, and Cultural Rights, and Art. 8 ECHR in order to underline the priority of family values over the principle of equality. Without indicating specific rulings, it also claims that,

> "(t)he European Court of Human Rights has examined applications regarding the surname in context of the principle of 'protection of private life and family life' in Article 8 of the European Convention on Human Rights. In these decisions the court stated that pursuant to the requirements of public interest (…), changing the surname could be restricted by legal regulations. The national legislator could have the discretionary power to choose the form of these restrictions in line with the historical and political structure of their own State."[616]

This argumentation is directly countered in all three dissenting opinions, which refer to international conventions and several ECtHR rulings clearly prioritising the right of female spouses to keep their premarital name over family values and public order requirements. The most elaborated one, signed by six of the eight dissenters, even extensively quotes from the ECtHR decision *Ünal Tekeli v. Turkey*[617] on the matter, in order to substantiate the unconstitutionality of the Turkish Civil Code provision under review, criticising "that the Constitutional Court has not taken into consideration the (…) ECtHR rulings which are evidence for developments in the international domain".[618]

The *Family Name II* decision is also an excellent example of some general characteristics of the AYM's use of international sources to legitimise its own decisions. As Table 8 shows, these references are more frequent, more extensive and, most importantly, more detailed in the adjudication on fundamental rights and freedoms, with a particular focus on case law

615 Cf. E. 2008/16, K. 2008/116 (22/10/2008), III.3.4.
616 E. 2009/85, K. 2011/49 (21/10/2011), III.3.24, p. 641.
617 Ünal Tekeli v. Turkey App. No. 29865/98 (ECtHR Nov. 16 2004); For the constitutional issue under review cf. also Chapter II.4.3.5.
618 E. 2009/85, K. 2011/49 (21/10/2011), III.3.24, p. 647.

concerning equality before the law and gender equality. This unequal distribution most likely reflects the growing internationalisation and particularly Europeanisation of Turkish constitutional law in these domains. As discussed in Chapter I.1.2, ECtHR adjudication played an important role in the AYM reform of 2010, and the ECtHR was consequently quoted most frequently in the analysed key rulings as a point of reference (12 decisions), followed by references to the UDHR (8 rulings). Precise references to ECtHR case law, however, can only be found in three rulings.[619]

In addition to these attempts to situate the Turkish adjudication within an international and European law discourse, direct references to other national legal orders and national apex case law are also used by AYM justices from time to time. In the ruling *Increase of Sentence in Domestic Violence Cases* (III.3.18), the main purpose of these comparative quotes is made explicit:

> "By elaboration of statistics of national and international institutions, it appears that crimes regarding domestic violence and their results are common problems of all nations. States have taken criminal, legal and administrative measures in order to prevent this kind of crimes by considering social traditions and tendencies of individual psychologies. In this context, some States adopt *ex officio* prosecution whereas others require a complaint of victims for prosecution."[620]

Linking Turkish laws under review to "common problems of all nations" legitimises the solution offered by the AYM as being well-reasoned and related to similar considerations in other countries. This emphasises that other "(m)odern and well-civilised countries"[621] are an important point of reference for the Court – and that Turkey is one of them. Besides, in the early 20th century, Turkish civil and criminal law had been modelled on several European legal orders, such as the Italian Criminal Code[622] and Swiss Civil Code. Therefore, the AYM deliberately refers to these countries' legislation to underpin its own position; for example, "Switzerland,

---

619 *Family Name II* E. 2009/85, K. 2011/49 (21/10/2011), III.3.24; *Right of Minorities to Choose a Non-Turkish Family Name* E. 2009/47, K. 2011/51 (12/07/2011), III.3.6; *Headscarf Decision II* E. 2008/16, K. 2008/116 (22/10/2008), III.3.4.

620 E. 2005/151, K. 2008/37 (29/03/2008), III.3.18, p. 591.

621 E. 1990/15, K. 1991/5 (27/03/1992), III.3.26, pp. 678-679. The significance of the repeated references to "well-civilised countries" is analysed in detail in Chapter III.5.3.

622 Extensive references can be found in E. 1988/04, K. 1989/3 (10/01/1990), III.3.16, for example.

from where the provision at issue was imported, also abolished this distinction by an amendment in 1978."[623]

Striking proof of this strategy can also be found in the dissenting opinions to the *Family Name II* decision, which have already been discussed as outstanding examples for international referencing. Justice *Engin Yıldırım* justified his conviction, according to which the Turkish law forcing female spouses to accept their husband's name as family name is violating the principle of equality of the Turkish Constitution, by referring to comparable legal provisions from Switzerland, Great Britain, Japan, and the United States of America. He even quoted nineteenth century American feminist Lucy Stone and international academic literature on the history and legal status of female surnames.[624] Likewise, the collective dissenting opinion signed by six justices not only offers an abundance of references to international conventions in general and the ECtHR ruling *Ünal Tekeli v. Turkey* in particular, but it also quotes directly from a German Constitutional Court decision[625] on the matter. To lend credibility to these international references, a detailed bibliography is added at the end of the dissenting decisions.[626]

All in all, the meticulous reconstruction of methods and argumentative patterns displayed in the analysed key rulings reveals a fundamental paradox: on the one hand, several decisions 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. On the other hand, there is a striking lack of such argumentative strategies in other key rulings. Even more puzzling, we could not find any 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 only indication which might have some explanatory value in this regard concerns a possible link with the combination of a high degree of political salience, intense disagreement on the bench, and a particularly feeble, incoherent (legal) argumentation in the merits. While it is impossible to validate such a causal assumption on the basis of our qualitiative content

623 E. 1990/15, K. 1991/5 (27/03/1992), III.3.26, p. 679.
624 Cf. E. 2009/85, K. 2011/49 (21/10/2011), III.3.24.
625 A similar quote of BVerfG case law can be found in E. 1990/15, K. 1991/5 (27/03/1992),III.3.26, p. 677.
626 Cf. E. 2009/85, K. 2011/49 (21/10/2011), III.3.24, pp. 653-654.

analyses, similar findings regarding the inconsistencies in the form and wording of several key rulings, documented in Chapter II.5.1, seem to point in the same direction.

5.3 Key Concepts and Values

References to key concepts and values enshrined in the Constitution are core elements of any constitutional reasoning. According to Jakab, Dyevre, and Itzcovich, apex courts use terms such as 'democracy', 'sovereignty', 'secularism', 'nation', or 'federalism' for multiple purposes. They may either employ them as a merely "rhetorical device" or they can build concrete decisions on them "in an operative manner in the sense of triggering specific legal consequences".[627] In the analysed AYM rulings, we found ample evidence of both approaches.

One reason why the Court tends to base its rulings on principles rather than on concrete constitutional provisions, putting particular emphasis on the "concept of the state as having rights of its own",[628] can be found in the Turkish Constitution itself. Not only does the Preamble list an entire series of general principles in an abstract (and even somewhat redundant) way, but in addition Part One is explicitly labelled "General Principles", stipulating – among other issues – "the concepts of public peace, national solidarity and justice", "the nationalism of Atatürk" (Art. 2 TA), "sovereignty" (Art. 6 TA), and "equality before the law" (Art. 10 TA) in a very general and nonspecific manner. An actual, more specific catalogue of individual rights follows in Part Two, labelled "Fundamental Rights and Duties" (Art. 12-40 TA).

As shown in detail in the case-by-case analyses in Chapter II.4, AYM rulings frequently refer to the Preamble and Part One of the Constitution in addition to, or instead of, more concrete constitutional provisions when justifying a decision. The content analyses also revealed, however, that general concepts are translated into concrete, 'operative' provisions on some occasions, while they stay purely abstract and 'rhetorical' on others. In the following pages, these ambiguities are highlighted and explained.

The range of concepts evoked in the key rulings is generally rather limited, but references to them are frequent and extensive. They mainly focus on the terms 'public order', 'nationalism', 'laicism', 'rule of law',

627 Jakab et al. 2017c, p. 806.
628 Can 2012, p. 272.

and 'equality before the law'. In addition, 'the principles of civilisation' and moral values like 'peace of the family' and 'honour' are regularly invoked. However, other key concepts equally enshrined in the Turkish Constitution such as 'social justice' (Preamble) or 'democracy' (Art. 5 TA), are mentioned significantly less frequently.

Among the principles directly deducted from the Constitution, 'rule of law' and 'equality before the law' stand out, because the Court defines these concepts using almost identical wording whenever it refers to them. In all cases analysed in the *General Principles of Rule of Law and Separation of Powers* set (Chapter II.4.2.1), great emphasis is put on the importance of Turkey being a state under the rule of law,

> "which respects and protects human rights, which establishes and carries out an equitable legal order, which is loyal to legal norms and the Constitution and all the acts which are subject to judicial review."[629]

This definition is also repeated in key decisions on various other issues, analysed in different topical sets. In particular, the importance of judicial independence and – hardly surprising – of independent judicial review are underlined on many occasions. While binding legal consequences are deduced from this general concept on some occasions, such as restricting administrative acts for the sake of the legislative supremacy of Parliament,[630] the term remains rather detached from the concrete case at hand in other rulings[631].

The same holds true for the principle of equality. In all 12 rulings analysed in the *Equality before the Law and Gender Equality* set (Chapter II.4.3.5), as well as in some key decisions on other topics,[632] the definition of equality is repeated in almost identical words:

> "As emphasised in many rulings of the Constitutional Court, the equality before the law principle does not mean that the same legal rules should be applied to everyone in all aspects. (…) Applying different legal rules to some citizens does not violate the equality principle,

---

629 E. 1976/1; K. 1976/28 (16/8/1976); not documented in Part III.

630 Cf. *Stay of Execution and Freedom to Claim Rights* (E. 2006/33, K. 2006/36 (10/01/2007), III.2.2); *Limitation of Executive Influence on Selection Procedures* (E. 2005/85, K. 2009/15 (03/04/2009), III.2.3).

631 Cf. *Re-Organisation of the Statistical Institute* (E. 2008/105, K. 2010/123 (26/02/2011), III.2.4).

632 Cf., for example, *Criminal Responsibility of Children in Case of Terrorist Accusations* (E. 2011/26, K. 2012/41(26/06/2012), III.2.19); *Right of Minorities to Choose a Non-Turkish Family Name* (E. 2009/47, K. 2011/51 (12/07/2011), III.3.6.).

> if they are based upon a rightful reason. (…) The Constitution aims at legal not de facto equality."[633]

Yet the consequences drawn from this distinction between *de jure* and *de facto* equality differ significantly from case to case. In the ruling *Equal Treatment of Spouses in Case of Adultery I*, for example, the merits consider the delimitation between constitutional and unconstitutional forms of discrimination between wife and husband in some detail: while unequal treatment of different sexes may well be justifiable in order to protect women because of a distinction "required by nature and functional properties", it does violate Art. 10 TA if the distinction is used "to privilege men".[634] An equally systematic approach, "triggering specific consequences"[635] from the general principle of legal equality, is presented in the *Increase of Sentence in Domestic Violence Cases* decision. The majority opinion justifies the constitutionality of the law stipulating more severe punishment in domestic violence cases compared to offences against strangers by arguing:

> "Differences in the conditions of victims and offenders may entail that different legal rules are applied to them. Since the obligations of persons indicated in the provision in question are a result of their cohabitation, this distinguishes them from third persons, and application of different legal rules does not violate the principle of equality."[636]

There are, however, some key decisions on very similar issues which refer to the principle of equality only in the abstract, giving no substantiated reason for the particular interpretation of this constitutional principle. This purely 'rhetorical' use mostly occurs when the Court found that other, less well-defined general principles are in conflict with the equality claim. Above all, the very broad understanding of public order often prevails over the principle of equality.

As demonstrated in Chapter II.4.3.5, both decisions on *The Right of Female Spouses to Use Their Premarital Family Name* are particularly revealing in this regard. Despite the fact that these cases were decided by different generations of justices and within different political settings (in 1997 and 2011 respectively), the AYM majority not only came to the same result, but it also based its decision on a very similar form of constitu-

633 E. 1988/04, K. 1989/03 (10/01/1990), III.3.16, p. 569.
634 E. 1996/15, K. 1996/34 (27/12/1996), III.3.19, p. 600.
635 Jakab et al. 2017c, p. 806.
636 E.2005/152, K. 2008/37 (29/03/2008), III.3.18, p. 592.

tional reasoning. According to both decisions, the Turkish law on family names that forced married couples to exclusively use the husband's name as the common family name, does not violate the wife's right to equal treatment before the law. In the first *Family Name* decision, the standard definition of the principle of equality stipulated in Art. 10 TA was not at all connected to the concrete question of family names. Instead, the merits laconically state that "rightful reasons" might prevail over the female spouse's claim to hand down her premarital name to future generations. These reasons are very briefly spelled out in the following paragraph:

> "By inheritance of the family name from generation to generation, unity and integrity of a family will endure. The legislator has given priority to one of the spouses so as to enable the unity of family. Public interest, public order and some necessities prove that it is rather preferred that the surname should be conveyed by the men."[637]

The three dissenters to this decision explicitly criticised, among other things, that the majority decision was based on the mere reference to "abstract concepts" instead of a substantiated legal argumentation.[638] Whereas the merits of the *Family Name II* decision elaborate the principle of equality as well as the public order argument and the importance of family values in slightly more detail, the result remains the same: not only do very technical "public order requirements", such as "keeping civil registration records properly, preventing any confusion in official documents", outweigh the principle of equality, but public order is even attributed a moral value of its own, as its alleged objective is "protecting the unity of the family and strengthening family bonds", which, in return, represent the "sacred foundation" of Turkish society.[639]

As this example illustrates, the concept of public order is not only particularly dominant in Turkish constitutional adjudication, but it is also applied in an extremely broad and imprecise manner. In contrast to the standard definitions of the constitutional terms 'rule of law' and 'equality', the AYM never developed a standard definition of 'public order'. Instead, the term can take many meanings, conveniently justifying almost any argument brought forward by the Court throughout its case law. This instrumentalisation of an indeterminate legal concept can even be traced in rulings which otherwise stand out for their comprehensive and system-

637 E. 1997/61, K. 1998/59 (15/11/2002), III.3.23, p. 633.
638 Ibid., p. 645.
639 E. 2009/85, K. 2011/49 (21/10/2011, III.3.24, p. 641.

atic constitutional reasoning: in the pro-rights-oriented decision *Freedom of Association and Assembly*, rendered in 1976, the justices explicitly emphasised the vagueness of the principle of public order, which makes it "open to subjective and broad interpretations according to individual views and opinions of the implementing authorities".[640] Nevertheless, they did not limit its meaning in order to minimise the possibility of an authoritarian (mis)interpretation. Instead, they stated that "the term public order, albeit being a term difficult to define, implies anything that aims at guaranteeing societal comfort and peace and protecting the State and its institutions."[641]

This last phrase, "anything that aims at (…) protecting the State and its institutions", perfectly summarises the Court's vague yet all-encompassing understanding of this core constitutional principle. Similar descriptions can be found in various rulings from all phases of AYM adjudication. In the 1992 ruling *Constitutionality of Anti-Terrorism Law*, the justices did not even bother to define the concept at all. While they made a deliberate effort to precisely define several legal terms related to terror and terrorism, they were much less specific in regard to the meaning of public order. Without any further clarification, they merely stated "(t)hat the concept (…) exists in the legal and constitutional language, and its meaning is very clear".[642]

Laicism and nationalism are two similarly indeterminate concepts on which the Court frequently builds its argumentation. Both terms belong to the "Characteristics of the Republic", enshrined in Art. 2 TA. The fundamental importance of these closely linked 'principles of Atatürkism' for the adjudication of the Court has been described in detail in the case analyses on *Fundamental Rights vs. Principles of the Republic* in Chapter II.4.3.1. Among these rulings, the first *Headscarf* decision stands out because it offers particularly detailed definitions of both concepts. First, the multifaceted meaning of laicism is unfurled at some length:

> "Laicism is a civilised lifestyle, which, by destroying medieval dogmatism, forms the basis of the concept of freedom and democracy, nation-state building, independence, national sovereignty, and the ideal of humanity which developed with the supremacy of reason and enlightenment of science. (…) Even if laicism is defined in a limited sense as the separation of the affairs of state and religion, (…) the

640 E. 1976/27, K. 1976/51 (16/05/1977),III.3.8, p. 492.
641 Ibid., p. 491.
642 E. 1991/18, K. 1992/20 (27/01/1993), III.2.17, p. 356.

> doctrine also shares the view that it is the last stage of the intellectual and organisational evolution of societies. (…) In a laicist order religion will be saved from politicisation, will no longer be an instrument of government and will be, by keeping it at its true, a respectable place, left to the individuals' conscience. Thus, science and law will be the basis of political life."[643]

Some paragraphs later, the justices give a similarly detailed account of their interpretation of the constitutional concept of nationalism that directly links it to the principle of laicism:

> "Atatürk´s nationalism, which marches as appropriate for and in accordance with civilised nations on the path of development and progress and in international proceedings and relations, is that form of Turkish nationalism (…) which covers everybody who is happy to be a Turk. (…) According to this definition, among the elements that constitute the nation are a common language, national feeling and feelings of kindness, unity in political existence, a common fatherland, common roots, and historical and ethical closeness. (…) Religion does not form the basis of the nationalism of Atatürk; the result is unification not through religion but nationalism and national values. Laicism also includes the reciprocal behaviour of state and society. This leads to integration. The integration lies not in religion, but in the nationalism of Atatürk, in the bond of the nation and national values."[644]

Both quotes are excellent examples of the crucial importance such highly abstract key concepts have in the Court's reasoning. Similar, if shorter, references to the "Characteristics of the Republic" can be found in many other analysed rulings. The quotes also illustrate how the justices' understanding of the principles of nationalism and laicism amalgamate into a single holistic interpretation of the constitutional foundations of state and society in Turkey. In a broader sense, these "national values" represent progress as such, which is defined as "the ideal of humanity which developed with the supremacy of reason and enlightenment of science".[645]

A general cipher for this overarching interpretation of the "Characteristics of the Republic" is the key concept of 'civilisation', which is also frequently used by the AYM. In the above quotes from the first

643 E. 1989/01, E. 1989/12 (05/07/1989), III.3.3, p. 432.
644 Ibid., p. 438.
645 Ibid., p. 432.

Headscarf decision, Turkey's "civilised lifestyle" and its adherence to the community of "civilised nations" are evoked to underpin the Court's specific interpretation of laicism and therefore justify the headscarf ban. References to the value(s) of civilisation in other key rulings may reinforce different constitutional concepts, such as equality claims or the state's duty to protect vulnerable groups within the Turkish population. For example, the restriction of succession rights for children born out of wedlock was found to be unconstitutional not only because it violates Art. 10 TA, stipulating equality before the law, but also because other "(m)odern and well-civilised countries have already abolished the distinction between legitimate and illegitimate lineage."[646] The same argumentative pattern was applied in the merits of *Criminal Responsibility of Children in Case of Terrorist Accusations*:

> "The civilised nations also set different legal rules on probation, trial and execution processes for juvenile delinquents and adult criminals. Hence, to omit the provision concerning the matter of aggravation for adults in cases where children are tried does not violate the [Turkish] Constitution, even though these cases are regarding terror crimes."[647]

The logic behind these recurring references to the 'principles of civilisation' is based on a simple syllogism: 'civilised nations' share common constitutional standards, Turkey adheres to these standards, and therefore Turkey belongs to the "civilised nations" and is thus part of the 'modern', 'progressive', or 'European' world. This argumentative pattern is in stark contrast, however, with other frequently evoked principles, emphasising the importance of Turkish-specific tradition and moral values. Above all, the progressive concept of 'well-civilised nations' is often countered by a very conservative understanding of family values. As repeatedly documented in the respective case analyses,[648] the specific 'Turkish doctrine of family law' propagates heterosexual marriage with children as the

646 E. 1990/15, K. 1991/5 (27/03/1992), III.3.26, pp. 678-679.

647 E. 2011/26, K. 2012/4 (26/06/2012), III.2.19, p. 365.

648 Cf., among others, *Mitigation of Sentence for Rape Crimes* (E. 1988/04, K. 1989/03 (10/01/1980), III.3.16), *Mitigation of Sentence for Honour Killings* (E. 1997/45, K. 1998/48 (22/11/2003), III.3.17), *Increase of Sentence in Domestic Violence Cases* (E. 2005/151, K. 2008/37 (29/03/2008), III.3.18), *Work Permission of Female Spouses* (E. 1990/30, K. 1990/31 (02/07/1992), III.3.21), *Severance Payment for Female Employees* (E. 2006/156, K. 2008/125 (26/11/2008), III.3.22), *Right of Female Spouses to Use Their Premarital Family Name I* (E. 1997/61, K. 1998/59 (15/11/2002), III.3.23) and *II* (E. 2009/85, K. 2011/49 (21/10/2011), III.3.24).

only family model to be protected by (constitutional) law.[649] Moreover, as 'peace' within the family must be maintained by any means (including hierarchical structures), and as wives are held responsible for creating familial harmony, it is implied that wives are expected to avoid conflict by subordination to their husbands if necessary.[650] In a certain sense, this patriarchal family model can even be interpreted to be at the base of the tutelary role often attributed to Turkish state institutions, including the AYM, vis-à-vis the citizens and their individual rights.

The traditionalist values attributed to the family by the Court are also closely linked to its extremely morally loaded employment of categories like (family) honour or (female) chastity. In the ruling *Mitigation of Sentence for Rape Crimes*, issued in 1990, the terms "chastity" and "stained honour" are used to evoke a narrative of "chaste women" suffering more than prostitutes when raped or abducted.[651] Without any references to legal norms or established case law, these moral categories are taken up several times throughout the merits in order to justify mitigating sentences for crimes committed against prostitutes. Similar arguments, neglecting well-defined constitutional norms like equality before the law in favour of those non-legal, extremely morally loaded ideas, can be found in several other analysed key rulings on related topics, such as *Mitigation of Sentence for Honour Killings* (III.3.17), *Severance Payment for Female Employees* (III.3.22(, and in both *Family Name* decisions (III.3.23 and III.3.24).

These examples highlight the fundamental ambiguity of the AYM's reasoning, oftentimes juxtaposing irreconcilable constitutional concepts and moral values. As a result, the Court never succeeded in developing a coherent, sustainable, or overall consistent interpretation of the Turkish Constitution, which could have strengthened its authority as the guardian of the Constitution in times of political crisis and democratic backlash.

5.4 Internal Dissent and Doctrinal Inconsistency

By reviewing fifty years of AYM case law through the lens of a carefully selected sample of key decisions, dominant trends in the development of the Court's adjudication became visible. Similar to the institutional history of the AYM described in Part I of the book, this development lacks

649 Cf., for example, E. 2006/156, K. 2008/125 (26/11/2008), III.3.22.
650 Cf. E. 1997/61, K. 1998/59 (15/11/2002), III.3.23, p. 399.
651 Cf. E.1988/4; K. 1989/03, (10/1/1990), III.3.16, p. 310.

continuity and rigour. What stands out are unexpected doctrinal twists (or even reversals), as well as a tremendous amount of dissent on the bench. As pointed out in the case-by-case analyses, even the most significant decisions, strengthening the Court's authority to defend the constitutional basis of democracy and individual rights, were repeatedly decided by the smallest possible majority.[652] All in all, 13 of the 50 analysed rulings were decided by the minimum vote of 6:5, 8:7, or 9:8 respectively (cf. Table 9). Consequently, it took little to give up doctrinal positions once a similar issue was later decided by an even slightly changed bench. At the same time, the many published dissenting and concurring opinions often reveal more about the legal and/or political reasoning behind these changes than the merits, which – as discussed in Chapters II.5.2 and II.5.3 – frequently show substantial argumentative gaps.[653]

652 Cf., among others, all decisions on Executive Law Making Power (Chapter II.4.2.3; III.2.9 – III.2.13); *Constitutional Review of Emergency Decrees I and II* (III.2.14 and III.2.15); *Amnesty for Certain Groups of Political Prisoners* (III.3.13).

653 For the importance of dissenting opinions in AYM decision-making cf. also Chapter II.2 and, in particular, Abad Andrade 2020.

*Table 9: Number of Dissenting Opinions in Key Decisions**

Titel	E. / K. Number	Date	Dissenting Opinions**	Vote***
Freedom of Association and Assembly (III.3.8)	E. 1976/27, K. 1976/51	16/05/1977	11	Rejected; 10:5 (regarding form) / Accepted; 8:7 (regarding substantive claims)
Constitutionality of Anti-Terrorism Law (III.2.17)	E. 1991/18, K. 1992/20	27/01/1993	10	Rejected; 7:4
Legal Basis of the Formation of State Security Courts (III.2.6)	E. 1974/35, K. 1975/126	11/10/1975	9	Accepted; 9:6
Amnesty for Certain Groups of Political Prisoners (III.3.13)	E. 1974/19, K. 1974/31	12/07/1974	9	Accepted; 9:6 (Art. 5 (A)) / Accepted; 11:4 (also Art. 5 (A)) / substantial review Rejected; 15:0 / Rejected to decide of date of coming into force; 9:6
Death Sentence (III.3.12)	E. 1972/13, K. 1972/18	24/07/1972	6	Accepted; 10:5
Freedom of Association of International Organisations (III.3.7)	E. 1963/199, K. 1965/16	23/09/1965	5	Rejected; 14:1 (Art. 3) / Rejected; 10:5 (Art. 10(1)) / Rejected; 10:5 (Art. 11)
Crime of Stirring Up Social Unrest (III.3.10)	E. 1963/193, K. 1964/09	11/06/1964	5	Rejected; 15:0 (Art. 312) / Rejected; 8:7 (Art. 143)
Independence of Public Prosecutors (III.2.5)	E. 1970/39, K. 1971/44	16/12/1971	4	Accepted; 11:4
Time Limits of Enabling Laws (III.2.10)	E. 1988/62, K. 1990/03	12/10/1990	4	Accepted; 7:4
Judicial Self-Restraint in Review of Statutory Decrees (III.2.13)	E. 2011/60, K. 2011/147	15/12/2011	4	Rejected; 7:7****
Constitutional Review of Emergency Decrees I (III.2.14)	E. 1990/25, K. 1991/01	05/03/1992	4	Accepted; 7:4
Right to Life of Terror Suspects (III.2.18)	E. 1996/68, K. 1999/01	19/01/2001	4	Accepted; 10:1
Parliamentary Procedure of Presidential Election (III.2.21)	E. 2007/45, K. 2007/54	27/06/2007	4	Accepted; 9:2
Constitutional Amendments Concerning Presidential Elections (III.2.22)	E. 2007/72, K. 2007/68	07/08/2007	4	Rejected; 6:5

Titel	E. / K. Number	Date	Dissenting Opinions**	Vote***
Constitutionality of the New Presidential Election Law (III.2.23)	E. 2012/30, K. 2012/96	01/01/2013	4	Rejected; 15:1 (Art. 5) / Rejected; 16:0 (Art. 11, 13, 14,21) / Rejected; 12:4 (Provisional Art. 1 (1)) / Accepted; 16:0 (Provisional Art. 1 (2))
Religious Identity in ID Cards II (III.3.2)	E. 1995/17, K. 1995/16	14/10/1995	4	Rejected; 6:5
Right to Property of Foreigners (III.3.5)	E. 1986/18, K. 1986/24	31/01/1987	4	Accepted; 6:5
Right of Minorities to Choose a Non-Turkish Family Name (III.3.6)	E. 2009/47, K. 2011/51	12/07/2011	4	Rejected; 9:8
Limits of Administrative Privilege in Prosecution (III.2.1)	E. 1991/26, K. 1992/11	23/11/1992	3	Accepted; 7:4
Re-Organisation of the Statistical Institute (III.2.4)	E. 2008/105, K. 2010/123	26/02/2011	3	Rejected; 10:5
Appointment of Judges and Public Prosecutors (III.2.7)	E. 1992/39, K. 1993/19	17/10/1995	3	Rejected; 8:3 (Art. 37/I b) and 7:4 (Art. 38)
Constitutional Review of Emergency Decrees II (III.2.15)	E. 1991/06, K. 1991/20	08/03/1992	3	Accepted; 6:5 (Art. 1, 5, 6, 9) / Accepted; 10:1 (Art. 7) / Accepted; 6:5 (Art. 7, 8)
Duties of a Demonstration's Organisation Committee (III.3.9)	E. 2004/90, K. 2008/78	05/07/2008	3	Rejected; 8:3
Mitigation of Sentence for Rape Crimes (III.3.16)	E. 1988/04, K. 1989/03	10/01/1990	3	Rejected; 7:4
Right of Female Spouses to Use Their Premarital Family Name II (III.3.24)	E. 2009/85, K. 2011/49	21/10/2011	3	Accepted; 12:5 (regarding admissibility) / Rejected; 9:8 (Art. 187)
Rights of Children Born Out of Wedlock I (III.3.25)	E. 1987/01, K. 1987/18	29/03/1988	3	Accepted; 6:5 (Art. 443 (1))
Hierarchy of Enabling Laws and Statutory Decrees (III.2.9)	E. 1989/04, K. 1989/23	08/10/1989	2	Rejected; 8:3 / Annulment request Accepted; 11:0
Religious Identity in ID Cards I (III.3.1)	E. 1979/09, K. 1979/44	13/03/1980	2	Rejected; 8.7 (Art. 43) / Rejected; 15:0 (Art. 46)
Headscarf Decision II (III.3.4)	E. 2008/16, K. 2008/116	22/10/2008	2	Accepted; 9:2
Press and Broadcasting Privilege (III.3.11)	E. 1999/39, K. 2000/23	12/10/2000	2	Accepted; 6:5

Titel	E. / K. Number	Date	Dissenting Opinions**	Vote***
Increase of Sentence in Domestic Violence Cases (III.3.18)	E. 2005/151, K. 2008/37	29/03/2008	2	Rejected; 7:4 (regarding phrase in Art. 86 (3) TCK) / Rejected; 11:0 regarding phrase in Art. 86 (3) TCK)
Stay of Execution And Freedom to Claim Rights (III.2.2)	E. 2006/33, K. 2006/36	10/01/2007	1	Accepted; 6:5
Constitutional Basis of Privatisation Law (III.2.12)	E. 1994/49, K. 1994/45-2	10/09/1994	1	Accepted; 7:4
Constitutional Review of Emergency Decrees III (III.2.16)	E. 2003/28, K. 2003/42	16/03/2004	1	Accepted; 6:5
Headscarf Decision I (III.3.3)	E. 1989/01, K. 1989/12	05/07/1989	1	Accepted; 10:1
Treatment of Prisoners and Visiting Rights (III.3.14)	E. 2012/07, K. 2012/102	06/10/2012	1	Rejected; 10:3
Unequal Standards in Military and Civilian Criminal Law (III.3.15)	E. 2011/98, K. 2012/24	19/05/2012	1	Rejected; 13:2
Mitigation of Sentence for Honour Killings (III.3.17)	E. 1997/45, K. 1998/48	22/11/2003	1	Rejected; 7:4
Equal Treatment of Spouses in Case of Adultery II (III.3.20)	E. 1998/3, K. 1998/28	13/03/1999	1	Accepted; 9:2
Severance Payment for Female Employees (III.3.22)	E. 2006/156, K. 2008/125	26/11/2008	1	Rejected; 9:2
Right of Female Spouses to Use Their Premarital Family Name I (III.3.23)	E. 1997/61, K. 1998/59	15/11/2002	1	Rejected; 8:3
Rights of Children Born out of Wedlock II (III.3.26)	E. 1990/15, K. 1991/05	27/03/1992	1	Accepted; 10:1
Social Equality and the Right to Receive Health Benefits (III.3.27)	E. 1990/27, K. 1991/02	19/08/1991	1	Rejected; 10:1
Limitation of Executive Influence on Selection Procedures (III.2.3)	E. 2005/85, K. 2009/15	03/04/2009	0	Accepted; 11:0
Unequal Treatment of Military and Civilian Judges (III.2.8)	E. 2010/32, K. 2011/105	27/10/2011	0	Accepted; 16:0

Titel	E. / K. Number	Date	Dissenting Opinions**	Vote***
Judicial Emancipation in Review of Statutory Decrees (III.2.11)	E. 1993/33, K. 1993/40-1	23/10/1993	0	Accepted; 6:5
Criminal Responsibility of Children in Case of Terrorist Accusations (III.2.19)	E. 2011/26, K. 2012/41	26/06/2012	0	Accepted; 15:0
Immunity of Members of Parliament (III.2.20)	E. 1994/09, K. 1994/28	Not published	0	Rejected; 11:0 (regarding procedural violation claims) / Rejected; 8:3 (regarding merits of the case)
Equal Treatment of Spouses in Case of Adultery I (III.3.19)	E. 1996/15, K. 1996/34	27/12/1996	0	Accepted; 11:0
Work Permission of Female Spouses (III.3.21)	E. 1990/30, K. 1990/31	02/07/1992	0	Accepted; 11:0
Total Amount of Dissenting Opinions			**145**	

Source: Own Compilation.

* Ordered by the quantity of published dissenting opinions; concurring opinions are not included in the numbers.

** The number of dissenting opinions does not necessarily represent the number of dissenting justices, because one dissenting opinion may be supported by more than one justice, and because some justices may second several dissenting opinions added to the same ruling. In addition, the number has to be put into proportion to the varying number of AYM members: 1961-1981: 15 AYM justices; 1982-2010: 11 AYM justices; 2010-2017: 17; since 2017: 15 AYM justices..

*** The number of votes does not necessarily add up to the total number of justices on the bench, because the Court can decide with some members missing. This quorum, stipulated in Art. 149 (1) TA, was changed several times: 1982-2010: the Court President and ten members; 2010-2017: at least twelve Court members; since 2017: „… The General Assembly shall convene with the participation of at least ten members under the chairpersonship of the President of the Constitutional Court or a deputy president designated by the President.(…)".

**** According to Art. 65 (1) CCA „The General Assembly and sections make their decisions with the absolute majority of the participants. In case of equality of votes, the decision is considered to be taken according to the view of the President".

As evidenced in Table 9, 44 of the 50 analysed key decisions include at least one dissenting opinion. On average, 2.9 dissenting opinions per ruling were published, amounting to a total of 145 dissenting opinions attached to the 50 cases of our sample.[654] Four rulings were even accompanied by nine (in the case of two rulings), ten, or 11 statements written by individual justices or varying groups of dissenters. These numbers attest to a significant amount of disagreement on the bench during all phases of the Court's existence.

We even found one dissenting opinion which openly addressed the deep divides on the bench and the external pressure exerted on the AYM. In the highly politicised case *Parliamentary Procedure of Presidential Election* (III.2.21),[655] *Haşim Kılıç*, then Vice-President of the Court, opened his strongly substantiated legal critique of the Court's majority decision by referring to Art. 138 (1, 2) TA guaranteeing judicial independence. He delineated his dissent as being the only option to document the internal conflict at the Court and the external interference "for the historical record."[656] All in all, four dissenting opinions were added to this particularly disputed decision.

This 2007 ruling on the parliamentary election of the State President also highlights another move typical of the AYM in cases of massive internal dissent: rather than deciding on the substance of the case, the justices focused on procedural aspects in a rather evasive, unsystematic way. The merits consist of a verbose discussion of the procedural question, if and to which degree the AYM was entitled to review the voting regulations of the TBMM. As described in Chapter II.4.2.5, this reasoning lacks any traceable argumentation and is even partially unintelligible. After the 1971 military coup, an earlier generation of justices had dealt with an equally polarised and politically controversial issue in a very similar way. When the AYM had been approached by two abstract norm control applications as last resorts for political activists persecuted by the post-coup Government, the justices were unable to agree on a common strategy. Instead, they based their rulings on the lowest common denominator to be found amongst

654 In addition to the dissenting opinions, we also counted more than 10 concurring opinions which disagreed with (parts of) the argumentation of the merits, but nevertheless supported the majority vote. For the purpose of clarity, these concurring opinions, while documented in Part III, are not included in Table 9.

655 For the political context and the extremely contested content of the majority decision, blocking the parliamentary election of an AKP-supported State President, see Chapter II.4.2.5.

656 E. 2007/45, K. 2007/54 (27/06/2007), III.2.21, p. 318.

them, which was declaring the laws under review unconstitutional on merely procedural grounds. Again, the merits were long and detailed, but lacked any clear legal argumentation.[657]

In all three decisions, the fierce controversy on the bench translated into unconvincing rulings, even causing unintended consequences in the *Death Sentence* case: because the Enforcement Law on Death Sentences was rejected as unconstitutional only on procedural grounds, the ruling could be easily overthrown by Parliament, and all convicts were consequently executed some weeks after the publication of the AYM ruling that had – if only ineffectually – intended to save their lives. Even taking into consideration the difficult situation in which the AYM had to render its decisions, such as the polarised political atmosphere of the early 1970s and the 2000s, more unity and a less-evasive strategy focusing on watertight judicial logic would have likely been more profitable for the Court's long-term authority. The justices could either have practiced judicial self-restraint, declaring the obviously politically motivated applications beyond the Court's jurisdiction, or opted for judicial activism, deliberately and boldly advocating for individual rights or principles of rule of law. In all three cases, the in-between decision, displaying the deep divide on the bench, as well as the (resulting) poor constitutional reasoning, made the AYM party to the political struggle and weakened its credibility as an independent guardian of the constitutional order in the long run.

It is important to note that the combination of openly documented dissent among the justices and poor (or even nonexistent) constitutional reasoning characterises several of the analysed rulings from all periods of the Court's existence, regardless of the political context. According to our findings, the portrait of a homogeneous bench, proactively and coherently supporting one particular political class or even Government, has always been a myth – during so called Kemalist rule, in the era of center-right coalitions, as well as under AKP rule since 2002.[658]

Another overall outcome of the content analysis approach to the AYM case law concerns long-term doctrinal developments. We discovered an astonishing coexistence of rulings strengthening a certain doctrinal position, and decisions abruptly ending this development, often without giv-

657 Cf. the analyses of the rulings *Death Sentence* (III.3.12) and *Amnesty for Certain Groups of Political Prisoners* (III.3.13) in Chapter II.4.3.4.

658 This result is valid at least for the time until 2012. After the 2016 coup attempt, the independence of the AYM has been gravely affected by the following general crackdown on the state under the rule of law in Turkey.

ing any plausible explanation for the turnaround. In general, doctrinal coherence is rather feeble in AYM adjudication because, among other things, the justices do not systematically refer to their earlier decisions.[659] It is also noteworthy that long-term doctrinal considerations are more often traceable in the case law on state organisation issues than in constitutional rights' adjudication.

The most prominent example of systematic doctrinal decision-making that was abruptly abandoned concerns the review of executive decrees (KHKs). As detailed in the case-by-case analyses in Chapter II.4.2.3, the AYM developed a coherent position on this question over the years, effectively reining in the law-making power of the executive branch. In a series of rulings, it concretised Art. 91 (2) TA, according to which an enabling law "shall define the purpose, scope, principles, and operative period" of executive decrees. The Court formulated standard review criteria to check the constitutionality of the necessary parliamentary enabling law, and repeatedly emphasised that KHKs may exclusively cover "**important, compulsory and urgent** cases".[660] When the AYM suddenly gave up on this doctrine in 2011 by the smallest possible number of 7:7 votes, the merits explicitly criticised this interpretation of Art. 91 TA in the earlier decisions. The seven justices who supported the rejection of the unconstitutionality claim argued that in the absence of a conclusive enumeration of review criteria in the text of the Constitution, it was not their place to develop an interpretation of their own. Instead, they should refrain from any constitutional reasoning and leave it to the discretion of the executive branch to define the scope and limits of decrees.[661]

The motives behind this fundamental change in the self-perception of the Court's role cannot be completely elucidated, as no further reasons were given in the ruling. The most obvious explanation would be the significant change of political context compared to the situation in 1994, when the previous decision on the matter had been taken: in 2011, one year after the far-reaching judicial reform of 2010, the increasingly anti-liberal AKP-rule was firmly established and some of the AYM justices may have therefore found it reasonable to comply with the executive branch's demands for extended law-making competencies.

---

659 Cf. also Chapter II.5.2.

660 E. 1989/04, K. 1989/23 (01/10/1989), III.2.9, p. 310 (emphasis in bold in the original).

661 Cf. E. 2011/60, K. 2011/147 (15/12/2011), III.2.13.

The plausibility of this interpretation is further supported by a very similar doctrinal change concerning emergency decrees that occurred some years later. As documented in the case analyses *Constitutional Review of Emergency Decrees I-III*, the AYM had found a way around the restrictive provision of Art. 148 (1) TA, which denied any constitutional review of KHKs issued under the state of emergency, be it in form or substance. By referring to the constitutional order as a whole, a (small) majority of AYM justices had repeatedly reasoned that even the proclamation of a state of emergency should not invalidate basic principles of rule of law. Therefore, executive measures taken under emergency conditions should be subject to a general constitutionality check by the Court in order to decide if they exceeded the immediate scope and necessities of the extraordinary situation. Only if the KHK in question was justifiable within these limits was it exempt from further judicial review. This anti-authoritarian interpretation of the Constitution, developed in the 1990s and confirmed in 2003, was abruptly abandoned in 2015[662] under conditions comparable to those of four years earlier when the doctrinal change was made regarding the constitutional review of ordinary decrees. Interpreted through the lens of the Court's subsequent refusal to review the constitutionality of a series of openly repressive and legally extremely problematic emergency decrees issued under the state of emergency after the failed coup attempt in July 2016[663], this doctrinal turnaround could be indeed marked as the "first step towards self-abandonment of the Constitutional Court as guardian of the rule of law in Turkey".[664]

However, such a retrospective analysis tends to overlook how contested the previous doctrinal position protecting the rule of law had always been within the AYM. As mentioned earlier, the doctrinal reversal in 2011 caused a maximal amount of disagreement among the justices, resulting in a standoff and the application being rejected for lack of majority. Besides, all earlier decisions on the matter had also been decided by very narrow majorities. The same holds true for the earlier rulings on emergency KHKs, which had only been supported by 7:4 or 6:5 justices, accompanied by up to five dissenting opinions.[665] Against this backdrop,

662 For details, cf. Chapter II.4.2.4.

663 Cf. E. 2016/166, K. 2016/159 (04/11/2016); E. 2016/167, K.2016/160 (04/11/2016); E. 2016/171, K. 2016/174 (08/11/2016); E. 2016/172, K. 2016/165 (08/11/2016).

664 Göztepe 2018b, p. 531.

665 Cf. Chapter II.4.2.4 as well as E. 1990/25, K. 1991/01 (05/03/1992), III.2.14, and E.1991/06, K.1991/20 (08/03/1992), III.2.15.

the juxtaposition of the consistently progressive, rule-of-law-promoting Court that existed through the early 2000s and one that sprung up in 2010 and abruptly surrendered to the political will of the AKP-led executive branch does not mirror the always conflictive and often incoherent reality of AYM decision-making.

The basic ambiguity of the Court's case law throughout all phases of its existence is further supported by the analyses of 12 key rulings on gender equality in Chapter II.4.3.5. Art. 10 TA, stipulating equality before the law, is the only fundamental right on which rich case law existed before the introduction of the individual complaint procedure in 2012, because concrete norm review cases on the issue were frequently brought before the Court. In addition, the principle of equality is one of the few constitutional concepts that has been systematically defined and applied by the AYM during all phases of its adjudication, as shown in the previous Chapter II.5.3. We also documented, though, that the principle of equality was completely set aside when it clashed with traditional, paternalistic family values shared by the majority of the Turkish constitutional justices across all generations and different political backgrounds. As a result, the AYM never succeeded in developing a coherent doctrinal position on the matter.

Whereas in the abstract, equality before the law has always been interpreted by the Court's majority in a rather consistent, pro-rights-oriented way, we found repeated doctrinal shifts and barely explained argumentative ruptures in the merits of concrete decisions on this matter. As long as children's rights to equal treatment[666] or social security issues[667] were at stake, the abstract commitment was translated into convincing constitutional reasoning, comprehensively protecting this fundamental right. In the rulings related to equal rights of male and female spouses, the picture is less coherent. While gender equality was actively promoted on the basis of a legally convincing argumentation in *Equal Treatment of Spouses in Case of Adultery I and II* (III.3.19, III.3.20) as well as – although with a much less straightforward legal explanation – in *Work Permission of Female Spouses* (III.3.21), the Court's majority completely abandoned this doctrinal position in the decisions *Severance Payment for Female Employees* and *Right of Female Spouses to Use their Premarital Family Name I and II* (III.3.23, III.3.24). In the merits of these three decisions, Art. 10 TA

666 Cf. E. 1987/01, K.1987/18 (29/03/1988), III.3.25 and E. 1990/15, K. 1991/5 (27/03/1992), III.3.26.

667 Cf. E. 1990/27, K. 1991/02 (19/08/1991), III.3.27.

was only passingly mentioned, without attributing any significance to the claim of gender equality. Instead, this fundamental right was completely subordinated to Art. 41 TA (protection of the family),[668] vague references to Turkish "family law doctrine",[669] or to barely substantiated public-order arguments.[670]

Taking into consideration that these key decisions on the matter cover the time span from 1987 to 2011, the documented doctrinal inconsistencies cannot be exclusively attributed to the changing political context or a particular composition of the bench. Instead, we suggest a multidimensional explanation, focusing mainly on the high amount of dissent among the AYM justices, the undetermined or even inexistent constitutional reasoning on the handling of conflicting constitutional claims, and above all, a basic lack of awareness regarding the importance of doctrinal consistency.

Despite the overall outcome of our analysis of the AYM case law throughout all phases of its existence, it is nevertheless important to note that the Court succeeded in durably extending its competences over the years in two regards: it ascribed itself the right to issue interim measures[671] and the right to review constitutional amendments based on their substance.

The problem of constitutional court decisions' temporal urgency was first brought before the AYM in the *Death Sentence* ruling from 1972 (III.3.12), already repeatedly referred to in this Chapter. One of the application arguments on which the justices could not agree concerned the request for an interim decision ordering a stay of execution to suspend the death sentences of three political activists until the Court had come to a final decision. The majority of AYM justices argued that neither the Constitution nor any law explicitly granted the Court the competence to issue such a temporary order. The six justices who were nevertheless in favour of an interim decision emphasised the exceptional quality of the law ratifying the death sentences. According to their argumentation, the Court is obliged to ensure the effectiveness of its own rulings. If the contested law were finally declared unconstitutional, they explained, it

668 Cf. *Severance Payment for Female Employees* (E. 2006/156, K. 2008/125 (26/11/2008), III.3.22).

669 Cf. *Right of Female Spouses to Use Their Premarital Family Name I* (E. 1997/61, K. 1998/59 (15/11/2002), III.3.23).

670 Cf. *Right of Female Spouses to Use Their Premarital Family Name II* (E. 2009/85, K.2011/49 (21/10/2011), III.3.24).

671 Cf. also Chapter I.4.1. for the scope of this AYM competence.

would no longer be possible to effectively implement that decision, as the death sentences would already have been carried out. Such irreversible consequences should be prevented by means of an interim decision.

21 years later, this argumentation was taken up by the AYM majority in the key decision *Judicial Emancipation in Review of Statutory Decrees* (III.2.11), issued in 1993, which was also already mentioned in this Chapter. Whereas in this case, concerning the establishment of the Turkish Telecommunication Agency, no matter of life or death was at stake, a majority of 6:5 justices issued an interim measure stipulating that the KHK under review should not enter into force until the AYM had taken its final decision. The Court majority attributed to itself this "power to create law"[672] in order to prevent serious and irreversible legal consequences if the norm under review were implemented before its constitutionality had been conclusively verified. Since then, the Constitutional Court has frequently made use of this self-ascribed competence.[673] According to the authors' investigation, the question of issuing an interim measure was raised over 650 times in the Court's adjudication until 2022; in 113 cases the AYM approved the measure.[674] Despite the systematic appropriation of this legal remedy by the AYM since the 1990s, it was not confirmed for abstract review proceedings in the constitutional reform of 2010.[675] Instead, interim decisions were explicitly introduced only for constitutional complaint cases.

The second case of self-empowerment by the Court concerns the substantial review of constitutional amendments. Art. 148 (1) TA states that constitutional amendments shall be examined and verified only with regard to their form. Whereas the 1961 Constitution – after the 1971 amendment – contained no definition of what was to be understood by

672 E. 1993/33, K. 1993/40-1 (21/10/1993), III.2.11, p. 319.

673 This self-empowerment of the AYM has been criticised in the prevalent literature due to the lack of explicit constitutional or legal basis. Cf. Özbudun 2021, p. 441; Gözler 2020, p. 462.

674 Calculation by the authors on the basis of information provided by the Research and Case-Law Unit of the AYM on request.

675 According to the documentation of the Parliamentary Constitutional Commission's work, this is an intentional loophole. During the debate on the reform of the Constitutional Court Act, commission members explicitly criticised the Court's adjudication on interim measures despite a missing constitutional basis. Cf. https://www5.tbmm.gov.tr/sirasayi/donem23/yil01/ss696.pdf, p. 58.

this term,[676] the 1982 Constitution is very explicit on this matter. Art. 148 (2) TA stipulates that: "The verification of constitutional amendments shall be restricted to a consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedures was observed". Since its first ruling on the issue in 1987, when Members of Parliament had initiated an abstract norm control regarding transitional regulations amending the recently enacted Constitution,[677] the AYM repeatedly rejected applications asking for substantive control of constitutional amendments.[678]

In the *Headscarf Decision II* (III.3.4), rendered in 2008, the Court surprised all actors involved with an unattended doctrinal change on the matter. The context of, and the reasons for, this turn were discussed in detail in the case analysis of this ruling in Chapter II.4.3.1. After two attempts to lift the headscarf ban for university students by ordinary law, both declared unconstitutional by the AYM for violating the principle of laicism,[679] the AKP-majority in Parliament amended the Constitution (Art. 10 and 42 TA) in order to overcome the Court's veto. When the parliamentary opposition initiated an abstract norm review against this amendment law, the justices could not find any formal violation, but nevertheless declared the constitutional amendment to be unconstitutional on substantial grounds. The judicial argumentation of the merits, which interpreted the mere proposition of an amendment law as a violation of the unamendable constitutional principle of laicism, was heavily criticised by the two dissenting justices as well as by public observers and academics.[680] Rather than 'helping' to uphold a certain interpretation of laicism[681] against the manifest political will of the majority of Turkish voters, the openly political reasoning and absence of substantial legal basis

676 For the judicial and political debate in the early years of the Court's existence about its assumed competence to substantially review constitutional amendments cf. Chapter I.1.

677 Cf. E. 1987/9, K. 1987/15 (18/06/1987); this decision is not included in the key decisions documented in Part III of the book. Justice *Yekta Güngör Özden* wrote an extensive dissenting opinion on this decision, which was referred to in order to justify the majority opinion in 2008.

678 Cf., for example, E. 2007/99, K. 2007/86 (27.11.2007); this decision is not documented in Part III.

679 Cf. E. 1989/1, K. 1989/12 (7/3/1989), III.3.; E.1990/36, K.1991/8 (9/4/1991), not documented in Part III.

680 Cf., for example, Shambayati / Sütçü 2012, p. 118f.

681 For a detailed discussion of the AYM's interpretation of the principle of laicism principle cf. Chapter II.5.3.

likely impaired the Court's credibility as the guardian of the Constitution. Disregarding these critical reflections, and despite the unchanged wording of Art. 148 (2) TA, the substantial review of constitutional amendments established by the AYM is a paradigm shift that continues to be perpetuated to this day.