Constitutional Court: Its Limits to Shape Turkish Politics

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ABSTRACT

This paper argues that the Turkish Constitutional Court acts within a set of limitations which significantly affect its final judgments. The court's major consideration and motivation in its deliberations over political cases has primarily been to guard the regime and order, as defined and outlined by a fairly pro-state interpretation. To study the Court's involvement in political cases, this study examines two types of cases, which will help identify the parameters restricting the Court's ability to proceed with its expected role. In party closure cases, the Court has considered the probable threat posed by the political party under review; accordingly, its rulings have mostly been in line with the prosecutor's indictment. The same also applies to cases concerning the headscarf ban, a sensitive issue that could be seen as a fault line in Turkey's social and political life.

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Turkey's Constitutional Court occupies a central and controversial place in Turkish politics and in Turkey's legal system. Its role and functions have attracted different reactions and responses, both within Turkey and beyond. While some –especially those in favor of secularism (*laikler*)—praise the court for its service as a watchdog overseeing the regime, some others – both among conservatives and liberals—harshly criticize its actions and even question why such an institution exists. Critics mostly make reference to the court's attempts to shape the political sphere, arguing that this is a role that should be played by political parties alone.

This study seeks to address the following questions: what political role does the Constitutional Court play in Turkey? On what justifications does it rely in delivering its politically and legally controversial rulings? Are there any

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specific patterns in these controversial decisions? In which areas and subjects can controversy be found? What are the consequences of the court's often controversial stance? More specifically, how do its actions and roles affect the parliament's authority in making laws? And most importantly, are there any specific considerations limiting the court's sphere of influence as a political actor when delivering its verdicts?

The paper argues that the Turkish Constitutional Court acts within a set of certain limitations which significantly affect its final judgments. The court's major consideration and motivation in its deliberations over political cases has primarily been to guard the regime and order, as defined and outlined by a fairly pro-state interpretation. Two types of cases have been chosen to identify the parameters restricting the court's ability to proceed with its expected role. In party closure cases, the court has considered the probable threat posed by the political party under review; accordingly, its rulings have mostly been in line with the prosecutor's indictment. The same also applies to the cases with respect to the headscarf ban, a sensitive issue that could be seen as a fault line in Turkey's social and political life.

The paper will examine a political party closure case reviewed and concluded by the court, and its overall stance with respect to the headscarf ban, with particular reference to the recent constitutional amendments lifting the headscarf ban in Turkish universities. The study argues that despite its traditional approach, the court considered the probable repercussions of a decision that would close the ruling Justice and Development Party (AK Party), which survived a closure suit filed by the Chief Prosecutor of the Supreme Court of Appeals, although the Constitutional Court had adopted a more aggressive stance in similar cases in the past. The same court, which did not shut down the AK Party, annulled the constitutional amendments lifting the headscarf ban despite the fact that it was not authorized to review such amendments with respect to substance. We will argue that the court considered the serious repercussions involved in the first case, whereas it played its traditional and expected role in the second because there was no potential for serious political or social consequences.

The Turkish Constitutional Court in Brief

Turkey did not have a system of constitutional review until the 1960s; the Turkish Constitutional Court was created by the constitution drafted after the military coup on May 27, 1960.[1] The 1961 Constitution created this institution to establish a constitutional review of legal actions by the legislature. The general reasoning behind

the establishment of a Constitutional Court had been the fact that Turkey had experienced a series of violations of its constitution under the DP rule between 1950 and 1960 and that, in the absence of constitutional review, all these violations remained unsanctioned and thus provided a justificatory ground for the military coup.[2] From another angle, the problem of a certain tension between some 'unwanted' results of democratic procedures, and the founding secular-nationalist ideology of the republic could be resolved, according to certain influential circles, without resorting to the direct intervention of the army, if the nation were to exercise its will *through certain state organs* along with the National Assembly.[3] Later, creation of the National Security Council (1962) and the Council of Higher Education Board (YÖK) (1981) aimed at strengthening this tutelage over Turkish society and governments[4].

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The primary task of the court under the 1982 constitution is to examine the constitutionality of the acts of the legislative body with respect to form and substance.[5] Article 148 of the constitution states: "The Constitutional Court shall examine the constitutionality, in respect to both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly." However, it enjoys a rather limited authority with respect to constitutional amendments, which it may examine and verify "with regard to their form."[6]

To this end, the constitution further provides:

> [T]he verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with.[7]

The Court has no jurisdiction with respect to constitutional review of the international treaties and conventions adopted by the parliament and ratified by the president. Article 90 of the constitution reads:

> No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.[8]

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The court's most political powers concern the sustenance of the political system, whose viability and democratic nature is secured by virtue of the presence of political parties. Under Article 69, the court is vested with the authority to decide for dissolution of a political party permanently if it "determines that the party in question has become a centre for the execution of [banned] activities."[9] The banned activities are spelled out in Article 68:

> The statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.[10]

Instead of dissolving a political party, the court may also "rule the concerned party to be deprived of State aid wholly or in part with respect to the intensity of the actions brought before the court."[11] Party members and/or executives whose statements lead to the dissolution of the party by a constitutional court ruling may not be founders, members, directors or supervisors of another party for a period of five years from the entrance into force of the relevant court decision.[12]

The Constitutional Court as a Political Actor

In addition to its legal function, the Constitutional Court has also played important political roles affecting the outcome and direction of Turkish political life. This is of course not surprising, considering the goal pursued in its establishment. Conversely, however, it does not necessarily entail that the court has always been politicized. Although some instances may be cited to prove it acted in reliance on political motives and considerations, the overall pattern that dominates its actions and rulings does not fit into such an explanation.[13]

The Court's roles throughout its history point to a regular and consistent pattern, fostered by the motive to protect the regime, and with it the institutional setting created after the introduction of the republican order. This role is perfectly embedded in its legal and institutional setting. In many cases, the Court considered whether the predefined regime is under threat and what would be the best action to deal with this threat. Belge shows that the Court, despite being a strong political

actor that engaged in visible activism in many cases, remains silent even in some contentious occasions, including cases referring to human rights violations. In other words, she argues that the court is politically active only selectively, suggesting that it appears to remain indifferent if the prerogatives of the state are not at stake.[14]

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However, the court does take an active stance if the boundary separating the cultural domain from the political sphere is transgressed. In other words, the Turkish Constitutional Court takes action in cases where it considers whether the appearance of students in college buildings with their headscarves on is seeking to convert a cultural symbol into a political identity. To this end, Koğacıoğlu argues that the Court "imagines itself as protecting the boundary between the political and cultural domains in an effort to uphold the right of a democracy to protect itself. This line of thought also enables the court's rather routine involvement in the political domain."[15]

Prominent constitutional lawyer Özbudun attributes this tendency of the Court to the governing principles of the 1982 constitution, arguing that the Turkish Constitutional Court "pursues an "'ideology-based' approach, putting emphasis on the interests of the state as it perceives them." Özbudun underlines that "the illiberal approach" of the Court is "demonstrated to be mainly a function of the basic philosophy of the 1982 Constitution."[16]

This role is most visible in the court's authority to dissolve a political party. So far, it has made controversial and yet influential decisions of this sort, which subsequently changed Turkey's political landscape and the course of its political developments. In exercising this authority, the court has acted in conformity with why it was created in the first place: to protect the regime and ensure the sustenance of the established order. Shambayati and Kirdiş demonstrate in a recent study that this is in fact a commonly held method in states assuming a mission of civilizing the society. They stress that "judicial empowerment is an attractive tool for defending the state against powerful segments of the society who might subscribe to different civilizing projects."[17]

This paper argues that the Court's decisions are mainly focused on the benefit of the state; in other words, court members are most times inclined to make a

decision preserving the status quo and the integrity of the state. To this end, the Court may even ignore universal democratic standards when making a decision. However, this paper will further attempt to explore the limits of the court; that is to say, to what extent it is able to remain committed to its overall goal. The latter question will form the basic inquiry of this article. As part of this inquiry, we will further argue that there are two major determinants drawing the borders of the court's sphere of action. First, external dynamics play a remarkable role in the final judgments delivered by the Constitutional Court with respect to controversial and crucial cases. Particularly, European institutions have a visible influence on the court's actions and decisions. In other words, where these institutions express implicit support for the premises of the established order in Turkey or where they appear to remain reluctant or indifferent, the court members take decision reaffirming the position of the status quo more comfortably. Conversely, the court considers the probable reaction and response by the European and international institutions and organizations if these responses are likely to contradict the expected decision by the court.

The AK Party closure case is one good example, useful to explain and further elaborate the growing impact of international institutions upon the Court's actions, and, by extension, the acts of other state institutions. The Constitutional Court might have been expected to rule for the closure of the ruling AK Party, relying on the indictment suggesting that the party has become a center of acts allegedly committed to undermining the secular character of the state. However, the court did not close the party; evidence shows that prior statements by European institutions and warnings from EU authorities had a visible impact on its final verdict.

However, the Constitutional Court took, in the views of the conservative majority, an aggressive stance vis-à-vis the headscarf issue; it annulled the constitutional amendments lifting the longstanding headscarf ban at the universities. In making this decision, the court did not feel uncomfortable at all because of the EU's implicitly consensual stance. Neither the EU[18] nor the European Court of Human Rights (ECHR), the leading watchdog of the human rights regime in Europe, expressed discontent with the ban, implying that they are indifferent to the issue. The regular progress reports by the EU did not make any reference to the ongoing headscarf ban in Turkey; likewise, the ECHR ruled that the ban was not in breach of the European Convention on Human Rights, which has a binding effect on Turkey.[19] Secondly, some internal factors have also affected the final verdicts of the Constitutional Court. Where the events will likely lead to instability or a total collapse of the political system, the Constitutional Court takes a construc-

tive approach, considering the probable repercussions of its decision. The AK Party closure case is illustrative in this respect. Considering that the economic and political situation in Turkey would be gravely affected by a closure decision, the court allowed the party to remain on the political stage despite strong criticisms by secular circles. However, the court did not take a similar stance with regard to the aforementioned constitutional amendments, because members of the court held that a decision of annulment would not considerably affect the overall political situation in the country.

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Testing the Limits: Turkey's Constitutional Court and the AK Party

The Constitutional Court has reviewed forty-seven party closure cases during its forty-six year history. Only six out of these forty-seven were concluded during the period between 1961 and 1982, whereas the closure of thirty-three political parties was requested in forty-one lawsuits filed after the 1982 military coup. The most notable party closure cases reviewed and concluded by the Court include, among others, the cases with regard to the *Refah Partisi* (Welfare Party), a pro-Islamic party that came to power as a coalition partner for a short period of time and was subsequently shut down because of its alleged involvement in anti-secular activities;[20] the *Fazilet Partisi* (Virtue Party), a successor of the banned Welfare Party that was closed down for the same reason;[21] the *Halkın Demokrasi Partisi* (People's Democratic Party or HADEP), a pro-Kurdish party that pursued ethno nationalist policies and was subsequently closed down by the court on the grounds that it extended support and assistance for the outlawed Kurdistan Workers' Party (PKK) and pursued policies to undermine Turkey's territorial integrity and the indivisibility of the state and the nation;[22] and the lawsuit against the *Adalet ve Kalkınma Partisi* (Justice and Development Party or AK Party) that survived the Constitutional Court review.[23] A more recent –and equally critical—case was the closure of another pro-Kurdish party, the *Demokratik Toplum Partisi* (Democratic Society Party or DTP).

A superficial review of the party closure cases examined and concluded by the court reveals that the prosecutions focused on two major categories of violations. The cases the court handled during the post-September 12 coup era were filed in connection with allegations indicating that the accused party was involved in activities in violation of the secular character of the state, or that the defen-

dant political party was undermining the indivisible integrity of the state with its nation. To put it differently, the court's –and of course the prosecutor's—major concern was to protect the secular character of the state intact and to prevent any probable move against the state's territorial integrity. In such a setting, the parties pursuing either pro-Islamic or pro-Kurdish policies were most likely to face a Constitutional Court examination and a closure appeal.

Of course, the court has also examined some procedural violations by political parties, which led to a total ban from politics (i.e., a political party is banned from politics if it fails to take part in two consecutive general elections). But these cases were never considered critical because in these instances there was no dispute or controversy among the court members. Conversely, court members often disagreed over the measures to be taken against a party indicted for closure because of alleged actions to undermine the secular character of the state and its territorial integrity. In most of these cases, the court considered the accused party as a threat to the regime. The same applies to the AK Party closure case wherein the court concluded that the party had become a center of activities that promote anti-secular sentiments, although it did not ban the party.

This was an interesting outcome, one which was severely criticized by secular circles in Turkey. The criticisms were in fact grounded, considering that if the party had violated the existing legislation as verified by the court, it should have been banned from politics; and if it had not, then the court should not have issued such a controversial ruling. Therefore, the question as to why the court did not proceed with closing down the AK Party and banning it from politics becomes relevant.

The answer to this question reveals the limits of the court when delivering its final rulings. The AK Party consolidated its power and legitimacy through landslide victories in two consecutive general elections and one local election, while it also promoted its image in the international arena. This posed a great challenge for the court, which finally had to consider these factors in its review and discussions of the case.

The most prominent members of the AK Party leadership came from the Welfare Party (WP) cadres (Erdoğan, Gül and Arınç). The WP was banned from politics by the Constitutional Court in February 1998 because the Army officers and other defenders of a secular way of life (pro-secular politicians, bureaucrats and the wealthiest businessmen) saw the party as part of an '*irtica*' (Islamic reactionarism). The Virtue Party (VP), the successor to the WP, was also banned in

June 2001 on the grounds of violating the secular principles. Its cadres split into two and those who remained loyal to Erbakan formed the Felicity Party. Those who followed Tayyip Erdoğan formed the AK Party on August 14, 2001. In the parliamentary elections held on November 3, 2002, in a highly-charged political atmosphere due to the most serious economic crash in the history of the republic,[24] the Felicity Party gained only 2.5%. The parties in the previous government, the DLP of Ecevit (1.2%), the NAP of Bahçeli (8.3%) and the MLP of Yılmaz (5.1%) were severely punished. The TPP of Çiller (9.5%) also won no seats in parliament. The AK Party with 34.2% of the votes won 363 seats and the RPP of Baykal (19.4%) 178 seats in the parliament. On March 28, 2004, in the elections for the local governments, the AK Party increased its share of votes to 42% while the RPP gained 18.4%. The leadership of the AK Party distanced the party from the National Outlook heritage[25] and presented the party as based on a new, yet familiar synthesis (socially conservative, economically liberal).[26] Apart from the cadres of the WP, in the AK Party, there have been politicians from the MLP, the TPP and the NAP, so in this sense the AK Party is reminiscent of the ANAP of Özal. Although it is clearly the new address of the Islamist voters, the AK Party flatly refused to be defined as Islamist and defined itself instead as conservative-democrat.

Tayyip Erdoğan (2004) defines his party as a mass party based on conservatism,[27] occupying a central place in the center-right.[28] According to him, the AK Party seeks:

> A modernity that does not exclude tradition
>
> A universality that accepts locality [native values]
>
> A rationality that does not reject the meaning
>
> A change which is not radical. [29]

Global competition, trade, and the web of international relations forces closed societies to open themselves to the world. The AK party believes that "radical rhetoric does not bring any good to Turkish politics." It is a social demand that consensus and toleration must replace polarization and conflict. Turkey must have "a pluralist, tolerant democracy with many voices" instead of "a *sui generis* democracy."[30]

It can be seen that the AK Party constitutes a new strategy on the part of Islamist elites who have secured the political support of the Islamist masses, for the time being, along with non-Islamist voters who come predominantly from the center-right. The AK Party constitutes in one sense a retreat of the Islamists, this

time in a leading role, into the fold of the 'conservatism' of the center-right which is more amorphous, more acceptable to the regime and hence less open to the attack of the forces of secularism. The new strategy sees democratization and sound economic growth as solutions to Turkey's problems (such as unemployment, the Kurdish question,[31] and the lack of some religious freedoms according to Islamists). In this strategy, the role of the EU, or at least of the desire to be a member of it, is very much valued.[32]

In fact, the AK Party attracted a great deal of external attention and support owing to its 'breathtaking' performance with respect to Turkey's EU bid. Bold reforms were introduced; reform packages were adopted at the parliamentary level in an attempt to harmonize the Turkish legal and political system with EU legislation. These attempts have paid off; EU circles welcomed the AK Party's performance, extending huge support and encouragement to the party leadership.

The AK Party leadership has acted pragmatically—and one may even say intelligently —since the very beginning. Despite its conservative and Islamist background, it created a broad coalition of diverse actors. Owing to this smart and effective move, "its unorthodox combination of agendas, such as endorsing religious conservatism as well as strongly supporting Turkey's membership in the EU, successfully blended seemingly opposite issues."[33] Turkish scholar Ergun Özbudun succinctly explains the AK Party's mastery in transforming its ideological base as follows:

> If one of the most interesting characteristics of the Turkish party system in the 1990s was the rapid rise of political Islam under the banner of the Welfare Party, an equally, perhaps even more, noteworthy development in the early 2000s is its transformation under the Justice and Development Party (AKP) leadership into a moderate conservative democratic party.[34]

Obviously, the AK Party enjoyed huge popular support because of the financial crises in late 2000 and early 2001, which devastated the economy and strongly affected the lives of ordinary people. However, the wise choices of the party leadership to attract steady support from the people as well as external actors should also be noted; otherwise, it is difficult to explain its consecutive landslide victories in both local and general elections as well as the constant backing of the EU.

The AK Party Closure Case and the Constitutional Court's Stance

Despite its moderate outlook and vast popular support for its actions and policies, the AK Party had to deal with a closure suit filed in request of its

dissolution.[35] The indictment prepared by the Chief Prosecutor of the Supreme Court of Appeals makes a number of references to remarks by Prime Minister Erdoğan, considered as evidence of an ambition to create a religious state and to introduce religious rules and standards in the country. For instance, one such remark by Erdoğan, who said in a press statement that religion is the cement holding different ethnic groups together, was considered within this context.

The Chief Prosecutor, in the indictment, asked for the closure of the ruling AK Party, alleging that the party had become a center of illegal activities that violate the principle of secularism. The application was reported as breaking news by a number of domestic and international media organizations. In the indictment, the prosecutor also requested a political ban for seventy-one party members, including current President Abdullah Gül, who had previously served as Turkey's foreign minister and prime minister.

The prosecutor argued that the party's activities violated the constitution and the Law on Political Parties, adding that it had not disconnected from the previously banned pro-Islamic parties RP and FP. He even argued that the party's ultimate goal is to establish a shariah-based regime. The party's most recent move to lift the headscarf ban via constitutional amendments was referred to in the indictment as a basis for the ban request. The prosecutor further argued that Abdullah Gül maintained close ties with religious groups during his service as prime minister, including the *Milli Görüş* (National View) movement and the Gülen community.

The same indictment also made use of extensive quotes from the prime minister in support of attempts to lift the longstanding headscarf ban at the universities. According to the prosecutor, these statements and remarks critical of the ban were in violation of the principle of secularism. The prosecutor made particular reference to the prime minister's statement in Spain where he noted that headscarf ban is not justifiable even if it is used as a political symbol. The prosecutor's appeal was particularly shocking because stricter requirements and conditions had been introduced by the Political Parties Law with regard to party dissolutions.

In its defense, the party dismissed the allegations, asserting that its actions did not violate the principle of secularism. The party representatives also made reference to the Venice Commission Criteria, implying that a political party may be banned from politics only if it promotes violence as a political means. The defense held that the AK Party is not the successor of any party, in an attempt to prove its disconnection from the pro-Islamic RP and FP, both of which had been closed down by the Constitutional Court for violating the principle of secularism.[36]

The court ruled that the outlawed actions outlined in article 68 of the constitution had been frequently and consistently committed by party chairman Recep Tayyip Erdoğan, former parliament speaker and AK Party member Bülent Arınç, Education Minister Hüseyin Çelik, and some deputies and local party administrators. Based on this, the court further resolved that the party has become a center of activities violating the principle of secularism.[37]

Six out of eleven members of the Constitutional Court voted for the closure of the AK Party, arguing that it is evident the party violated "the principles of the democratic and secular state." Four members voted to deprive the party from State aid, whereas only one member asked for the dismissal of the suit. However, because a closure decision requires a qualified majority vote (at least 7 affirmative votes), the AK Party survived the suit; in the end, the party was deprived of half of the State aid it was entitled to.[38]

It is interesting to note that the same court has issued different rulings with respect to almost identical cases. For instance, in May 1997, the Chief Prosecutor of the Supreme Court of Appeals filed a suit with the Constitutional Court, asking for the permanent dissolution of the Welfare Party (RP) on the grounds that it had become a center of activities contrary to the principle of secularism. Nine out of eleven court members voted for the permanent dissolution of the party, as requested in the indictment, and for a five-year ban from involvement in political activities for the party members whose acts had led to the dissolution.[39] Likewise, the Constitutional Court also ruled with regard to the suit asking for the dissolution of Virtue Party that the party had violated the constitution, and further decided for its dissolution because of its activities in violation of the principle of the secular state. The court also unanimously held that the party members whose acts led to the dissolution of the party should be banned from involvement in political activities.[40]

Apparently, the Court abstained from proceeding with complete dissolution and banning of the AK party from politics, considering the huge popular support it enjoys. This is evidenced by the court's decision, which reads as follows:

> The majority of the activities, allegedly committed by the defendant, took place during the 22nd legislation term and before the general elections on July 22, 2007. While these activities were taking place, its actions with respect to foreign policy making, legislation and execution were known to the people. The defendant party gained representation in the parliament with a fairly renewed composition. Considering that the defendant party received support of half of the voters, the people seem to have endorsed the defendant's actions.[41]

It is interesting to note that the court implicitly exonerated the AK Party of the charges on anti-secularist policies and actions whereas it did not hesitate to declare the constitutional amendments as unconstitutional. This is particularly interesting because the AK Party's attempt to lift the headscarf ban was referred to by the prosecutor as the greatest evidence for the party's ambition to introduce an Islamist rule in the country. "There is little doubt that the recent headscarf amendments acted as a catalyst for the filing of the suit. Though tensions with the judiciary have been common throughout the AKP's tenure as the ruling party, this is by far the most serious threat to date."[42] Therefore, it would be fair to argue that this move was the primary motive for the prosecutor to charge the AK Party as "a center of anti-secular activities."

This implies that the Constitutional Court finds the headscarf ban an appropriate measure to preserve the secular identity of the Turkish republic, whereas it also –even though with a slight margin—takes a rather constructive approach towards the AK Party despite its attempt to change the status quo. This is surely a contradiction because, normally, the court should have dissolved the AK Party or confirmed that the amendments were constitutional. The above excerpt from the court's final decision actually gives a clue as to why it opted not to dissolve the defendant party.

The court also makes strong references to the ambition of the AK Party to harmonize Turkish legislation with the EU legal system while simultaneously acknowledging anti-secular moves by the party members. In this case, the EU appears to serve as an assurance, in the court's view, for the AK Party's commitment to a secular regime and political system. In other words, the court held that a political party, so eager to introduce further reforms to make Turkey an EU member, should not be dissolved even though some of its members committed violations that would normally lead to its dissolution.

In fact, the AK Party frequently stressed its eagerness to introduce bold reforms within the context of Turkey's EU membership bid in its defense submitted to the court. It appears as if the party tried to present its policies and actions as compatible with Turkey's longstanding desire to become a full member of the EU. On the other hand, the EU circles also extended full support to the AK Party and acknowledged its reformist stance. Some EU figures made it clear before the delivery of the Constitutional Court's verdict with respect to the closure case that dissolution of the AK Party would be detrimental to Turkey's bid. The court considered this implicit warning and abstained from dissolving the defendant party despite the fact that it found some of its policies to be in breach of the principle of secularism.

The Headscarf Issue and the Constitutional Court

The headscarf issue has been a controversial one in Turkish politics. Because it is viewed as a political symbol representing an Islamist ambition to maintain control in the public sphere, secularist circles have always remained alert to make sure that it does not appear in public institutions. There have been several attempts by conservative parties to resolve this problem; however, the Constitutional Court has every time taken effective action to preserve the status quo.

The most recent action by the court to address the issue was instigated by a constitutional amendment lifting the headscarf ban at the universities. Such a measure was viewed as necessary by the ruling party because it was argued that the Constitutional Court relied on the constitution in its previous decisions to confirm the ban. The ruling AK Party believed that if the constitution were amended to allow the wearing of the headscarf at the universities, the problem would be resolved.

The constitutional amendment lifting the headscarf ban states: "The phrase 'in utilization of all forms of public services' shall be inserted in section four of article 10 of the Turkish Constitution following the phrase 'in all their proceedings.'"[43] With such an insertion, this section becomes: "State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in utilization of all forms of public services."

The same amendment also provides that the following phrase shall be inserted in article 42 following paragraph 6: "No one should be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise this right shall be determined by the law."[44]

Applications with respect to the annulment or cancellation of a specific piece of legislation, as well as the relevant supplemental documentation, are first reviewed by the court's rapporteurs who are assigned by the presidency of the court.[45] The rapporteurs submit their final reports to the court presidency and participate in the relevant meetings where they further elaborate on their views and suggestions.[46]

The constitutional amendments were sponsored by the AK Party government and strongly supported by the MHP; with overwhelming support from 411 deputies,[47] the amendments were endorsed by the parliament on February 9, 2008 and finally ratified by President Abdullah Gül on February 22 . Two opposition parties,

the CHP and the DSP petitioned the Court on February 27 to annul the amendments on the grounds that they violated the principle of secularism as defined in the constitution.

In mid-May, Osman Can, the rapporteur appointed by the Constitutional Court, submitted a report to the court advising that the case should be dismissed because the court did not have authority to examine substantive constitutional amendments. Recalling the constitutional provisions, Can's reports underlined that the court's authority with respect to constitutional amendments may only be extended to the monitoring of whether procedural requirements have been met.

The court reviewed a suit filed by the main opposition party, which requested the annulment or cancellation of law no. 5735 lifting the headscarf ban at the universities on the grounds that the said law violated the constitution. The petition accompanying the suit filed by the main opposition CHP made particular reference to the alleged violations of the principle of secularism. The applicants argued that the constitutional amendments as outlined in the law were in breach of the democratic, secular and social character of the Turkish state, suggesting that any attempt to lift the ban would be inconsistent with the constitution and the founding principles of the state.

Despite the constitutional provision stating that constitutional amendments may not be examined by the court with respect to substance, the main opposition party asserted that the court is authorized because if it were not, legislative actions contrary to the constitution would go unsanctioned and unexamined.[48]

The court admitted the suit despite the constitutional provision providing that the court's authority with respect to examination of the constitutional amendments is limited to form. In its ruling, the court argued that the legislative body may not adopt such a bill because it would constitute a violation to article 4 of the constitution, which reads: "The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed."[49]

The court considered the constitutional amendments lifting the headscarf as contrary to article 4 and annulled the law introducing these amendments. The court asserted that the amendments made to articles 10 and 42 of the constitution were in violation of the principle of secularism because they would lead to the

exploitation of religion in political activities and to disruption of the public order. In its decision, the Court made specific reference to the rulings by the ECtHR, which confirmed the headscarf ban at Turkish universities.[50]

The court's reference to the ECtHR is particularly interesting because it shows that Court members take the decisions of the European court into account. The ECtHR's confirmation of the ban seems to have served as a supporting evidence for the Court's stance. Despite some scholars' arguments that the ECtHR ruled correctly in Sahin v. Turkey when it "upheld Istanbul University's ban on headscarves in context,"[51] international human rights NGOs and other watchdog groups have criticized the timid stance of the European court.

For instance, New York-based Human Rights Watch made the following remarks regarding the headscarf ban in Turkey:

> The Constitutional Court's decision to annul these amendments will have a dire impact on women university students who wish to wear a headscarf for reasons of conscience and as an expression of their Muslim faith. Human Rights Watch has long supported lifting the current restrictions on headscarves in university on the grounds that the prohibition is an unwarranted infringement on the right to religious practice. Moreover, this restriction of dress, which only applies to women, is discriminatory and violates their right to education, freedom of thought, conscience, religion, and privacy.[52]

The ECtHR's headscarf decision, therefore, is against the position commonly held by civil society organizations. In addition, concerns are raised to note that if the court continues to interpret the European Convention on Human Rights "in a manner that nearly gives complete discretion to States to abridge religious freedoms without objective evidence necessary in a democratic society, then States may take more liberties that lead to clear violations of human rights.[53] The Turkish Constitutional Court relied on such a controversial position to annul the constitutional amendments. However, the European court did not actually resolve the conundrum; its timid approach only made the issue more complicated. Furthermore, its decisions on the headscarf ban cannot be taken as final, for at least two reasons. First, like any other court, the European court may not act as a legislature to introduce or confirm a ban; it may only monitor a particular legal instrument in terms of its consistency with the European Convention on Human Rights and its protocols. Second, the European court's frequent reliance on the margin of appreciation doctrine, under which states party to the convention are recognized as possessing a certain level of discretion in the implementation of its provisions, becomes visible in particularly controversial issues.

No doubt, the European court's ruling on the headscarf seriously undermined the case of those defending abolition of the ban; but asserting that the administration may not lift the ban in reference to the European court ruling has no legal basis, simply because the court is not authorized to act as a lawmaker. This also applies to other courts and is actually the natural outcome of the principle of separation of powers in advanced democracies.

In addition, the ECtHR's headscarf decision should be considered with a particular reference to the margin of appreciation doctrine. Under Article 15 of the European Convention on Human Rights, any "Contracting Party" can "take measures derogating from its obligations … to the extent strictly required by the exigencies of the situation."[54] The European court has considered this provision in some cases, resulting in the emergence of the "margin of appreciation doctrine," under which the states party to the convention are allowed to exercise a certain measure of discretion in implementing the convention and its protocols.[55]

This implies that endorsement of the current headscarf ban by the court is based on recognition of the country's particular conditions and its right to rely on the doctrine. Obviously, any contracting party is also allowed to reconsider its particular conditions or decide not to rely on the margin of appreciation doctrine. In such cases, the court will not have anything to say; yet, it will remain in charge of supervising the convention's implementation and fulfillment of the obligations under this convention by the party states.

Clearly the ECtHR's headscarf ruling is not an authoritative final solution to the issue; the Constitutional Court merely makes reference to this ruling to justify its decision. It should also be noted that not only the European court but also the European Union did not make mention of the ongoing headscarf ban in Turkey in its progress reports. This attracted a great deal of criticism from conservative circles as well as liberals who actually promote Turkey's EU membership bid. For instance, a columnist from *Today's Zaman* asks:

> Is it understandable that the European Commission has failed to include the headscarf issue, considered a violation of human rights not only by an 80 percent majority in our society, but also by international nongovernmental organizations such as Human Rights Watch, Amnesty International and the European Parliament in its progress report for nine years?[56]

Therefore, the Constitutional Court was able to make its final ruling on the headscarf ban and relevant attempts by the government to lift this ban without having to consider a probable opposition by the European Union or other

European institutions that may affect Turkey's Western orientation. In the case of constitutional amendments lifting the headscarf ban, the Constitutional Court took the silence and indifference of the European Union and other relevant institutions vis-à-vis the ongoing ban in Turkey as supporting evidence for and approval of the status quo.

Conclusion

Turkey's Constitutional Court has been a center of bitter discussions and controversies because of its stance vis-à-vis critical legal issues. Because of its rulings and decisions, the court is sometimes harshly criticized. Interestingly, political actors rely on a different discourse depending on the outcome at the court and on whether this outcome serves their interests. While an opposition party, for instance, praises a Constitutional Court ruling against the party in power, the same party figures may take an opposite stance when, say, the same court exonerates the ruling party of unconstitutionality charges.

Likewise, the ruling party may call for respect to judicial verdicts when it finds the court's decision as accommodating its interests and expectations, whereas members of the same party react negatively to a decision they consider unpleasant and undesirable. To some degree, this is actually understandable because the process of constitutional review is different than process of penal prosecution or trial. In cases where alleged breaches of administrative law and constitutional law are reviewed, the final decisions of the members in the trial panel may be shaped by their personal approaches and even their political and philosophical views.[57]

This calls for different criticisms from diverse backgrounds depending on the court's decision. The disagreements and rows over the court's rulings become even more visible and grave in the events of critical cases handled by the court. Actions brought to the court with respect to the alleged violations of the principle of secularism and damages to the territorial integrity of the state attract great attention in this respect. Political actors as well as the public express the greatest interest towards such issues, expecting the court to fix the problem through its final ruling.

Members of the court also cast their final votes depending on the case under review and their ideological stance with regard to that case. For this reason, sometimes the final ruling may be easily predictable in sensitive suits because of the composition of the court. This is especially visible in party dissolution cases. The relatively conservative members of the court, for instance, voted against the

dissolution of the pro-Islamic parties, whereas members known for their strong attachment to the principle of secularism adopted a rigid stance vis-à-vis these parties.

For this reason, the identity and ideological stance of Turkey's president matters particularly, because he is vested with the authority to appoint members of the court. It is generally held that the presidents make these appointments taking the worldviews and overall tendencies of the candidates into consideration. This makes the court's rulings both contestable and predictable.

That said, considering the current composition, the court might have been expected to rule for the dissolution of the AK Party; however, it made a rather controversial decision showing its ambivalence. While it confirmed that the party has become a center of activities in breach of the principle of secularism, the court also considered some other factors, which limited its ability to take a decisive action. The visible support for the AK Party among EU circles and international actors, as well as the strong public support for the party were the primary reasons for the court's ambivalence.

However, the court annulled the constitutional amendments lifting the headscarf ban despite the fact that such a ruling is more controversial and disputable than the one regarding the AK Party dissolution case. The court followed its traditional path and considered any action or measure that could even slightly erode the principle of secularism as illegal. It was a relatively easy decision because there was no objection by the EU or international circles against such a measure, nor was it likely that the people would strongly react to this annulment.

So what does this leave us with? Identifying the Turkish Constitutional Court's roles with respect to the prohibition of political parties and other sensitive cases is particularly relevant to draft proper policies. Such an inquiry will also provide clues on the future actions and behaviors of the court in similar cases. More importantly, because external factors serve as leverage in the court's decisions, political actors holding central places in Turkish foreign policymaking incline to serve as agents of democratization and transformation in Turkey.

The unique role played by the European Union is particularly informative and illuminative. A brief survey of bilateral relations between Turkey and the EU reveals that the latter has acted eagerly since the early 1990s to revive a wave of democratic transformation in this country. This eagerness is especially due to the EU actors' awareness that Turkey places such great importance upon full member-

ship in the EU that its institutions will comply with demands for further democratization and expansion in the sphere of fundamental rights.

Considering that full membership is central to the fulfillment of Turkey's long-standing policy of Westernization, the EU often uses this as a carrot to dangle in front of Turkey to keep its democratic progress on track.[58] On the other side of the coin, there is recognition of this role of the EU by Turkey's institutions, even the most conservative ones, including the Constitutional Court. To this end, the abolition of the death penalty by a coalition government where a far right party served as a coalition partner is a particularly important case to recall. The Nationalist Movement Party (MHP) consented to this action despite the fact that it spared the life of Abdullah Öcalan, the leader of the outlawed Kurdistan Workers' Party (PKK). The MHP supported abolition because of the recognized leverage of the EU and other European institutions. This leverage allows external actors, including the EU, to exert greater pressure for more radical and determinative steps towards further democratization in Turkey.

A recent report adopted by the European Parliament confirms this leveraging role. The parliament's progress report on Turkey expresses concerns over "the closure cases opened in 2008 against two parliamentary parties, especially the case still pending against the Democratic Society Party (DTP)," and also "emphasizes the need to amend, as a matter of priority, the legislation on political parties."[59] Partly in consideration of the reference made in this report to the closure case against the DTP and of the recognized significance of Turkey's EU bid, the Turkish Constitutional Court spent much time deliberating as to whether it would be a wise decision to dissolve the pro-Kurdish DTP. While the court eventually shut it down, it should be noted that the decision arrived at a time when EU support for the DTP's actions had become less visible.

Meanwhile, it should also be recalled that domestic actors in Turkey who favor institutional reforms rely on the EU's firm stance and commitment to democratic standards to act more comfortably before taking bold steps. Therefore, it is no coincidence that the AK Party, which was struggling with a closure case handled by the Constitutional Court, declared shortly after the announcement of its accession progress report, as well as a report by the Council of Europe's Venice Commission,[60] that it "has plans to partially change the current constitution,"[61] an initiative that was previously shelved because of domestic reactions.

The initial steps towards implementation of these plans were taken by the government which acted firmly to hold a referendum for partial constitutional

amendments. Coinciding with the thirtieth anniversary of the military coup of Sept 12, 1980, the referendum attracted a great deal of attention. The package, after having survived the Constitutional Court's review, received wide popular support in the referendum where 58 percent of the voters endorsed the amendments to 26 articles of the constitution. The referendum results are taken as a sign of popular support for further reforms. The EU's firm and clear backing for further reforms subsequent to the voting as well as its expression of satisfaction with the results is interpreted positively.

The amended version of the constitution now presents a radically changed Constitutional Court which will have to admit individual applications resulting from alleged violations of the provisions of the European Convention on Human Rights. The composition of the court will also be affected by the recent amendments. The long-term effects of the changes, however, still remain unclear given that pro-status quo circles have already expressed perseverance to keep things as they have been so far.

Endnotes

1. For the historical reasons justifying the establishment of the Constitutional Court in Turkey, see Ergun Özbudun, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy," *European Public Law,* Vol. 12, No. 2 (2006), pp. 213-223.

2. See, for instance, Özkan Tikveş, *Teorik ve Pratik Anayasa Hukuku* (İzmir: Dokuz Eylül University Pub., 1982), pp. 446-447.

3. The effect of this understanding can still be seen in the current constitution, e.g. "The Turkish Nation shall exercise its sovereignty through the authorized organs…" (Article 6).

4. Also from the perspectives of elite theories and the struggle between forces of secularism/nationalism and Islamism/Conservatism, the view of late Ernest Gellner (*Encounters with Nationalism*, Oxford: Blackwell, 1994: 81) that Turkey has a special claim on the attention of anyone concerned with the future of liberal societies, with Islam, or with the relationship between the West and the Muslim world, seems to continue to hold.

5. For a brief account of the duties and authorities of the Constitutional Court, see Kemal Gözler, *Anayasa Hukukuna Giriş: Genel Esaslar ve Türk Anayasa Hukuku* (Bursa: Ekin Press, 2007), pp. 348-352.

6. The Constitution of the Republic of Turkey [Hereinafter referred to as the Turkish Constitution], Law no. 2709, entered into force 7/11/1982.

7. Turkish Constitution, Article 148 (2).

8. Turkish Constitution, Article 90(6) (as amended on May 22, 2004).

9. Ibid., Article 69(1).

10. Ibid, Article 68(4).

11. Ibid., Article 69(8).

12. Ibid., Article 69(10).

13. Zeki Sarıgil finds that the court became visibly more politicized from the 1980s onwards. He attributes the increased judicialization of politics in the 1980s and 1990s to "the shift from the ideology politics of the 1960s and 1970s to issue politics in the post-1980." Sarıgil, "The judicialization of politics: the case of Turkey," Paper presented at the Annual Meeting of Midwestern Political Science Association, 2009.

14. Ceren Belge, "Friends of the Court: The Republican Alliance and Selection Activism of the Constitutional Court of Turkey," *Law and Society Review,* Vol. 40, No. 3 (2006), pp. 653-692.

15. Dicle Koğacıoğlu, "Progress, Unity and Democracy: Dissolving Political Parties in Turkey," *Law and Society Review,* Vol. 38, No. 3 (2004), p. 433.

16. Ergun Özbudun, "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights," *Democratization,* Vol. 17, No. 1 (2010), p. 125.

17. Hootan Shambayati and Esen Kirdiş, "In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey," *Political Research Quarterly,* Vol. 62, No. 4 (2009), p. 767.

18. It should be noted that most leading EU figures actually oppose the headscarf ban in Turkey in their individual capacity. However, the EU, as an institution, has remained cautious and indifferent to the issue.

19. Interestingly, as Kösebalaban points out, ECHR, instead of following a universal interpretation of human rights, seems to side with the secularist view in Turkey that Turkey constitutes a special case with regard to its current phase in the secularization process. Hasan Kösebalaban "Globalization and the Crisis of Authoritarian Modernization in Turkey," *Insight Turkey*, Vol. 11 , No. 4 (2009), pp. 77-97.

20. See, Constitutional Court Decision No. 1998/1, delivered on January 16, 1998.

21. See, Constitutional Court Decision No. 2001/2, delivered on June 22, 2001.

22. See, Constitutional Court Decision No. 2003/1, delivered on March 13, 2003.

23. See, Constitutional Court Decision No. 2008/2, delivered on July 30, 2008.

24. Ümit Cizre and Menderes Çınar, "Turkey 2002: Kemalism, Islamism, and Politics in the Light of the February 28 Process," *The South Atlantic Quarterly,* Vol. 102, No. 2/3 (2003), pp. 309-332.

25. On the National Outlook Movement and the Welfare Party, see, Cengiz Dinç, *Islamism, Modernity and the West in Turkey: The Role of the Welfare Party* (Eskisehir: Privately Printed, 2009); Yalçın Akdoğan, *Siyasal İslam: Refah Partisinin Anatomisi* (Istanbul: Sehir Yayınları, 2000); İhsan Dağı, *Kimlik Söylem ve Siyaset: Doğu-Batı Ayrımında Refah Partisi Geleneği* (Ankara: İmge, 1998).

26. Cf. Ziya Öniş, and Fuat Keyman, "A New Path Emerges," *Journal of Democracy,* Vol. 14, No. 2 (2003), pp. 95-107.

27. For an account of the AK Party's expressions of conservatism with regard to the subject of the family and women, and need for protecting traditional values (which usually means Islamic values), see Ahmet İnsel, "The AKP and Normalizing Democracy in Turkey," *The South Atlantic Quarterly,* Vol. 102, No 2-3 (2003), pp. 293-308.

28. With the further decline of the left, it could be argued that the traditional left-right divide in Turkish politics now stands as 25% vs. 75%.

29. Recep Tayyip Erdoğan, "Açış Konusması" in *AK Parti Uluslarası Muhafazakarlık ve Demokrasi Sempozyumu* (Ankara: AK Parti Yayını, 2004), p. 12.

30. Recep Tayyip Erdoğan, *AK Parti Uluslarası Muhafazakarlık ve Demokrasi Sempozyumu*, pp. 7-17.

31. Ali Bulaç criticizes the AK Party for giving a basically secular message to the Kurds in Turkey which "cannot be as effective as" the WP's message that emphasized Islamic brotherhood/sisterhood (*Zaman*, Oct. 6, 2004).

32. Early signs of this attitude were already seen immediately after the February 28, 1997 NSC meeting, as pointed out by WP officials: "The EU may well be the Antidote to Coups" (İlnur Çevik, *Turkish Daily News,* March 25, 1997).

33. Evren Çelik Wiltse, "The Gordian Knot of Turkish Politics: Regulating Headscarf Use in Public," *South European Society and Politics,* Vol. 13, No. 2 (2008), p. 196.

34. Ergun Özbudun, "From Political Islam to Conservative Democracy: The Case of the Justice and Development Party in Turkey," *South European Society and Politics,* Vol. 11, No. 3-4 (2006), p. 243.

35. Indictment filed by the Chief Prosecutor at the Supreme Court of Appeals, No. SP 115 Hz.2002/3, dated March 14, 2008.

36. Preliminary defense filed by the AK Party with the Constitutional Court, dated April 30, 2008, annexed to Constitutional Court Decision No. 2008/2.

37. Constitutional Court Decision No. 2008/2.

38. Ibid.

39. Constitutional Court Decision, No. 1998/2.

40. Constitutional Court Decision, No. 2001/2.

41. Constitutional Court Decision No. 2008/2. Translation by the author.

42. Wiltse, "The Gordian Knot of Turkish Politics: Regulating Headscarf Use in Public", p. 197.

43. Law on Amending Some Provisions of the Constitutions of Republic of Turkey, No. 5735, adopted 9.2.2008, article 1.

44. Ibid., Article 2.

45. Constitutional Court bylaw, Published in Official Gazette No. 19300, 3.12.1986, article 8.

46. Ibid., Article 8(b) and article 9.

47. This amounts to some 75 % support of the deputies. See for instance, Ali Çarkoğlu "Religiosity, Support for *Seriat* and Evaluations of Secularist Public Policies in Turkey," *Middle Eastern Studies,* Vol. 40, No. 2 (2004), pp. 111-136.

48. Constitutional Court Decision, No. 2008/116, 5.6.2008.

49. Turkish Constitution, Article 4.

50. Constitutional Court Decision No. 2008/116.

51. Karima Bennoune, "Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression and Women's Equality under International Law," *Columbia Journal of Transnational Law,* Vol. 45, No. 2 (2007), p. 367.

52. "Turkey: Constitutional Court Ruling Upholds Headscarf Ban; Religion and Expression Rights Denied, Broader Reform Agenda Endangered," *Human Rights Watch Statement,* June 5, 2008.

53. Talvikki Hoopes, "The *Leyla Şahin v. Turkey* Case before the European Court of Human Rights," *Chinese Journal of International Law,* Vol. 5, No. 3 (2006), p. 722.

54. Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005, entered into force September 3, 1953, article 15.

55. For further details see, Cenap Cakmak, "The Problem Relating to the Margin of Appreciation Doctrine under the European Convention on Human Rights," *Review of International Law and Politics,* Vol. 2, No. 5 (2006), pp. 18-29.

56. Abdulhamit Bilici, "Europe's Headscarf Mistake," *Today's Zaman,* November 1, 2008.

57. Taha Akyol, "Ergenekon Savaşları" *Milliyet,* January 13, 2009.

58. For further details on this, see Mehmet Uğur, *The European Union and Turkey: An Anchor/credibility Dilemma* (Ashgate, Aldershot 1999).

59. European Parliament Resolution on Turkey's progress report 2008, no. B6-0105/2009, p. 3.

60. Report by the Venice Commission on the prohibition of political parties in Turkey, March 13, 2009.

61. "Government gears up for partial change to Constitution," *Today's Zaman,* March 14, 2009.