
Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey

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During the past two decades, scholars have noted a global expansion of judicial power and court-led rights revolutions. Far from leading a rights-revolution, the Constitutional Court of Turkey became renowned for its restrictive take on civil liberties during this period. Why are some high courts more activist than others in protecting and expanding civil rights and liberties? I argue that judicial power and judicial independence offer incomplete explanations of judicial activism on questions of rights. Even powerful courts are activist only selectively, using their clout to protect some groups while suppressing the demands of others. Building on perspectives on legal mobilization and judicial entrenchment, I argue that the sociopolitical alliances in which high courts and judiciaries participate explain the selective nature of their activism. The initial parameters of these alliances are set during critical junctures when formerly dominant coalitions are displaced and new institutions entrench new alliances. Such alliances are not static, however, and struggles within alliances can transform high courts' orientations on rights questions.

In September 1971, a military-imposed cabinet in Turkey amended Turkey's constitution to remove the guarantees of judicial independence that had been established with the 1961 Constitution. This amendment was struck down by the Constitutional Court of Turkey (CCT) in January 1977. Reviewing the constitutionality of amendments was not one of the powers granted to the CCT in the constitution. Indeed, following the court's de facto establishment of this power in an earlier ruling, the constitution had been amended to state explicitly that the court could not review the substantial constitutionality of amendments. The 1977 ruling showed that "the least dangerous branch" in Turkey was willing and able to make creative rulings and challenge influential

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quarters on important political questions. Indeed, from its establishment in 1962 until 1999, the CCT struck down more than half the statutes referred to it, establishing itself as an important party in the policy process and a central power to be reckoned with.

Despite its assertiveness in challenging government laws and constitutional amendments, the court took a decidedly passive role in one key area. During the 1990s, the bulk of Turkish human rights litigation was taking place not at the CCT in Ankara, but at the European Court of Human Rights in Strasbourg. Why was the CCT, which frequently ruled against the government and occasionally made controversial judgments, unwilling to employ this power on human rights questions to lead a rights revolution?

This question is part of a broader question about judicial behavior: Why would a relatively powerful and independent court, such as the CCT, be unwilling to protect and expand civil rights and liberties? The question becomes even more puzzling in the light of a comparative assessment. Scholars have noted a global expansion of judicial power in the past two decades (Holland 1991; Tate 1995; Stone Sweet 2000; Amit 2004) and documented rights revolutions in various settings, stretching from South Africa to Eastern Europe, Asia, and the Middle East (Epp 1998; Schwartz 2000; Hirschl 2000). The Hungarian and South African courts' decisions to abolish the death penalty on human rights grounds mark the high tide of these constitutional revolutions spearheaded by courts. During the same period, the 1990s, the CCT seemed to swim against this international tide. It closed down 15 political parties that demanded official recognition for Kurdish ethnic identity or Islamic religious identity. Unlike new courts in Eastern Europe and South Africa, which have been celebrated for their positive contribution to democratic transitions, the CCT was standing in the way of the liberalization of Turkish democracy during the 1990s. Why did the Turkish court seem to be moving against the current? What makes some high courts more activist than others, particularly in protecting civil rights and liberties?

I argue that the CCT's failure to expand civil rights and liberties cannot be explained by its weakness vis-à-vis the other branches. Indeed, the CCT was both independent and powerful, I claim, but was activist only selectively. That is, the court used its clout to protect some groups and values while suppressing the demands of others. I maintain that the sociopolitical alliances in which high courts and judiciaries participate explain the selective nature of their activism. The initial parameters of these alliances are set during constitutional transitions when formerly dominant coalitions are displaced and a new coalition entrenches its own values and takes measures to lock in its power. Such alliances are not static, however, and struggles within alliances can transform high courts' orientations on rights questions.

The growing body of research and theory on non-U.S. courts focuses primarily on courts' relations with the other political branches and problematizes why self-interested politicians would be willing to delegate power to an independent court (Stone Sweet 2000; Hirschl 2000, 2004; Moustafa 2002, 2003), how bargaining among political parties during a democratic transition affects the choice of judicial institutions (Magalhaes 1999; Smithey & Ishiyama 2000; Ginsburg 2003), which high courts are likely to survive disgruntled executives and legislatures (Schwartz 2000; Epstein et al. 2001), and which features of the political system promote judicial activism (Holland 1991; Edelman 1995; Tate 1995; Smithey & Ishiyama 2002; Helmke 2002; Iaryczower et al. 2002; Ginsburg 2003).

These scholars study constitutional courts predominantly from a principal-agent framework. They problematize why self-interested politicians (the principals) would delegate power to a constitutional court (the agent), which can overturn legislation. Principal-agent scholars argue that uncertainty about future political outcomes provides politicians with an incentive to empower independent judiciaries to monitor their initial bargain—the constitution—with other political parties. The consensus in this literature is that politicians design courts with greater independence and broader access when there is greater uncertainty about the future during a constitutional transition. Uncertainty is conceptualized as a function of the relative distribution of power during the transition, measured by vote-shares of political parties in the first post-transition elections (Magalhaes 1999; Smithey & Ishiyama 2000; Ginsburg 2003). Once a court with review power is established, the argument continues, opposition groups and minorities have an incentive to mobilize the court to reverse legislative defeats or to secure policy preferences. The process further empowers the judiciary and simultaneously leads to the deepening of basic rights as long as courts remain within boundaries tolerated by the other branches (Holland 1991; Stone Sweet 2000:55; Ginsburg 2003:66–77). Powerful courts emerge to protect human rights, in this view, where executives and legislatures are weak or divided. In particular, the literature on non-U.S. and non-Western courts frequently equates *judicial independence* from the other branches¹ with *activist rulings on rights*.²

¹ By judicial independence, I mean the formal legal arrangements established to ensure judicial autonomy, such as the constitutionalization of appointment and removal procedures and arrangements for the tenure security of judges.

² But see Moustafa 2002 and 2003 for an account of a rights-activist judiciary in an authoritarian regime (Egypt), Hilbink n.d. and Sutil 1993 for accounts of an independent but not rights-activist judiciary (Chile), and Shambayati 2002 for a court whose “activism is not always in the service of democratic consolidation and the protection of constitutional freedoms” (Turkey; 2002:41).

Turkey provides us with a case where an outgoing regime wrote a liberal constitution in 1961 and established an independent constitutional court to guard it. Although power was not evenly distributed among the groups participating in constitution-making, a powerful and independent court was established, along with other non-majoritarian institutions, such as the National Security Council, the State Planning Organization, and the High Council of Judges. The 1961 Constitution abandoned parliamentary supremacy in favor of a system of separation of powers and checks and balances. Simultaneously, it established a liberal framework for the protection of civil rights and liberties, stating that restrictions on rights “cannot infringe on the substance of a right even if for such reasons as the public interest, general morality, public order, social justice, or national security” (1961 Turkish Constitution, Art. 11). From the perspective of evolutionary theories of judicial power and the expansion of rights, the 1960–1961 transition should have led to an incremental and progressive expansion of civil rights and liberties, with the court at the forefront in defending these rights and liberties.

The discussion that follows demonstrates, however, that the CCT was no champion of civil liberties even though it was a powerful player in national politics. While the court frequently ruled against the government and took risky decisions, even leading to a bomb attack on the court on one occasion, the judges rarely threw their weight behind expansive rulings on civil liberties. The CCT was *selectively* activist, protecting social and political members of a particular coalition but not other political groups. By the mid-1990s, it stood as a remarkable obstacle to a more pluralistic democracy by repeatedly closing down political parties that attempted to bring excluded identities, such as put forward by Kurdish or Islamic groups, into the Turkish political sphere. I argue that the court’s narrow take on civil liberties cannot be explained by a lack of judicial independence in the formal-institutional sense of that term.

The analysis here explains the court’s narrow take on civil liberties by focusing on the Republican alliance that was empowered in 1960–1961. This alliance included the military and civilian bureaucracy, the Republican People’s Party (RPP), the intelligentsia (universities, professions, the press), and university students. The glue of the Republican alliance was a shared Kemalist worldview, the ideological legacy of Mustafa Kemal Atatürk, who led Turkey’s independence war and initiated a top-down modernization program after founding the Republic in 1923. The values, priorities, and interests of the Republican alliance, whose members wrote the 1961 Constitution and established a host of counter-majoritarian institutions to lock in their power, were not conducive to expansive

interpretations of civil liberties.³ At the doctrinal level, Kemalist secularism and nationalism excluded political projects based on religious and ethnic identity. At a pragmatic level, Kemalist groups depended on nonmajoritarian institutions to preserve their political power. When civil liberties were mobilized in favor of political projects that challenged the hegemonic status of Kemalism, the judges saw little compelling interest for expansive interpretations of such liberties. Members and supporters of the populist, right-wing Democrat Party (DP), which was ousted from power in the 1960 military intervention, as well as socialist and communist movements in the 1960s and 1970s, and Kurdish and Islamic movements in the 1980s and 1990s, were thus largely left without protection in their attempts to push the boundaries of the political system.

In order to explain why Republican groups had such sway over the CCT, I analyze the constitution-making process of 1960–1961 in light of Hirschl's hegemonic preservation thesis (Hirschl 2000, 2004). Hirschl argues that delegating power to a high court often involves a conscious attempt by threatened elites to lock in their previously acquired privileges by transforming them into rights. Hirschl examines how political, economic, and legal elites, who "possess disproportionate access to and influence upon the legal arena" (Hirschl 2000:95), initiate a process of constitutionalization in order to insulate their policy preferences from democratic pressures: "[J]udicial empowerment through the fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage" (Hirschl 2000:95). Drawing on Hirschl, I argue that Republican groups, which lost their hegemonic status in the 1950 elections, played an active role in the constitution-making process of 1960–1961 and secured important enclaves of political power for themselves. The CCT was one of several nonmajoritarian institutions through which Republican groups locked in their new gains. In the next decades, the court played an important role in protecting the values and interests of this coalition.

The question remains why 40 years later, the CCT continued to favor Republican values in its rights jurisprudence. Bottom-up perspectives in sociolegal studies show that organized social and political groups can influence judicial outcomes by shaping a court's docket, transforming judges' preferences on key human rights issues, and providing courts with crucial support when a

³ Stulz makes a similar argument with respect to Chile, where the judiciary and the military considered themselves to be civil servants and developed a strong esprit de corps, a corporate identity in opposition to the politicians who did not understand them, which aggravated their isolation from society (1993:96).

court's autonomy is threatened by other political actors. (Galanter 1974; Zemans 1983; Epp 1998; Dotan 1999; Moustafa 2002, 2003, Cichowski 2001, 2004; Woods 2001). Recently, scholars have also shown that participating in international legal networks can transform the values of domestic judiciaries and provide support with decisions that are unpopular at home (Woods 2001; Amit 2004; Maveety & Grosskopf 2004; Scheppele 2004). During the period under study, the CCT was largely immune to the kinds of pressures legal mobilization scholars have identified. To begin with, law schools and the legal profession largely remained institutions of Kemalist socialization, although this is now beginning to change.⁴ Second, the Turkish judiciary did not have extensive links with the international human rights community until quite recently. Third, although there were ways that nongovernmental organizations (NGOs) could indirectly participate in legal mobilization, such groups did not have direct access to the court. Thus the channels through which autonomous social groups could influence the court were limited. Instead, political parties, and among them, the RPP, have been the most significant "repeat players" at the CCT.

Can we conclude, then, that the CCT ruled unfavorably on civil rights and liberties from 1962 to date because it was an instrument of Kemalist rule? In the last part of the article, I argue that there were key moments when the CCT delivered important rulings on civil rights and liberties. Such rulings coincided with periods when the two key pillars of the Republican alliance, the military and the RPP, disagreed on important political questions. In other words, I show that Kemalism was not always a coherent and stable ideology, nor was the Republican alliance static through the decades. When groups within the Republican alliance disagreed with one another, particularly when the RPP turned against the military and experimented with other political projects, important gains for civil rights and liberties were won through the CCT.

My analysis rests on an exhaustive survey of the CCT's 671 decisions from 1962 until 1982 and a subset—those that involve the Kurdish and Islamic opposition movements—of its decisions after the enactment of a new constitution in 1982. The decisions are analyzed both at an aggregate level and qualitatively. Apart from limitations of space, there are two reasons why the period 1962–1982 is analyzed in greater depth than the post-1982 period. First, while the court's controversial party closure decisions in the post-1982 period have been the subject of scholarly studies and

⁴ In the universities, the Kemalist establishment has struggled to guard the gates through such policies as the ban on the headscarf. Within the legal profession, the High Council of Judges and Prosecutors has guarded the gates through its disciplinary powers over judges and prosecutors.

extensive public debate in Turkey, relatively little is known about the court's pre-1982 jurisprudence beyond Turkish law schools.⁵ Second, the 1962–1982 period constitutes a tougher test of the main thesis of the article since the 1961 Constitution contained a significantly more liberal rights regime and established a more autonomous and powerful judiciary than the 1982 Constitution. If judicial independence and judicial power were sufficient for a rights-activist judiciary, the CCT should have made expansive interpretations of civil rights and liberties during the 1962–1982 period.

The rest of the article is divided into three parts and a conclusion. The first part provides the historical background and an analysis of how Republican groups locked in their power by establishing countermajoritarian institutions through the constitutional transition of 1960–1961. The second part contrasts the CCT's activist rulings on matters that affected the autonomy of Republican groups with its more narrow jurisprudence on civil rights and liberties, demonstrating the selective nature of the court's activism. The third part focuses on key moments when the CCT delivered important rulings on civil rights and liberties and traces these rulings to shifts in the Republican alliance. In the conclusion, I discuss the CCT's relevance for comparative studies.

The Entrenchment of the Republican Alliance Through the Constitutional Transition of 1960–1961

Turkey was ruled by the RPP in a single-party framework from its independence in 1923 until the transition to a multiparty regime during 1946–1950. During the 27 years of RPP rule (1923–1950), there had been no meaningful distinction between the government and the bureaucracy, between the party and the state. Instead, Turkey's founding elite established the RPP, and members of the party filled both bureaucratic and governmental positions. Nor was there a distinction between the ideology of the party and the official ideology of the state. The Kemalist ideology of the party, emphasizing top-down modernization, Westernization, nationalism, and secularism, was also the official ideology.

With the first free parliamentary elections in 1950, the DP, which represented commercial and rural constituencies,⁶ won a

⁵ See Arslan 2002; Shambayati 2002, 2004; and Koğacıoğlu 2003; 2004 for an analysis of the court's post-1982 jurisprudence, in particular regarding the closure of Islamist and Kurdish political parties. For the analysis of Turkish legal scholars, see Tanör and Yüzbaşıoğlu 2001. For the 1962–1980 period, see Ünsal 1980.

⁶ See Sunar and Sayarı 1986:173 and Eroğul 1970:59 for a discussion of the constituencies of the two parties and Frey 1965 for the backgrounds of party elites.

sweeping majority in the parliament, ousting the Republicans. Democrats quickly grew hostile to the RPP and its support groups due to their well-founded fear that the civil and military bureaucracy continued to be loyal to the RPP even when the RPP was no longer in power. During their 10 years in power (1950–1960), Democrats took increasingly repressive measures against the RPP and its support groups, the bureaucracy, the intelligentsia, and students. For instance, DP governments passed stringent press laws to suppress the Republican press, sent recalcitrant civil servants (including judges and university professors) into early retirement, and attacked the RPP by suppressing political opposition (Sarıbay 1991:126; Zürcher 1993:241).

Conflict between the DP and the RPP escalated in the late 1950s when the DP established a parliamentary commission with judicial powers to investigate the “subversive” activities of the RPP. Law professors protested this move as unconstitutional, and students began demonstrations against the DP government. When the DP government declared martial law to quell the unrest, the military sided with the Republican groups. On May 27, 1960, the military staged a coup and arrested the leaders of the DP. In the ensuing period of military rule, DP leaders were tried and convicted for violating the constitutional order,⁷ a new constitution was drafted, and the Constituent Assembly was established to debate and finalize the Constitution.

The Constitution-Making Process

On the day of the coup, five law professors from Istanbul University were summoned to Ankara to prepare a new constitution.⁸ This Constitutional Commission frequently consulted with the National Union Committee (the military junta) during the drafting process and informally incorporated the views of the military into the draft. Once the draft was completed, law professor Turhan Feyzioglu, who had strong Republican credentials, was appointed to chair a commission that would establish the election rules for the

⁷ The top three leaders of the DP were executed. The remaining death sentences were commuted. Several judges and prosecutors from the ad hoc tribunal established to try DP members, including its chief prosecutor Salim Basol, would later serve as judges on the new Constitutional Court. These include Abdullah Üner (1972–1978), Hasan Gürsel (1974–1978), Nahit Saçlıoğlu (1978–1984), A. Fazlı Öztan (1966–1970), Kani Vrana (1970–1974), Mustafa Karaoğlu (1968–1973), and Servet Tüzün (1981–1993) (see Sungur 1961:22–3, 375–6 for a list of the prosecuting team and judges who served on the ad hoc tribunal).

⁸ The chair of this commission was Sıddık Sami Onar, a law professor from Istanbul University, who became a national hero when he was injured during the demonstrations against the DP.

Constituent Assembly, which would debate and ratify the final version of the constitution.

Instead of a directly elected assembly composed of the representatives of political parties, the Feyzioglu Commission recommended that the seats of the Constituent Assembly be divided with a quota system to ensure that freely elected party representatives could not constitute the majority of the deputies. The assembly would include members of the National Union Committee and its appointees, representatives of "still operative" political parties (thus excluding the DP)⁹, elected regional representatives, and members of various professional organizations, most of which constituted traditional support groups of the RPP.¹⁰ Members and supporters of the DP were excluded from the assembly by a law that forbid the election of those who, "with their activities, publications, and behavior, had supported acts in violation of the Constitution or of human rights before the Revolution of 27 May 1960" (Law 157, adopted on December 13, 1960). As a result, the Constituent Assembly would be staffed by the RPP and its support groups, such as the army, the civilian bureaucracy, and the intelligentsia, while excluding the DP.¹¹

Since the DP, which represented roughly half of the Turkish population, was completely excluded from the Constituent Assembly, the debates in the assembly did not reflect the main bones of contention in either the political spectrum or the society at large.¹² The idea of a constitutional court with review power was not seriously challenged in the assembly. Only one representative, Şükûfe Ekitler, raised the countermajoritarian difficulty, but her motion to limit the court's powers did not find resonance with any of the other members, who were convinced that elected representatives had to be guarded closely by an independent institution.

⁹ The seats of party representatives were allocated by quota. The RPP was to have 44 members, while two minor parties would have 25 members each (the Republican Peasant Nation Party and the Nation Party), and the DP none.

¹⁰ The members from the professional institutions would be distributed as follows: judicial organs (12), universities (12), the press (12), bar associations (6), teachers' organizations (6), labor unions (6), veterans (2), youth (1), shopkeepers (6), chambers of commerce and industry (10), and agricultural associations (6) (Parla 1986:53). With the possible exception of shopkeepers, chambers, and agricultural associations, these institutions were likely to be dominated by Republican groups.

¹¹ According to Gençkaya, 222 among 273 members were affiliated with the RPP (Gençkaya 1998:24). According to Güneş-Ayata, 125 members of the Assembly were RPP-affiliated (Güneş-Ayata 1992:81). See Gençkaya 1998 and Parla 1986 for a critique of the corporatist representation of the Assembly.

¹² Within Republican groups, there were disagreements between the "legalist" Istanbul group and the "political" Ankara group. While the Istanbul group was more elitist and antimajoritarian than the Ankara group, both were significantly more antimajoritarian than the DP. The two groups were roughly equally represented. See Weiker 1963:65-72 for a more in-depth analysis of these groups during the drafting and ratification process.

On the opposite margin, Suphi Batur's proposal that all citizens be allowed to initiate suits on basic rights was also defeated without difficulty. For the framers of the 1961 Constitution, the ultimate problem was not how to protect the citizens, but rather, how to protect Republican groups from elected officials.¹³

The Constitutional Court and Other Countermajoritarian Institutions of the 1961 Constitution

The CCT was undoubtedly one of the most important institutions established by the 1961 Constitution. The new court was granted constitutional review power, that is, the capacity to annul (declare void and strike out of existence) statutes and parliamentary decisions inconsistent with the constitution, and it was provided with a high level of formal independence from the political establishment.¹⁴ Appointment powers were shared between high judicial organs, the two houses of parliament, and the president, with the judiciary selecting eight of the 15 members.¹⁵ This preference for self-selection reflected the framers' lack of faith in political actors. Additional guarantees on tenure security ensured that no one could tinker with the independence of the court without violating the constitution.

The rules determining who could refer cases to the new court also reflected a certain bias in favor of Republican groups. Similar to European constitutional courts, certain political officials could initiate constitutional review: political parties in the National Assembly or their assembly groups, one-sixth of the members of Parliament in either chamber, or the President of the Republic could initiate annulment suits within 90 days of the promulgation of a statute. However, while most European courts reserved the right to initiate abstract review to political officials, the 1961 Constitution also authorized the high appellate courts,¹⁶ the High

¹³ For the debates, see Kurucu Meclis 1961.

¹⁴ There is no evidence of removal or intimidation of judges in the CCT. From 1962 to date, the terms of eight out of 102 judges ended before their natural retirement. Further information on the reason for early retirement was not available to this author. However, no judge has ever been officially removed or replaced, and there has been no instance of court-packing.

¹⁵ Together, the Court of Cassation, which is the final court of civil and criminal appeals; the Council of State, which is the final court of administrative appeals; and the Auditor General would elect eight of the 15 principal members and three of the five associate members from among their own members, providing the higher echelons of the judicial bureaucracy with greater appointment powers than the elected and partisan institutions (the two houses of parliament and the president). In the 1982 Constitution, which reduced the number of principal members to eleven, high courts would retain the power to nominate candidates, but all appointments would be made by the president. Two candidates would be nominated by military courts.

¹⁶ The Court of Cassation, the Council of State, and the Military Court of Cassation.

Council of Judges, and universities to initiate review on laws that infringed on their own autonomy. In this way, rules on standing provided the judiciary and universities—Republican groups—with a potential veto over government policy affecting their autonomy.¹⁷

Lower courts could also refer constitutional questions to the CCT in the course of settling ordinary disputes (concrete review). This process, too, was borrowed from European courts. However, unlike some European courts, such as those in Germany and Spain, and more recently in Hungary and the Czech Republic, and unlike most common-law systems, individuals could not directly petition the Constitutional Court on matters affecting their rights. Nor did NGOs have standing before the CCT. These rules limited the extent to which private citizens and civil liberties groups could activate the court as “repeat players.”

The CCT was only one of the many countermajoritarian institutions established by the 1961 Constitution. In addition, the power and autonomy of the Council of State, a high administrative court with administrative review power, was increased. A National Security Council with advisory power,¹⁸ a State Planning Organization to steer industrial policy, a High Council of Judges responsible for appointments and personnel affairs of the judiciary, and an elite upper chamber were established as further checks on elected majorities. Thus, the 1961 constitution delegated major policymaking powers to the bureaucracy (to senior judges, military officials, and technocrats) and increased the bureaucracy’s supervisory role over politicians, empowering Republican strongholds vis-à-vis those elected institutions more likely to be controlled by the populist right-wing governments in the tradition of DP. Moreover, the autonomy of the judiciary, the universities, and the press was expanded and placed under constitutional protection as further checks against government power.

In sum, the 1961 Constitution reflected the fears of Republican groups from elected majorities. The experience of the 1950s, in which the RPP lost every single election to the DP, taught the Republicans that they had little chance of remaining in power under a majoritarian system. The separation-of-powers system embraced in the 1961 Constitution therefore empowered bureaucratic enclaves against elected governments. The electoral system was simultaneously changed from an extreme version of the plurality system to an extreme version of the proportional representation system,

¹⁷ These groups would lose this power and minor political parties would be prevented from petitioning the court in the 1982 Constitution.

¹⁸ The National Security Council’s powers would be expanded in the 1982 Constitution.

further eroding the prospective power of elected officials and making it very hard for the latter to amend the constitution.

This analysis of the critical juncture of 1960–1961 lends support to Hirschl's hegemonic preservation thesis (Hirschl 2000, 2004) that delegating power to a high court often involves a conscious attempt by threatened elites to lock in their previously acquired privileges by transforming these into rights. Republican groups lost their privileged status with the DP's electoral victory after the transition to democracy in 1950. The DP's repressive policies toward (Republican) opposition groups provided the grounds for the military intervention of 1960. In the ensuing period, Republican groups wrote a new constitution that would minimize the future power of elected majorities through a rigorous system of checks and balances. Thus, although the adoption of the new constitution and the establishment of the CCT reflected a reaction to the authoritarian majoritarianism of the DP, these moves toward constitutional democracy and the rule of law were not neutral in terms of substantial political values. In other words, the CCT was not established as an impartial referee of a contract between Republicans and Democrats, but as the guardian of a Republican constitution against Democrats. As Shambayati argues (2002), a constitutional structure bifurcated between elected institutions and unelected ones would facilitate the judicialization of politics in Turkey, but such judicialization would not always be in the service of democracy or human rights.

A Pattern of Selective Activism

Aggregate Data

We begin our analysis of the CCT with aggregate data on its caseload and on its decisions of annulment (findings of unconstitutionality). Data are reported for the years 1962–1999.¹⁹ Aggregate data on the rulings of the CCT from 1962 to 1999 reveal that since its inception, both the caseload of the CCT and the rate of annulments have been relatively high in comparative terms.²⁰ Only

¹⁹ The court began functioning in 1962. 1999 was taken as a cutoff date because major constitutional transformations have occurred through the Europeanization process since 1999.

²⁰ For instance, constitutional courts in the Czech Republic, Georgia, Latvia, Estonia, Lithuania, Russia, Moldova, and Slovakia decided a total of 10, 11, 13, 19, 41, 59, 74, and 96 cases, respectively, in their first three years of operation (Smithey & Ishiyama 2002:723), while the CCT decided a total of 119 cases in its first three years. The French Constitutional Council received nine referrals in its first 15 years (Provine 1996:191), and the Federal Constitutional Court of Germany heard a total of 112 challenges through abstract review and 2,612 cases through concrete review from 1950 until 1991 (Blankenburg 1996:309). The CCT also appears as a relatively activist court in terms of its an-

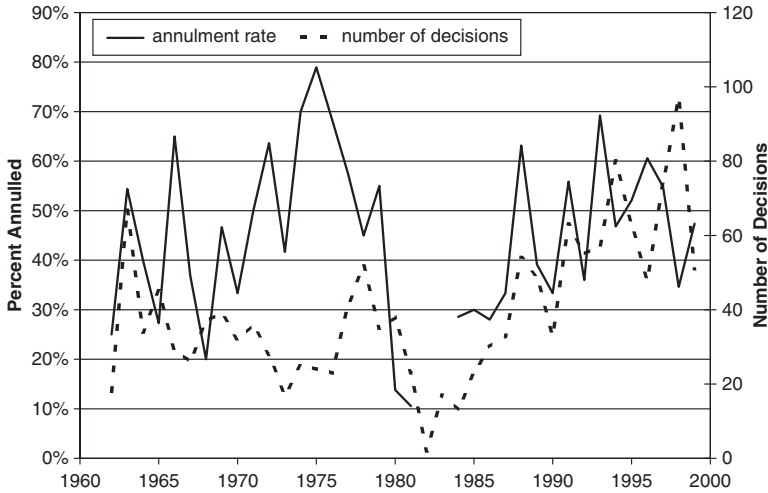


Figure 1. Number of decisions and percent annulments, 1962–1999.

Notes: The y-axis on the left denotes percent annulments. Decision outcomes were categorized into three groups: annulment (when the CCT found at least one provision of the statute unconstitutional), procedural rejection (when the CCT refrained from deciding on various procedural grounds), and rejection (when the CCT rejected the complaint and upheld the constitutionality of the statute). Annulment rates were calculated as annulments over total number of valid decisions (annulments and rejections), excluding procedural rejections. These rates were then converted into percentages. The secondary y-axis on the right denotes number of decisions. “Number of decisions” refers to the total number of constitutional review decisions, excluding party closure and other types of cases. These were compiled by the author from the CCT’s official Web site (<http://www.anayasa.gov.tr>). The CCT did not report all procedural rejections in the 1962–1982 era. Thus part of the increase in the number of decisions in the post-1984 era may be due to increased reporting of procedural rejections.

during the period of military rule in 1980–1983 did the court’s activity come to a standstill. Apart from this period, however, there is no evidence in aggregate data that the CCT functioned as a rubber stamp for the other branches. By most standards of court power or activism in the literature, the CCT figures as a powerful court (see Figure 1).²¹

annulment rates. Until 1985, the Japanese Supreme Court found only three laws unconstitutional (Sanders 1996:327). From 1983 until 1997, Argentina’s Supreme Court found 26% of the norms unconstitutional (Molinelli 1999; cited in Iaryczower et al. 2002:703), compared with the CCT’s 46% for 1962–1982. The CCT’s annulment rates in abstract review are even higher: 65% (1962–1982) and 82% (1983–1999), while these rates are 54% since 1981 in France (Stone Sweet 2000:63), 53% since 1991 in Germany (Stone Sweet 2000:64), and 52% during 1981–1990 in Spain (Stone Sweet 2000:64).

²¹ See Tate 1995:33, Holland 1991:1, and Smithey and Ishiyama 2002:721–2 for definitions of *judicial activism* that focus on the policymaking role of courts, their caseload, and the number of rulings against the government (in the form of annulments of unconstitutional statutes). Smithey and Ishiyama hold that “[I]n general, courts that decide more cases, across a greater range of issues, should be considered more activist than those that decide a smaller number of cases across a narrower range of subjects . . . Nullification is . . . considered the highest form of activism by most commentators” (2002:720–1). Ginsburg

Table 1. Percent Annulments with Respect to Different Issue Areas, 1962–1982

Issues	1962–1970	1971–1977	1978–1982	1962–1982 Average
Republican autonomy	84% (43)	80% (38)	35% (19)	73% (100)
Civil rights and liberties	35% (45)	68% (26)	8% (33)	35% (104)
Other issues	35% (239)	53% (130)	38% (98)	41% (467)
Total	41% (327)	61% (194)	29% (150)	46% (671)

Notes: Columns show changes in level of activism with respect to different issue areas. Rows show changes in level of activism over time. Numbers in parentheses next to percentages show the total number of cases in a specific issue area, including cases delivered inadmissible (procedural rejections).

Decision outcomes were categorized into three groups: annulment (when the CCT found at least one provision of the statute unconstitutional), procedural rejection (when the CCT refrained from deciding on various procedural grounds), and rejection (when the CCT rejected the complaint and upheld the constitutionality of the statute). Annulment rates were calculated as annulments over total number of valid decisions (annulments and rejections), excluding procedural rejections. These rates were then converted into percentages.

Issues areas were categorized as “Republican autonomy” if they involved statutes affecting the autonomy and security of civil servants, the judiciary, or the universities; as “Civil rights and liberties” if they involved associational and expression rights and liberties (including labor rights to organize and strike) or if they involved criminal due process rights. Cases involving sentencing practices and fairness of criminal punishment were excluded from the analysis.

Data were compiled by the author from the decisions of the CCT, published on the official Web site of the court (<http://www.anayasa.gov.tr>).

At first look, aggregate data on the CCT’s rulings support two central assumptions of the literature on judicial power and judicial independence. First, the data reveal an evolutionary trend, especially since the end of military rule in 1983, of a gradually expanding docket and successively more activist rulings. These data support the arguments advanced by Stone Sweet (2000:55) and Ginsburg (2003:66–77) that “judicialization” is a potentially irreversible, self-reinforcing process. Second, the sharp drop in both caseloads and number of annulments during the period of military rule (1980–1983) confirms the view that democracy and judicial independence are crucial for judicial activism (Holland 1991; Tate 1995).

Three further findings complicate this picture, however. First, it is puzzling that the court’s level of activism was not affected negatively by the indirect military intervention of 1971–1973, when a militarily imposed cabinet declared martial law and ruled the country under the threat of military takeover. Indeed, during this period of indirect military rule, the rate of annulments increased from 33% in 1970 to 50% (1971) and to 64% (1972). Thus, while

similarly develops the concept of a “high-equilibrium” court as one that frequently rules against the government, has a heavy caseload, and has high levels of compliance with its decisions (Ginsburg 2003:73). The annulment rates and caseload that I report capture two of these three indicators of Ginsburg’s high-equilibrium court and of Smithey and Ishiyama’s activist court.

aggregate data on the period 1980–1983 confirm the significance of judicial independence and democracy for judicial activism, data on the period 1971–1973 leave a puzzle to be explained.

Second, although the fall in annulments and in caseload coincide with the year of the military coup (1980), as we see below in a qualitative analysis of the data, the fall in activism regarding civil rights and liberties began in 1978, two years before the military takeover (see also Table 1). I suggest that the CCT's decreasing activism on rights questions coincided with the RPP's abandonment of the rights agenda and was not due to direct pressures on the court from the military. This is not to deny the role of the military in Turkish politics, but to draw attention to the ways in which other actors were also consequential.

Third, a qualitative analysis of decisions in two issue areas reveals a deeper trend about activism that begs explanation. As I show below, activism has consistently been *selective* regardless of the ups and downs caused by military interventions. While the CCT has been very activist in protecting the autonomy of Republican groups, such as civil servants, the judiciary, and universities, it has, with few exceptions, been quite conservative on civil liberties, such as the freedoms of expression, assembly, and association. For a better interpretation of aggregate data, we thus need a closer look at the content of the decisions. Such an analysis, which I undertake below, challenges the evolutionary perspective linking the expansion of rights to the gradual expansion of judicial power.

Protecting the Autonomy of the Republican Alliance

As a reaction to the DP's attack on the civil service during the 1950s, the 1961 Constitution included a provision stating that all administrative acts would be subject to judicial review. One of the first tasks of the newly established CCT was to give life to this provision by striking down DP-era legislation on the disciplinary powers of the executive over civil servants, state employees, and the professions. Through a series of decisions in 1963, the justices transferred the ultimate decisionmaking power over the career paths of these groups from the executive to the administrative judiciary. In doing so, they simultaneously increased the power of the judicial branch over the other branches and protected their allies from hostile politicians. Disciplinary actions over lawyers (K. 1963/129),²² judges (K. 1963/291), government attorneys (K. 1965/02),

²² Decisions of the CCT are available in Turkish at the court's official Web site at <http://www.anayasa.gov.tr/KARARLAR/GERKARANA.htm>. In the text, I list the decision number (*Karar* No.) for each case, which consists of the abbreviation "K." for "Decision No.," followed by the year when the decision was rendered, and the number of that decision within that year. Decisions on political party dissolution are identified separately as party

salaried personnel in state-owned enterprises (K. 1962/86), civil servants pensioned off against their will (K. 1963/21), and members of professional associations and chambers (K. 1963/190) were subjected to judicial oversight through a series of similar decisions. In these cases, the justices acted with great confidence: “The unconstitutionality of the said provision is clear in a way that leaves no room for doubt, discussion, or even the need for lengthy explanations” (K. 1963/115). These decisions established checks on the hiring and firing capacity as well as the disciplinary power of elected officials over the bureaucracy, by empowering the Council of State²³ to supervise the legality of such decisions. As the DP attacked the civil service in the 1950s, its successor Justice Party (JP) would attack the civil service in the 1970s and the careers of civil servants and state employees would polarize the JP and RPP. During the 1970s, the court, the Council of State, and the RPP acted jointly to protect the salaries, pension benefits, and tenure security of civil servants and state employees, causing great annoyance to JP governments. As Levi states, “Completely unable to get along with [the Council of State], the JP government resorted to subterfuge, like refusing to accept letters sent by it” (Levi 1996:146).

A second area that triggered systematic annulment decisions from the court during the 1960s and 1970s was the autonomy of the judiciary. The 1961 Constitution provided strong guarantees for the independence and autonomy of the judiciary, once again, as a reaction to the interference of DP governments with the judiciary during the 1950s. The CCT consolidated and expanded these guarantees during the 1960s and delivered more controversial rulings during the 1970s. Contested issues included the powers of the Ministry of Justice over the personnel affairs of the judiciary—over their appointment, removal, and relocation—as well as the status of prosecutors.²⁴ The court effectively minimized the power of the Ministry of Justice over the judiciary while extending to prosecutors some of the protections afforded to judges, expanding the autonomy and corporate nature of the legal profession.

These early cases were followed by bold rulings during the 1970s when judicial autonomy was attacked by the martial law-era cabinets of 1971–1973 and by JP governments thereafter. In a landmark ruling in 1977, the CCT struck down a constitutional

closure decisions. For a full citation, which includes application year and number (*Esas No.*), decision year and number (*Karar No.*), and the date the decision was rendered, please refer to the list at the end of the article.

²³ The administrative high court.

²⁴ These included K. 1963/270; K. 1963/111; K. 1963/291; K. 1963/112; K. 1964/38; K. 1966/40; K. 1966/44; K. 1966/47; K. 1967/45; K. 1969/31; K. 1969/38; K. 1971/44. The court rejected two cases on procedural grounds, because the disputed law had already been amended (K. 1963/162; K. 1963/172).

amendment of the military-imposed cabinet of 1971–1973, which exempted disciplinary decisions over judges from further judicial review (K. 1977/04; K. 1977/117). This same cabinet had passed another amendment explicitly prohibiting the court from reviewing the substantial constitutionality of constitutional amendments. The justices, however, made a roundabout argument that they were engaged in *procedural* review, for which they had to interpret the government's attempt to dilute judicial autonomy as amounting to a regime change.²⁵ This broad interpretation demonstrates how closely the judges identified the regime's nature with their own professional autonomy. Orhan Aldıkaçtı, a conservative law professor who authored Turkey's illiberal 1982 Constitution, criticized these decisions with the following words:

[When the court] declared in a decision that it had the authority to review constitutional amendments, law 1488 has been passed to establish that amendments can be reviewed only procedurally, that is to say, not substantively. Yet the Constitutional Court has continued to review amendments substantively in an indirect way, by giving new meaning to article 9. . . It will be very instructive to study the history of the American Supreme Court here. After attempting to obstruct the executive, the judicial power [in the U.S.] has understood that its real function is not to stay opposite the executive, but rather to stay next to it, and to aid it in disposing of its functions in harmony with the Constitution and the laws

(Aldıkaçtı 1980:18).

The CCT's rulings on constitutional amendments were also the most controversial from a legal standpoint. Indeed, the justices were willing to eschew their positivism when the stakes were high. As in the cases on civil service, the CCT's decisions protecting judicial autonomy helped entrench the members of the Republican alliance within state organizations in the face of hostile opposition from JP governments. As we see below, such creative and bold rulings were rarely made in the name of protecting civil liberties.

A third area for court activism was the autonomy of universities. In early, low-profile cases on personnel affairs,²⁶ the judges struck the provisions infringing on the autonomy of universities with characteristic confidence: "Yet this is nothing but a softened and slightly concealed version of a provision that would allow certain persons [from the political establishment] to directly influence

²⁵ The judges argued that the amendment violated Article 9 of the constitution, which prohibited amending articles on the Republican nature of the regime. The attempt to dilute judicial autonomy was interpreted as an attempt to change the Republican form of government. This interpretation allowed the judges to claim that they had exercised procedural review.

²⁶ K. 1971/05; K. 1971/82; K. 1972/62; K. 1974/04.

who can be a professor, a Ph.D., an assistant” (K. 1971/05). During the 1970s, when universities became centers of student activism and began challenging government authority directly, the court protected universities from counterattack by right-wing governments. Even though the martial law-era cabinet had considerably diluted constitutional provisions on university autonomy, the CCT continued to subscribe to high standards of autonomy, disregarding “legislative intent” in this area with its 1974 decision on the new University Personnel Law (K. 1974/04). One year later, the CCT struck down another martial law-era piece of legislation on universities.²⁷ The new University Law, which attempted to bring the universities under tight government control, would give the government wide powers over the curriculum and the fate of instructors, research assistants, and students. It would facilitate prosecution of university staff and authorize arbitrary police action within universities. In one of their longest sessions, lasting five days, the justices struck down nearly two-thirds of this repressive law. As in the civil service cases and judicial autonomy cases, the justices protected their allies in the universities from the arbitrary action of authoritarian politicians.

Finally, the CCT defended civil servants and state employees not only from the executive but also from disaffected citizens. An Ottoman-era law protected civil servants from prosecution initiated by citizens, by requiring citizens to first obtain permission from the administration to initiate a criminal suit against an abusive civil servant. According to this law, although citizens could lodge complaints about abusive civil servants, it was up to the administration to decide whether the complaint merited a judicial hearing. The law was a major barrier for the right to an effective remedy as it allowed the administration to protect abusive civil servants and state employees. From 1962 until 2000, the Law on the Trial of Civil Servants was referred 16 times to the CCT for annulment. Cases included public school teachers (K. 1970/44; K. 1992/12; K. 1992/46), village headmen (K. 1965/06; K. 1967/36), gendarmerie (K. 1963/88; K. 1968/35), and other public officials (K.1965/53) who engaged in abusive practices toward citizens (beating, threatening to use their guns in personal disputes, etc.) or caused harm to citizens by their negligence (K. 1991/10; K. 1992/13; K. 1992/31). Until a partial annulment in 1992 (K. 1992/11), which at least allowed citizens to appeal a decision not to prosecute, the CCT rejected all of these petitions, procedurally or in their substance. In these decisions, too, the court defended civil servants and provided them with security and permanence within positions of power, even when they had demonstrably abused that power. The CCT’s

²⁷ K. 1975/25; K. 1975/22; K. 1975/23; K. 1975/24.

jurisprudence on this law illustrates the court's priorities when weighing the security and power of Republican groups with the rights of citizens to an effective remedy from abusive state employees.

As the preceding cases show, the CCT was highly active in defending the autonomy of judges, prosecutors, university professors, civil servants, and the professions from governments and even from citizens. It systematically annulled legislation tinkering with the autonomy of Republican groups in public institutions. Furthermore, in these decisions, the justices occasionally eschewed their positivist attitude in favor of creative, controversial, and bold rulings. The CCT's decisions secured the permanence of Republican groups within public institutions against threats from elected officials. To be sure, these decisions contributed to the rule of law by limiting the discretionary authority of the executive and legislative. The concept of the rule of law, however, was colored by a peculiarly Republican understanding of what was arbitrary and what was lawful. It meant that JP officials could not remove or discipline Republican civil servants. The justices' activism in this sphere, however, contrasted sharply with their take on civil rights and liberties, to which I now turn.

Civil Rights and Liberties

In civil liberties cases, the court adopted a conservative and restrictive stance, in sharp contrast to its rulings on the autonomy of Republican groups. While the CCT struck down at least one provision of 73% of the laws referred to the court on the autonomy of Republican groups, it struck down only 35% of the laws involving civil rights and liberties (see Table 1).

When liberty was demanded by socialists, communists, and DP members in the 1960s and 1970s and by Islamist and Kurdish activists in the 1980s and 1990s, the justices almost always came down on the side of "public order and security," consolidating the status of Kemalism as the only permissible political ideology. Furthermore, the judges were not as willing to eschew formalism and make creative or natural law arguments to protect civil liberties.

Before surveying civil liberties cases, it is worth briefly exploring the constitutional basis for the court's rulings. Until the amendments of 1971, the 1961 Constitution established an ideal basis for expansive rulings on civil liberties. After listing a full bill of rights, it stated that "[T]he restrictions on the exercise of rights, to be prescribed by law, cannot infringe on the substance of that right, even if for such reasons as the public interest, general morality, public order, social justice, or national security." (1961 Turkish Constitu-

tion, Art. 11) This provision gave enormous discretion to judges to legitimize expansive rulings on civil rights. In a complete round-about, this article was amended in 1971 to facilitate restrictions on rights:

Basic rights and liberties can be restricted by law for the purpose of providing the unity of the state with its nation and territory, for the protection of the Republic, national security, public order, public interest, general morality and public health, or for specific reasons specified in other articles of the Constitution, provided such restrictions are not contrary to the word and spirit of the Constitution (1961 Turkish Constitution, Art. 11, as amended by Law No. 1488, adopted on September 20, 1971).

More restrictions were introduced through the illiberal 1982 Constitution. However, as we see below, the text of the constitution was not determinative of the court's level of activism. Indeed, during the 1960s, the judges did not take advantage of the liberal basis of Article 11 to expand civil liberties. They adopted a dry, positivist, and narrow jurisprudence even when human rights arguments were raised by the petitioners. Furthermore, the more important rulings for civil rights and liberties came during the 1970s, despite a much less convenient textual basis. In fact, the court annulled 68% of the 26 laws restricting civil rights and liberties that were referred to the court during the 1970s (see Table 1), and the court's activism on rights questions reached a peak when both the government and the constitution were hostile to civil rights and liberties. In the third part of this article, I show that the CCT's expansive rulings reflected changes in alliance relationships. Specifically, I claim that a temporary rift between the military and the RPP accounts for the CCT's expansive rulings in the 1970s.

Civil Rights and Liberties During the 1960s

The first important test of how far the judges were willing to go in protecting the freedom of expression came with the referral by three courts of a 1962 statute that prohibited criticizing the 1960 military coup (K. 1963/83). The lower courts were hearing cases on speeches or newspaper articles critical of the "27 May Revolution," i.e., the 1960 intervention. In one of them, an influential former DP member had said in response to a journalist that an amnesty for former DP members (a hotly debated issue at the time in the National Assembly) would be restitution rather than an act of pardoning. He was charged with violating the constitution. When the case came to the CCT, the judges held that permitting the expression of opinions critical of the trial of the old regime would mean endorsing the actions that led to the breakdown of the constitutional order in 1960. According to the judges, allowing such

criticism would divide the citizens, thereby causing a danger to public order. Here, the judges did not introduce criteria to test whether an actual threat to public order existed. Rather, they presumed that allowing criticism of Kemalism would bring anarchy.

The CCT was also conservative when freedom of speech was evoked by the socialist Workers Party of Turkey (WPT) in 1964 (K. 1964/09). The WPT challenged Article 312 of the Criminal Code on incitement to hatred, which has been utilized to crack down on socialist, Islamist, and Kurdish activists over the past four decades for their political views, even when these groups express their views nonviolently. During the late 1990s, Article 312 also formed the basis of countless petitions to the European Court of Human Rights (ECHR). Successive ECHR decisions on violation of the freedom of expression eventually forced the legislature to amend the article, but the CCT did not find Article 312 unconstitutional.

Throughout the 1960s, the CCT handed down conservative rulings on freedom of expression and association when the exercise of these involved foreign connections. For instance, while the constitution stipulated that everyone had the right to form associations without prior permission, Article 143 of the Criminal Code required individuals to receive permission from the Council of Ministers to become a member of an international association or to set up branches of a foreign-based association. This article was challenged by the JP and the WPT (K. 1964/08; K. 1964/09). The CCT rejected both petitions, evoking the general morality and public order restriction. The judges argued that activities dangerous for public order within the country would easily spread if associations with international connections could be established without prior permission.

A similar provision of the Law on Associations was referred the next year by the WPT. The CCT replied,

Today, there are innumerable associations around the world. Many of these can be very dangerous for our country. For instance, the activities of associations established abroad to spread certain harmful ideologies incompatible with the principles of our Constitution can bring us more harm than good (K. 1965/16).

The judges also upheld Article 6 of the police law, which required police permission for broadcasting films imported from abroad (K. 1963/179); Article 31 of the press law, which gave the Council of Ministers the power to prohibit the entry of foreign publications into Turkey (K. 1963/178); and Article 22 of the passport law, which prevented certain persons from receiving passports on

political grounds (K. 1963/100). In these cases, the judges presumed a prima facie connection between foreign affiliations and a threat to public order that justified for them the prior restrictions and prohibitions, and gave civil liberties a narrow reading when weighing these against presumed threats to public order. In sum, throughout the 1960s, the CCT delivered narrow rulings on civil liberties even though Article 11 of the constitution provided a basis for expansive interpretations.

Civil Rights and Liberties During the 1990s

This conservative, nonactivist stance of the court in civil liberties cases continued well into the 1990s. A new antiterror law replaced the older laws criminalizing various forms of speech and association in 1991.²⁸ Like the Criminal Code articles that preceded it, the antiterror law defined terrorism broadly. Thus various forms of political activity, including supporting a federal solution to Turkey's Kurdish question, could be prosecuted as terrorism. Article 8 of the 1991 antiterror law, along with Article 312 of the Criminal Code, have been the subject of numerous ECHR cases on Turkey, in which the ECHR judges have stated time and again that freedom of expression also includes the freedom to express "ideas that shock, offend, and disturb the state or any sector of the population" and have held tests of "pressing social need" to establish restrictions on civil rights and liberties.²⁹ The CCT, however, found Article 312 constitutional in 1964 and the antiterror law's definition of terrorism constitutional in 1992 (K. 1992/20).

During the 1990s, the CCT also interpreted expressions of religiosity in public institutions as a threat to the constitutional order. The CCT blocked two legislative attempts that would permit observant female students to wear the Muslim headscarf in public universities. The court claimed that this would violate the secular principle of separating religion from state and might disturb "the unity of the state and the nation, public order, and public security" by provoking differences of opinion and religious affiliation among

²⁸ Articles 140, 141, and 142, which criminalized communist propaganda and established the basis of mass arrests during 1971–1973 and 1978–1982, were repealed with the entry into force of the 1991 antiterror law (Law 3713, adopted April 4, 1991).

²⁹ In 1998, the ECHR found two violations of the freedom of expression arising from Article 312 of the Criminal Code on incitement to hatred: *Zana v. Turkey* (judgment on November 25, 1997) and *Incal v. Turkey* (judgment on June 9, 1998). In a landmark ruling in July 1999, the Grand Chamber of the ECHR found 13 violations arising from either Article 312 or the antiterror law: *Arslan v. Turkey*; *Başkaya and Okçuoğlu v. Turkey*; *Ceylan v. Turkey*; *Gerger v. Turkey*; *Polat v. Turkey*; *Karataş v. Turkey*; *Erdogdu and Ince v. Turkey*; *Okçuoğlu v. Turkey*; *Sürek and Özdemir v. Turkey*; *Sürek v. Turkey* (no. 1); *Sürek v. Turkey* (no. 3); *Sürek v. Turkey* (no. 4); *Öztürk v. Turkey* (Judgment on July 8, 1999). The decisions of the ECHR are available at the ECHR's official Web site, <http://www.echr.coe.int>.

young people (K. 1989/12; K. 1991/08).³⁰ In other instances, however, separating state from religion did not lead the CCT to exempt individuals from the obligation to state a religion on their identity cards (K. 1979/44; K. 1995/16). In other words, the justices interpreted freedom of expression narrowly while interpreting “separation of state and religion” through a Kemalist, antireligious lens.

The most controversial rulings of the CCT during the 1990s were in the area of party closures.³¹ From 1983 until 1999, the court banned two parties that supported Islamic politics and initiated proceedings on a third (Dissolution of Political Party cases K. 1983/02; K. 1998/01; K. 2001/02), and it banned 10 small political parties that supported Kurdish autonomy or called for an open debate of the Kurdish question.³² These pro-Kurdish parties were closed for attempting to divide the unity of the state and the nation. Rather than protecting the expression of Kurdish identity, the court criminalized the party as a race-based attempt to divide the state. The CCT argued that “[I]n democratic societies, the real criterion for basic rights and liberties is the individual. There cannot be a basis for transforming this into a national right and liberty for minorities to divide the nation, territory or the state” (Dissolution of Political Party Case K. 1993/03). The CCT also approved, in 1994, lifting the immunity of several Kurdish Members of Parliament (MPs) who took the parliamentary oath in the Kurdish language, wearing Kurdish national colors.³³ As Koğacıoğlu argues, the expressions of religious and ethnic identity were permissible only if they were not overtly politicized (2004).

In sum, the CCT took a conservative stance on the freedom to express “shocking” opinions, even though it had enough clout to challenge the government. Political ideologies critical of Kemalism received no protection from the CCT. The justices adopted this stance very early on in the 1960s, even before street violence between the left and right in the 1970s or the Kurdish uprising after

³⁰ The first case was referred by General Kenan Evren (who established himself as the President of the Republic after presiding over military rule during 1980–1983), and the second case was referred by the Social Democratic People’s Party (SDPP), the party for Republicans after the 1980 coup.

³¹ See Arslan 2002; Shambayati 2002, 2004; and Koğacıoğlu 2003, 2004 for more in-depth analyses of the court’s party closure decisions.

³² The Turkish United Communist Party was closed down on July 16, 1991, for supporting separatism and class domination (K. 1991/01). Other parties banned for separatism until 1999 were the Socialist Party (K. 1992/01); People’s Labor Party (K. 1993/01); Freedom and Democracy Party (K. 1993/02); Socialist Party of Turkey (K. 1993/03); Democracy Party (K. 1994/02); Socialist Union Party (K. 1995/01); Party for Democracy and Change (K. 1996/01); Labor Party (K. 1997/01); and the Democratic Mass Party (K. 1999/01). These decisions are listed under “Dissolution of Political Parties” at the end of the article.

³³ After their immunity was lifted, these MPs were tried in state security courts and received sentences of up to 15 years.

1980s fortified the presumed link between non-Kemalist ideologies and threats to public order and security. This persistently conservative stance on civil rights and liberties distinguishes the CCT from high courts that have played leadership roles in human rights and democratization, such as those in Germany, Hungary, South Africa, and India.

Shifts in the Republican Alliance

The preceding section underlines the contrast between the court's approach to the autonomy of the Republican alliance and its approach to civil rights and liberties in order to demonstrate that judicial power and independence do not automatically lead to activism by courts on rights questions. I argue, rather, that courts' implicit alliances shape the values and groups they protect, leading to a selective activism, and that in Turkey's case, the initial parameters of this alliance were set during the constitutional transition of 1960–1961, when Republican groups established countermajoritarian institutions to insulate themselves from democratic pressures. This section concentrates on changes over time in the court's approach to civil rights and liberties, to identify how shifts in alliances affected the values and groups that received the court's protection.

I note two key periods when shifts within the Republican alliance resulted in expansive rulings by the court on rights questions. First, I argue that after the military memorandum of 1971, as described in the following section, the short-lived rift within the Republican alliance between the military and the RPP accounts for the court's landmark decisions on civil rights and liberties during the 1970s. A significant number of these rulings were in response to RPP petitions, which had now shifted to the left. However, the RPP abandoned its commitment to the rights agenda when the Bülent Ecevit government declared martial law in 1978, after failing to contain civil violence through constitutional means. Tables 1 and 2 show that the CCT's activism on rights questions came to a halt simultaneously, although lower courts continued to refer rights questions to the court. Thus the RPP's ideological shifts were crucial for the rights-jurisprudence of the CCT.

Second, when left-wing groups among Republicans briefly challenged official policies toward the Kurdish regions of Turkey in the early 1990s, important gains for civil rights and liberties were won through the CCT on this most unlikely area. This experiment did not last very long either, however, and the Republicans abandoned the Kurdish cause, increasingly becoming an anti-Islamist, single-issue party from the mid-1990s on. With the rise of Islamist political parties in Turkey, the worldviews of the military, the RPP,

Table 2. Court Use and Success Rates with Respect To Different Litigants in Civil Rights and Liberties Cases and Other Questions, 1962–1982

Actors	Number of CRL Referrals			CRL Totals 1962–1982	Non-CRL Totals 1962–1982	Totals 1962–1982
	1962–1970	1971–1977	1978–1982			
RPP	8	5	0	13 (80%)	24 (73%)	37 (75%)
JP	5	0	0	5 (67%)	45 (71%)	50 (70%) ^a
WPT (socialist)	15	2 ^b	0	17 (27%)	23 (61%)	40 (45%)
Other political actors ^c	0	3	0	3 (50%)	51 (70%)	54 (71%)
Lower courts	16	15	33	64 (24%)	300 (25%)	364 (25%)
High courts	0	1	0	1 (0%)	66 (81%)	67 (79%)
Universities	–	–	–	–	21 (45%)	21 (45%)
Other petitioners ^d	1	–	–	1	37 (-)	38 (-)
Total	45	26	33	104	567	671

Note: CRL refers to rulings on civil rights and liberties. Columns show number of referrals and success rates with respect to different petitioners. Rows show a petitioner's success rates in CRL cases over time and success rates in total other cases.

^a JP, the archenemy of not only the RPP but also the CCT during the 1970s, emerges as an active and successful litigant from these statistics. It should be noted that JP referred 40 of these 50 cases in 1963, well before the institutionalization of such conflict, during the halcyon days after the transition to democracy when the party was searching for a compromise with Republican quarters on the status of former DP members.

^b WPT, the most active rights-litigant at the CCT, was closed down by a decision of the CCT in 1971.

^c Includes cases brought by nine minor political parties (N = 26), the President of the Republic (N = 6), and groups of deputies from the two houses of Parliament (N = 22).

^d Includes cases brought by petitioners without standing (N = 27), immunity cases of parliamentary deputies (N = 10), and one party closure case.

and the CCT gradually converged again during the course of the 1990s and 2000s.

The 1971 Memorandum and the Shift to the Left

During the late 1960s, the emergence of a vibrant left-wing movement in Turkey (Zürcher 1993:253–91; Ahmad 1993:120–80) pressured the existing political parties to reformulate their positions along a left-right axis (Tachau 1984). The RPP began to take a mildly left-wing stance with the adoption of the “left-of-center” slogan in the 1965 elections while also cautiously distancing itself from communism and socialism. This mild move, however, was highly contentious within the party. Forty-eight members rejected this turn in 1967 and left the RPP to establish the Reliance Party to better preserve what they believed were the core values of the RPP.³⁴ The RPP moved further left after a leadership change following the military memorandum in 1971. Meanwhile, the JP made anticommunism one of its central tenets and began to use the

³⁴ The dissidents were led by Turhan Feyzioğlu, who had been one of the architects of the 1961 Constitution and a key personality in the party.

anticommunism banner as a way to appeal to the support of the military and of ultranationalist groups against the RPP and its support groups. Thus the emergence of the left-wing movement destabilized the Republican alliance and its ideology of Kemalism.

In the late 1960s, a combination of political violence by student groups, assassinations, trade union activism, and political fragmentation provided the military with the opportunity to reassert itself. On March 12, 1971, the commanders of the armed forces issued a memorandum, accusing the JP government of driving the country into “anarchy, fratricidal strife, and social and economic unrest,” calling for the establishment of “a powerful and credible government . . . which will end the present anarchic situation . . . and will implement reformist laws,” and threatening to carry out “the duty which is given to them by law to protect and preserve the Turkish Republic . . . directly” otherwise (Hale 1994:184–5). The threat notwithstanding, the military did not seize power but ruled indirectly through a civilian emergency cabinet.

At the outset, it was not clear whether the intervention was for or against the right or the left. Indeed, it appears in retrospect that different factions had different projects in mind, as the armed forces, like all public institutions in Turkey during this period, was divided between left and right factions. When the memorandum was issued, the incumbent right-wing JP government resigned and the generals installed a new cabinet, to be led by Nihat Erim, a member of the right-wing faction of the RPP. Erim established a “technocrat-government” with individuals largely drawn from outside the parliament. Soon, however, the intervention took a decidedly anti-left direction. Martial law was declared in 11 provinces, and the armed forces began a witch hunt for left-wing activists, including trade union members, teachers, and professors. The WPT was closed down along with the Islamist National Order Party, while members of ultranationalist right-wing militias were left alone. The intervention was now clearly against left-wing groups.

The RPP was divided over how to react to these developments. When party leader İsmet İnönü cautiously announced his support for the military-supported Erim government, Ecevit, the emerging leader of the left-wing faction of the RPP, resigned from his post as secretary-general. Ecevit’s resignation was followed by a great deal of commotion and soul-searching within the RPP. Party leader İnönü announced that *left of center* could not be interpreted contrary to the tenets of Kemalism and that the RPP could not embrace socialism because socialism was contrary to RPP’s core principle of nationalism.³⁵ Others accused Ecevit of turning the

³⁵ See *Cumhuriyet*, 24 Jan., 1972.

RPP into a class party.³⁶ RPP never completely resolved the doctrinal debate on the boundaries between Kemalism and socialism, but Ecevit won the party chairmanship from İnönü at a party conference in May 1972, and thereafter, the party took an active stance against the 1971 intervention.

Meanwhile, the military-backed government amended more than 40 articles of the 1961 Constitution. The amendments included restrictions on all civil rights and liberties and a frontal attack on the autonomy of institutions protected by the 1961 Constitution. In September 1971, civil servants were prohibited from becoming members of trade unions (Article 119); the autonomy of universities (Article 120), radio and television (Article 121), the prosecutor's office (Article 137), and the High Council of Judges (Articles 143 and 144) was curtailed. In 1973, provisions were made for the establishment of State Security Courts to try crimes against the state. These courts were to be staffed by military judges alongside civilian judges (Article 136). The CCT and the Council of State did not escape the crackdown on the institutions set up with the 1961 Constitution. A new clause, stating that "[J]udicial power cannot be exercised in a manner that limits the lawful exercise of the executive function. Judicial decisions cannot have the nature of administrative acts and actions," invited the court and its junior partner, the Council of State, to begin exercising restraint (Article 114). Another amendment prohibited the CCT from reviewing constitutional amendments except in their procedural validity (Article 147). Meanwhile, the right to petition the court was slightly narrowed (Article 149), to block minor parties such as the WPT, which had consistently flooded the court's docket with civil rights questions from 1962 until the party's closure during martial law.

While the arrest of many left-wing activists by martial law authorities antagonized the left, the constitutional amendments also antagonized many Republicans with moderate left-wing sympathies, since these developments rejected the legacy of the 1960 "Revolution" dear to many Republicans. As a result, for a brief period in Turkish history, the cause of the left was joined with the cause of the Republicans. During the 1970s, as right-wing governments routinely violated civil rights and liberties in their attack against left-wing groups, Republican institutions such as the CCT and the Council of State tried to protect these rights and liberties. The close relations between the RPP, the Council of State, and the CCT were particularly significant for important civil liberties rulings during this period.

³⁶ Retired admiral and RPP member Sezai Orkunt criticized Ecevit on this count. See *Cumhuriyet*, 7 Feb., 1972.

CCT rulings Through the 1970s

The CCT delivered its boldest decisions after the period of indirect military rule (1971–1973). During the 1970s, the court struck down several constitutional amendments with the argument that these amounted to transforming the Republican nature of the regime, delivered its most expansive interpretations of civil rights and liberties, and made its politically most risky decisions, challenging both the right-wing governments of the day and the military. Furthermore, the court occasionally extended protection to left-wing groups and prevented the militarization of the criminal justice system.

How did CCT rulings affect left-wing movement? For instance, the CCT made a procedural argument to prevent the execution of three student activists, Deniz Gezmiş, Yusuf Aslan, and Hüseyin İnan, who modeled themselves after Che Guevara and who were icons of the Turkish revolutionary youth movement (K. 1972/18). Since the annulment was only procedural, however, the government reauthorized the executions and the CCT was ultimately unable to prevent them. At another instance, in a series of rulings, the CCT expanded the scope of the RPP-enacted amnesty law to cover a broader set of political prisoners who had been incarcerated during the period of mass arrests in the martial law era. Through a procedural argument, the CCT extended the amnesty to individuals convicted of setting up socialist organizations or engaging in socialist propaganda,³⁷ of attempting to overhaul the constitutional order,³⁸ and of arming the population against the government (K. 1974/31). By basing these decisions on the unconstitutionality of the procedures through which these laws had been enacted, the CCT avoided the more difficult question of what sorts of political ideologies and activities received protection under the constitution as well as the question of what sorts of means were permissible to achieve these political goals. Simultaneously, however, the court's decision freed scores of political prisoners, most of them belonging to some brand of left-wing movement. This decision created great uproar among right-wing circles, as when DP-era President Celal Bayar accused the court of "abandon[ing] our cities to anarchists with bombs and automatic rifles" (quoted in Ünsal 1980:163).

Beside these controversial rulings on partisan issues, the CCT also made broader interpretations of civil liberties during the 1970s. It struck down newly imposed restrictions on trade unions

³⁷ Articles 141 and 142 of the Criminal Code. The RPP had had to exempt these articles from the amnesty in order to gain the agreement of its coalition partner, the Islamist National Order Party. What was lost in the parliament by the RPP was given back to the Republicans by the CCT.

³⁸ Article 146 of the Criminal Code.

(K. 1972/03), associations (K. 1973/37), the freedom of assembly (K. 1974/09; K. 1976/51), and the right to prove allegations in defamation suits involving civil servants (K. 1972/60), and struck down increased powers for the police (K. 1974/13).

The CCT was also willing to take on the military on the question of fair trial. The first challenge concerned martial law legislation itself, which restricted the freedom of speech and publication, established martial law courts with military judges, authorized martial law commanders to decide questions of jurisdiction for courts, and extended detention periods up to 30 days during emergencies. The CCT upheld the restrictions on the freedom of speech and publication, but it struck down the provisions setting up military courts and extending detention periods (K. 1972/05).

A more severe threat to civil rights from the martial law era was the establishment of State Security Courts through a constitutional amendment followed by legislation. These permanent courts would try crimes committed against the security of the state during normal times and include military judges alongside civilian judges. With fewer due process guarantees, they constituted a fast track for trying political opponents. The CCT began by establishing boundaries on who could be tried in these courts. The judges decided, with a vote of 10 to five, that the clause "Crimes committed with the general or common purpose to commit crimes specified in the A and B clauses, or with the purpose to commit or conceal these, or committed because of the crimes specified in the A and B clauses" violated the principle of a "lawful court" by being too subjective and arbitrary in defining which crimes fell under the court's jurisdiction (K. 1974/21). This decision had the crucial consequence of preventing State Security Courts from arbitrarily expanding their domain. The next year, the CCT struck down a portion of the constitutional amendment that authorized these courts. The portion that was struck down had exempted State Security Courts from the obligation to select the majority of their judges from among the judicial profession during times of war (K. 1975/87). Shortly after this decision, the CCT handed down its most consequential ruling in the area of fair trial by striking down in toto the law establishing State Security Courts (K. 1975/126). With a slim majority of eight to seven, the judges decided that two articles of the law had not been adequately debated in the Senate, contrary to the provisions of the constitution, which, they argued, necessitated the nullification of the entire law. Although the procedural argument avoided important substantive human rights questions, the decision had enormous practical consequences since in the next five years the government would never be able to find the required majority to re-pass the law through a constitutionally

valid procedure. Thus, the CCT prevented State Security Courts from effectively functioning until they reentered the legal system through the military-engineered 1982 Constitution.³⁹

The CCT's rulings in favor of fair trial show that the CCT was willing to directly challenge the military during the 1970s. In this period, the court delivered its most activist rulings on civil rights and liberties, flying in the face of right-wing governments, military authorities, and the ideology of legal positivism. Shifts within the Republican alliance account for this bravery: the martial law regime's attack against the legacy of the 1960 "Revolution," the principles and institutions of which were so passionately embraced by Republican quarters, created divisions within the Republican alliance; the RPP's turn against the military with Ecevit's election to chairmanship in 1972 made it possible to be a Republican and disagree with the army on certain policy questions; and a fledgling though uneasy alliance between left-wing movements and the RPP expanded the ideological world of Republican groups. The RPP's attention to rights questions, in turn, affected the jurisprudence of the CCT. As we can see in Table 2, the RPP became the most active civil liberties litigant at the CCT during the 1970s. Lower courts, too, referred many cases, but these isolated efforts received little attention from the CCT, when compared with the high-profile, publicly visible petitions of repeat-player political actors. With the closure of the WPT in 1971, the RPP became the most active civil rights litigant. RPP's attention to rights questions was consequential because it had a very high success rate at the CCT, unlike the WPT and lower courts, which referred many rights questions but received few favorable outcomes (see Table 2).

Republicans Approach Kurdish Activists

A similar tribute to civil rights and liberties occurred briefly during the early 1990s, when the RPP, now reorganized as the Social Democratic People's Party SDPP, experimented with an alliance with Kurdish activist groups. During this period, SDPP-RPP briefly adopted the human rights paradigm to address the Kurdish question and referred to the CCT a series of repressive laws and decrees in the government's struggle with the armed Kurdish movement for independence. Although the CCT was largely conservative on civil rights and liberties during the 1990s, particularly

³⁹ The 1982 Constitution included multiple safety measures to ensure that the CCT could not rule State Security Courts out of existence again. However, during the 1990s, the ECHR took the lead on this issue by refusing to recognize these courts as "impartial tribunals" and repeatedly finding violations of the right to a fair trial, protected by Article 6 of the ECHR.

in the area of party closures as discussed above, when the SDLP raised human rights arguments at the CCT during the early 1990s, the court made a number of important contributions in this area.

After the 1980 regime's comprehensive crackdown on all political parties and organizations, left-leaning Republican groups reorganized as the Social Democrat Party but were prevented from participating in the 1983 elections by the military. In 1985, this group was joined by the People's Party to form the Social Democratic People's Party (SDPP) and became the party of left-leaning Republicans. In 1990, the SDPP published a report on South-Eastern Turkey in which it criticized the continuation of emergency rule in Kurdish areas despite the end of military rule in 1983, the military-imposed ban on the Kurdish language, the restrictions to rights and liberties perpetuated by emergency legislation, the abuse of the rights of innocent citizens in the course of the government's struggle with the PKK (Partiya Karkerên Kurdistan, the Kurdish armed organization for independence), and the village guard system through which local informants were armed and paid by the state in Kurdish zones against supporters of the PKK. In the report, the SDPP argued that democracy and human rights should not be perceived as obstacles to combating terrorism and that a nonviolent solution to the Kurdish question was possible through democratization, civic citizenship, socioeconomic development, and respect for human rights (Dağistanlı 1998:175–80).

The SDPP simultaneously made an electoral alliance with Kurdish activists, and pro-autonomy Kurdish politicians entered the parliament in 1991. Relations were strained soon after, however, on the occasion of the oath ceremony, when Kurdish MPs wore Kurdish national colors to the parliament and took the oath in the Kurdish language. A scandalized Parliament voted to lift the immunity of the Kurdish members. The SDPP itself was divided over its Kurdish members: some members voted to lift their immunity, while others, including party leader Erdal İnönü, voted against the decision. The Kurdish deputies resigned from the party.

CCT Rulings on the Kurdish Question During the 1990s

During the early stages of this saga, the SDPP referred three emergency decrees to the CCT for constitutional review. According to the 1982 Constitution, the CCT is prohibited from reviewing the constitutionality of emergency decrees. However, the court took the case and argued that it could at least review whether the decree actually regulated matters within its mandate. The CCT also noted that it could review whether the restrictions on civil rights and liberties in emergency decrees were in conformity with Turkey's

obligations under international human rights law.⁴⁰ With this reasoning, the CCT struck down the decree's provisions restricting press freedoms beyond the emergency zone and its provisions that authorized the government to expand emergency zones without legislative approval (K. 1991/20).⁴¹ The decree also prohibited suing state officials in the emergency zone for their actions while discharging their emergency duties. This last provision, which provided a blanket protection for officials in the region and was a great impediment to human rights litigation within Turkey, was found constitutional, although five of the 11 members wrote a dissenting opinion.

Next, the SDPP questioned 14 articles of the infamous antiterror law (K. 1992/20). The law's controversial definition of terrorism was found constitutional. However, the judges did strike down important restrictions on due process rights as well as annulling several protections extended to antiterror law enforcement officials. For instance, the law had limited the maximum number of lawyers for defendants charged with terrorism, and it had authorized prison officials to be present in defendants' meetings with their lawyers. These provisions were struck down as unjustified restrictions of the right to an adequate defense. The CCT also struck down a number of protections and privileges that the law had granted to antiterror law enforcement officials: that law enforcement officials would be heard as witnesses in secret sessions; that if law enforcement officials themselves were accused of crimes related to the way they discharged their duties (such as abuse of authority), they would be prosecuted under the Law on the Trial of Civil Servants, which left it up to administrative organs to determine whether a judicial hearing was necessary; and that if law enforcement officials were tried in courts of law, they would be tried without arrest. The CCT struck these provisions down on grounds of equality before the law and on rule of law principles.

Finally, constitutional law professor and veteran Republican Mümtaz Soysal collected 113 signatures from various MPs in 1996 to challenge the constitutionality of a law covering various antiter-

⁴⁰ According to international human rights law, certain rights cannot be violated or restricted even during periods of emergency. These are the right to life, the security of the person, the freedom of conscience (but not expression), the presumption of innocence, and the prohibition on retroactive punishment. The CCT also affirmed the principle stipulated in the ECHR that restrictions on rights and liberties must be proportional and cannot exceed those necessary in a democratic society, although it did not actually hold an exacting test of whether the restrictions in the decree were proportional and necessary in a democratic society. The court did strike down several provisions of the antiterror law on this basis in a later ruling (K. 1992/20).

⁴¹ The CCT had also annulled several provisions of an earlier decree (K. 1991/01), but these were reintroduced by the government in ways that would pass the constitutionality test.

rorism regulations. The preamble to the law explained the reasoning behind the law as “covering the gap [in antiterror measures] that would result when emergency rule is lifted” (Law 3713, April 4, 1991). The CCT took three years to deliver a ruling, but when it did, it struck down a provision that authorized security officials to shoot to kill when a terror suspect did not obey a security official’s “Stop!” order and attempted to use a weapon. The CCT referred to the ECHR and ruled that the provision was an unconstitutional violation of the right to life (K. 1999/01).⁴²

Apart from these cases referred by Republican quarters, no political party ever raised substantial challenges⁴³ to the constitutionality of the measures in the government’s antiterror strategies, either because they did not wish to, or because the constitution exempted emergency decrees and 1980-1983-era legislation from review,⁴⁴ or because the 1982 Constitution restricted the right to petition the court to the primary opposition party, excluding smaller parties from access. Nor did such cases come with any frequency from lower courts. During a decade of grave human rights violations, a total of three cases that directly concerned civil rights and liberties were referred by lower courts from the Kurdish region (K. 1992/36; K. 1992/47; K. 1999/11).⁴⁵ The CCT rejected the admissibility of all three of these cases on procedural grounds. In retrospect, this dearth of cases makes the SDPP-referred cases seem both exceptional and significant. As in the 1970s, Republicans were more likely to persuade the CCT on human rights questions. However, Republicans themselves rarely broke their ground with the military to embrace political ideologies and movements beyond the ambit of Kemalism.

Conclusions: Turkey in Comparative Context

This article has questioned the link between judicial power and the expansion of rights by showing that even powerful courts may

⁴² The CCT also struck down a provision authorizing army officials to determine the duration of an operation called by the governor, provisions that exempted certain financial arrangements from scrutiny, and a provision authorizing the executive branch to arbitrarily pardon village guards of its liking.

⁴³ In 1996, the Islamist Welfare Party raised a procedural challenge to the constitutionality of the means through which emergency rule was extended in the parliament (K. 1996/14).

⁴⁴ Many restrictions on civil rights and liberties dated from this era and were thus exempt from constitutional review through a provision in the constitution. The CCT did not take the route of invalidating this provision although, based on the fact that the 1982 Constitution was prepared by the military, an argument could presumably be made on rule-of-law or human rights grounds.

⁴⁵ This count does not include litigation on amnesty laws or the amnesty provisions of the antiterror law.

fail to cultivate a commitment to human rights. Indeed, the theoretical problem posed by the persistently selective nature of the CCT's activism is not one specific to Turkey. The Israeli Supreme Court has developed an expansive jurisprudence of human rights on nearly every issue except for those relating to Palestinians (Kretzmer 2002). The Egyptian Supreme Constitutional Court has taken up some of the most dangerous questions about political opposition in an authoritarian regime (Moustafa 2002, 2003) but has been cautious in expanding women's rights. Newly empowered courts in Canada, New Zealand, and South Africa have employed "judicial activism" to expand rights to privacy and personality but have not taken up social justice issues or otherwise challenged neoliberal values (Hirschl 2004:14). Even the ECHR, with its unwillingness to recognize Islamic identity and politics as deserving legal protection under civil liberties doctrines, has been selective in its approach to human rights.⁴⁶ These conclusions compel us to rethink our assumptions about the automatic link between judicial independence, judicial empowerment, and the expansion of rights. In particular, the Turkish case obliges us to abandon the notion that rights "increase" as executive power "decreases." While a relatively fragmented political system may be a necessary condition for activist judiciaries, it is far from sufficient.

Legal mobilization perspectives provide a fuller account of when and why high court judges begin expanding human rights (Galanter 1974; Epp 1998; Dotan 1999; Cichowski 2001, 2004; Moustafa 2002, 2003). Following Galanter's (1974) argument that repeat players fare better in courts than one-shot litigants, Epp (1998) claims that rights revolutions occur only when individual rights claims are supported by public interest litigation. In this account, the emergence and strength of "support structures" within civil society account for the emergence and strength of rights revolutions. Moustafa (2002, 2003) shows that such support structures matter not only for shaping a court's docket toward rights questions, but also because they provide courts with critical support when they get in trouble with the executive. The case of the CCT confirms the significance of support structures for both the activism and the survival of courts. Had the CCT not had powerful allies, such as the military (at least initially), the RPP, and to a lesser extent the bureaucracy, university professors, and students, it would not have been able to overrule major policies of JP governments or of the emergency cabinet of the martial law era. Nor would the court get the opportunity to play a high-profile role

⁴⁶ While convicting Turkey for closing down pro-Kurdish political parties, the ECHR has approved of the CCT's decisions closing Islamist parties as well as the CCT's decisions on the headscarf ban.

in Turkish politics if Republican groups did not actively use the court in their struggles against popular majorities. What is less adequately explored in legal mobilization studies is that mobilization does not always mean “more rights.” Indeed, the particular support structure of the CCT also accounts for why the court was conservative on many significant rights questions. While Republican groups provided the court with the caseload and support necessary for rulings that challenged the government, Republican values and interests also constrained the court’s potential contribution in the area of civil rights and liberties, institutionalizing a pattern of selective activism. Indeed, it was during periods when Republicans were divided among themselves and the RPP opened its ranks to new political movements that the court delivered its more expansive rulings on civil rights and liberties. Shifts in alliance relationships were thus crucial for the court’s approach to rights questions.

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Dissolution of Political Parties

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European Court of Human Rights

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