

The Constitutional Court of Turkey: The *Anayasa Mahkemesi* as the Protector of the System

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INTRODUCTION

Heir to the Ottoman Empire, the Turkish Republic is a relatively young constitutional parliamentary democracy, which embraced laws and cultures from various sources, and endeavoured to build a monolithic legal and cultural system by using law and legalism as formative tools to reflect a particular vision for the country.¹ Judges try to balance divergent interests within the official framework which is there to safeguard the six pillars of the Republic, called at their inception the six arrows of Kemalism: nationalism, laicism, republicanism, populism, statism and reformism often referred to as westernisation. Today, in addition are: a democratic state, human rights, a social state and the rule of law. All are protected by the Constitution and by laws whose constitutionality cannot be challenged. Turkey's institutions, political and legal systems are captive to past and present political and social problems and live within the restraints imposed by these. The role of the Constitutional Court (*Anayasa Mahkemesi*), set up in 1962, in the preservation of the vision and the building up of a modern Turkey is regarded as perhaps more important than the protection of individual rights.²

The first Constitution of the Republic (1924), concentrated political power in a single legislative Assembly. There was no constitutional review, no effective guarantees

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¹ See Örucü, E (2006) 'A Synthetic and Hyphenated Legal System: the Turkish Experience' (2) *The Journal of Comparative Law*, 261- 281.

² A wide range of human rights, fundamental freedoms and civil liberties, and social rights, were entrenched for the first time in the 1961 Constitution, and at present, are in the 1982 Constitution. Looking at the Index of Cases decided in 2006 by the *Anayasa Mahkemesi*, we see the following rights and freedoms subject to decisions: legitimate expectations, university autonomy, freedom to form associations, right to education, principle of equality, right of action, legality of offence and punishment, proportionality in punishment, presumption of innocence, individuality of criminal responsibility, the principle of respect for vested rights, property rights, respect to privacy, right to social security, freedom of the press, sexual discrimination, freedom of expression and dissemination, right to protection of the home, freedom of contract. (*Anayasa Mahkemesi Kararlar Dergisi* (AMKD): 42 & 43, 2006).

for fundamental rights and liberties and the judiciary did not have full independence. Parliament (the Turkish Grand National Assembly) had the exclusive right to define the limits of the classical civil liberties cited in the Constitution. The 1961 Constitution, which followed the 1960 military take-over, was a reaction to past events and the majoritarian form of democracy of the previous period. It introduced extensive innovations including a Constitutional Court and a liberal model of democracy. After a second military take-over in 1980, a new Constitution was adopted in 1982, which has been amended many times since then in response to political and social events. Substantial amendments are being discussed today.

It is important to note that articles 1 to 3 of the 1982 Constitution are 'immutable provisions' protected by article 4, which states that articles 1-3 'shall not be amended nor shall their amendment be proposed'. These set the form of the State as a Republic and pose the characteristics of the Republic as democratic, laic,³ social, governed by the rule of law, respecting human rights within the concepts of public peace, national solidarity and justice, loyal to Atatürk nationalism and based on the fundamental tenets set forth in the Preamble.⁴ They further lay down that the State is an indivisible whole with its territory, nation and language. In addition, protection is afforded to certain Laws, noted above, passed at the time of the formation of the Republic by article 174 of the Constitution. These are the *İnkılap Kanunları* (Laws of Radical Reform), which were, and still are, regarded as a *sine qua non* of modernisation, westernisation and laicism - the major aims of the Republic.⁵ This means that at the very outset the *Anayasa Mahkemesi* is restricted in the issues it can deal with and the way it can use its powers of interpretation.

Important consequences of the above are the strict control on political parties and the use of freedoms such as those of expression, the press, association and religion, and a self-referential legal system. The concept of sovereignty has a strong hold in Turkey.

Until October 2001, when Parliament repealed the provisional article 15/3 of the 1982 Constitution, another limitation was that claims of unconstitutionality of laws and decrees with the force of law passed between 1980-1983 could not be brought to the *Anayasa Mahkemesi*.⁶

Since 1961, the Turkish Constitutions have embodied almost all the human rights and freedoms covered by the ECHR and other Conventions on related issues, as well as the principle of review of constitutionality. Nevertheless, the specific socio-cultural and political problems Turkey faces give a peculiar twist to these, to be seen below.

³ Secularism as understood in its French version of laicism.

⁴ As re-written in 1995 and amended in 2001, the Preamble includes: '[N]o activity to be defended which is opposed to Turkish national interests, the principle of the indivisible integrity of Turkish existence with its State and territory, Turkish historical and moral values, the nationalism, principles, reforms and modernisation of Atatürk, and that as demanded by the principle of laicism, sacred religious feelings being in no way permitted to interfere with State affairs and politics.'

⁵ The general aim was for modernisation and national integration, and to become European legally, socially and culturally. The eight principal reform laws established secular education and civil marriage, adopted international numerals, the Turkish alphabet and the new calendar, introduced the hat, closed the *derwish* convents, abolished certain titles and prohibited the wearing of certain garments.

⁶ See for example, 1999/23; 1999/18; 25.5.1999 AMKD: 35, 2000, 446, where the Court declared lack of competence and said that in order to review laws passed in this period, the ban introduced by art. 15 must be lifted by Parliament (Art. 87) (repealed on 3.10.2001 as part of the harmonization package with the EU). However, there are a few cases where the Court gave direct effect to the constitutional provision to sidestep (by neglect) laws passed during this period.

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Reasons for setting up a Constitutional Court

Demand for a constitutional court was first expressed in 1957 after the Republican People's Party (*Cumhuriyet Halk Partisi*) lost the elections. However, the party that then came to power (*Demokrat Parti*) enjoyed the advantages of majoritarian democracy and did not support this view. A number of laws passed in the period 1957-1960 had dubious constitutionality and led to the political climate calling for military intervention in May 1960.

The 1960-61 Constituent Assembly, dominated by the secular elite establishment, accepted constitutional review without much debate. The 1961 Constitution was adopted after referendum and contained a detailed Bill of Rights, which put rights and liberties, including social rights, under effective judicial guarantees. Its basic philosophy was the replacement of majoritarian democracy with liberal democracy. The scope of legislative action with respect to civil liberties was substantially limited through the principles of constitutional supremacy, constitutional review ensuring this supremacy, separation of powers and the independence of the judiciary.

The Constitutional Court (*Anayasa Mahkemesi*) that became operative in 1962, was established on the German and the Italian models, following debate as to the type of court, its composition, method of selecting judges and access to the court. The concept of the 'core of rights' was brought in (article 11), which meant that the *Anayasa Mahkemesi* had additional ammunition to use when reviewing violation of rights. This article was construed by the Court as 'prohibiting any infringement which would make the exercise of a right or liberty impossible or particularly difficult'.⁷

The 1982 Constitution, born after another military coup and the product of similar elites and the army, came into effect with another referendum. It was inspired by the 1958 French and American Constitutions. Amendments to it over the years draw on Turkish social and political reality, and more recently, on the perceived demands of the European Union and the European Convention on Human Rights. This Constitution did not change the powers of the *Anayasa Mahkemesi* in essence (articles 146-153). However, though under the 1961 system, ordinary courts also had the power to render a decision on the constitutionality of a particular law applicable in a pending trial in exceptional cases and *inter partes* decisions were allowed, the system of the 1982 Constitution did not allow either.

In preference to protecting the rights of citizens, the Court was now conceived as an instrument to protect the fundamental values and interests of the establishment. The concept of 'core of rights' was dropped from the Constitution.⁸ Instead the limit of limits was now 'the necessities of democratic social order'. The Court was seen as a protector and guardian of the basic ideology, Kemalism, reflected in the provisions of the Constitution. In fact, in the last three decades, the Court has acted essentially to fulfil the expectations

⁷ Özbudun, E (2004) 'Constitutional Law' in Ansay T and Wallace D (eds) *Introduction to Turkish Law* 5th ed (Kluwer Law International, The Hague) 24. For an analysis of this concept see Örüçü, E (1986) 'The Core of Rights and Freedoms: The Limit of Limits' in Campbell, T, Goldberg, D, McLean, S and Mullen, T (eds) *Human Rights: From Rhetoric to Reality* (Basil Blackwell, Oxford) 37-59.

⁸ This concept re-entered the Constitution with the 2001 amendments.

of the elite that had empowered it. One of the examples of this attitude can be observed in cases related to the dissolving of political parties to be seen below. The Court, which protects the national and unitary state and the principle of laicism, the two basic pillars of the Kemalist vision, has been consistent in its attitude to ethnic Kurdish, separationist and Islamist political parties by using a rigid and narrow interpretation of the Constitution and the Law on Political Parties. Constitutional review thus ensures adherence to the Constitution and supports its superiority and its binding force, the Court defending primarily the legal order and rule of law according to the Constitution.⁹ This has been described as ‘an ideologically-based paradigm’ in contrast to ‘a right-based paradigm’.¹⁰

A number of decisions of the *Anayasa Mahkemesi* protecting the rights of Parliament from the executive, also reflect distrust of the mechanisms of majoritarian democracy.¹¹ The Court does in fact act as a ‘negative legislator’.

The structure of the Court

Under the 1961 Constitution, the majority of the *Anayasa Mahkemesi* judges (15 regular and five substitute judges) were chosen by the other High Courts: the Court of Cassation (*Yargıtay*), the Turkish Conseil d’Etat (*Danıştay*), the Military Court of Cassation (*Askeri Yargıtay*), the Court of Accounts (*Sayıştay*) and the Supreme Military Administrative Court (*Yüksek Askeri İdare Mahkemesi*). In addition, the National Assembly chose three, the Senate of the Republic two and the President of the Republic two members (one of whom from among the three candidates nominated by the Military Court of Cassation (*Askeri Yargıtay*)).

The present 1982 Constitution provides that all eleven regular and four substitute judges are appointed by the President of the Republic (direct appointment system), the majority of judges to be nominated by judges of the High Courts, with each court nominating three for each vacant seat. The President appoints two regular and two substitute members from the *Yargıtay*, two regular members and one substitute member from the *Danıştay*, and one member each from the *Askeri Yargıtay*, the *Yüksek Askeri İdare Mahkemesi* and the *Sayıştay*. The President also appoints one judge from the three candidates put forward by the Supreme Council of Higher Education (*YÖK*) who are members of the teaching staff of institutions of higher education. The President can only choose freely three regular judges and one substitute judge from among senior civil servants and lawyers (article 146). They must be over the age of forty, have completed higher education, or have worked at least fifteen years in the teaching staff of institutions of higher education, as administrators or lawyers. The Court has complete independence from the legislative and the executive branch. The Court assembles *en banque*.

The 1961 Constitution did not limit the term of office of the judges of the *Anayasa Mahkemesi*, which meant that changes in public opinion could not be easily reflected in the

⁹ Art. 11 of the Constitution states that: ‘The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Laws shall not be contrary to the Constitution.’

¹⁰ Arslan, Z (2002) ‘Conflicting Paradigms: Political Rights in the Turkish Constitutional Court’ *Critical Middle Eastern Studies*, 9-25.

¹¹ Decisions limiting the scope of ‘decrees with the force of law’ and of martial law and emergency regime ordinances can be given as examples. See 1988/64; 1990/2; 1.2.1990 AMKD: 26; 1989/4; 1989/23; 16.5.1989 AMKD: 25; 1991/6; 1991/20; 3.7.1991 AMKD: 27/1; 1990/25; 1991/1; 10.1.1991 AMKD: 27/1.

composition of the Court. The 1982 Constitution foresees retirement of judges at the age of sixty-five. Apart from age, their office may be terminated *ipso facto* upon conviction of an offence entailing dismissal from the judicial profession or for reasons of health, in which case, the Court decides on termination (article 147).

As noted, the legislature is excluded from the selection process.¹² It has been often suggested that the legislature should be involved in the process. Some judges of the *Anayasa Mahkemesi* are of the opinion that this would politicise the Court and interfere with their independence, in the belief that the Presidential office is apolitical, neutral and above political parties.

Nonetheless, in 2004 the *Anayasa Mahkemesi* submitted to the Venice Commission a draft proposal on a constitutional amendment with regard to the Court, introducing a hybrid solution with a modest role for the legislature in the selection process, the Court to be composed of seventeen judges, eleven elected by the High Courts, four by Parliament and two directly by the President. However, Parliament would not be entirely free in their choice, and could only elect one member from the three candidates nominated by the *YÖK*, one member from the three candidates nominated by the Union of the Bar Associations and two members from the presidents and members of the *Sayıştay*.¹³ There would be no substitute judges. The Court would be divided into two chambers. The minimum age requirement would be fifty and the retirement age 67. The proposal provided for a twelve-year term of office.

This proposal met with strong opposition from the presidents of the other High Courts. It is not known whether the present membership of the *Anayasa Mahkemesi* would still support this draft.

The new draft constitutional amendments, presently under discussion, transfer the competence to elect members of the *Anayasa Mahkemesi* from the President of the Republic to Parliament, with eight members to be elected by Parliament (at least three from among law professors), four by the *Yargıtay*, four by the *Danıştay* and one by the *Sayıştay*. They would be elected for one period of nine years. There would be seventeen members, no substitute members, the minimum age for election would be forty and retirement age 65.

The jurisdiction of the Court and gateways for invoking jurisdiction and developments

The jurisdiction of the *Anayasa Mahkemesi* extends to constitutionality of laws, decrees having the force of law, and the rules of procedure of Parliament (article 148). The Court examines their constitutionality as to substance and form. Constitutional amendments however, can only be examined with regard to their form. The review as to form means consideration of whether the requisite majority was obtained in the last ballot, and in the case of constitutional amendments, of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. Review of form can be requested by the President of the

¹² This has been called a *sui generis* phenomenon, a 'Turkish type', resembling neither the European nor the USA models. See Arslan, Z (2004) 'Tartışma' *Anayasa Yargısı* No: 21, *Anayasa Mahkemesi Yayınları* : 51, Ankara, 132.

¹³ See *ibid* for papers and discussion on this proposal presented at a Symposium organised by the *Anayasa Mahkemesi*.

Republic or one-fifth of the members of Parliament. Such an application cannot be made more than ten days after the date on which the law was promulgated. Furthermore, if the parliamentary immunity of a deputy has been waived, the deputy in question, or another deputy, may, within seven days of the decision of Parliament, appeal to the *Anayasa Mahkemesi*, for the decision to be annulled for being contrary to the Constitution, law or procedure, whereupon the Court must decide on the issue within fifteen days (article 85).

The Court is not bound by the reasoning put forth by the parties.¹⁴ The quorum for decisions is absolute majority. However a decision to invalidate a constitutional amendment on procedural grounds must be made by a three-fifths majority of the Court (articles 148, 149). This same quorum is required for decisions on the closure of political parties. All decisions are *erga omnes* and not *inter partes*.

There are certain restrictions on the jurisdiction of the Court: No action can be brought before the Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war (article 148/1).¹⁵ In addition, international agreements duly put into effect carry the force of law and no appeal to the *Anayasa Mahkemesi* can be made with regard to them on the ground that they are unconstitutional (article 90). Furthermore, as noted above, no provision of the Constitution can be construed or interpreted as rendering unconstitutional the Reform Laws which aim to raise Turkish society above the level of 'contemporary civilisation' and to safeguard the laic character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey (article 174).

There are other restrictions: no appeal can be made to any legal authority, including the *Anayasa Mahkemesi*, against decisions and orders signed by the President of the Republic on his/her own initiative, against decisions of the Supreme Military Council (*Yüksek Askeri Şura*), and decisions of the Supreme Council of Judges and Public Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*) (articles 105, 125 and 159). In addition, the *Anayasa Mahkemesi* at times declares lack of jurisdiction regarding certain decisions of Parliament (article 87). Furthermore, when the legislature is negligent in passing laws in fulfilment of its obligations under the Constitution no remedy is allowed to the *Anayasa Mahkemesi*. Neither has the Court the right to prior preventive control but only to a posterior repressive control. Another restriction laid down in article 153/2 is that, while annulling the whole, or a provision, of a law, the Court cannot act 'as law-maker and pass judgment leading to a new implementation'. This signals the necessity of judicial self-restraint and may be regarded as an unnecessary provision, since the Court does not go into the merits of the cases and does not discuss political preferences of the legislature.¹⁶

Access to the Court can be through two gateways: The first is by an annulment action (*iptal davası*), a principal proceeding, an abstract norm control, which can be instituted by the President of the Republic, parliamentary groups of the governing party and the main opposition party, or at least one-fifth of the full membership of the Assembly (article 150).¹⁷ Here, there is no need for a conflict or violation of a right, only a diverse opinion on

¹⁴ Art. 29 of Law 2949 on the Establishment and Procedure of the *Anayasa Mahkemesi*.

¹⁵ However, see cases cited in footnote 11 supra. Another limitation in Art. 15 has been repealed (see footnote 6 supra).

¹⁶ See 1984/1; 1984/2; 1.3.1984, AMKD: 20, 161; 1987/23; 1987/27; 9. 10.1987, AMKD: 20, 380-381.

¹⁷ The draft constitution brings in a restriction in that the main opposition party alone will not be able to go to the *Anayasa Mahkemesi*.

constitutionality. Such suits of unconstitutionality for substantive review must be initiated within sixty days following the promulgation of the law in the Official Gazette (*Resmi Gazete*). In case of formal review, the period is ten days from promulgation.

The second gateway is by an incidental proceeding, the plea of unconstitutionality (*anayasaya aykırılık itirazı*), that is, the objection of unconstitutionality before other courts, leading to a concrete norm control. This arises out of a pending trial in an ordinary civil, criminal or administrative court and can be raised by that court or any individual party to the pending trial and is not subject to any time limitation. The court trying the case must determine whether such a demand is serious and justified. If the court so decides, it adjourns the proceedings and refers the matter to the *Anayasa Mahkemesi*, which must decide the issue within five months. Otherwise, the regular court must render judgment on the basis of the existing law.¹⁸ According to article 153, if the *Anayasa Mahkemesi* dismisses the case on substantive grounds, no plea of unconstitutionality for the same law can be put forward before a ten-year period has elapsed.¹⁹ This Article was brought in for 'legal stability', however, 'it is, in fact, a serious limitation upon defendants' rights',²⁰ is contrary to the purpose of constitutional review and does not cater for changing social circumstances.

The Court gives two types of judgments: Annulment or dismissal of claim. However, over the years, the *Anayasa Mahkemesi* has developed further means not foreseen by the Constitution through its precedents. The first of these is the method by which the Court avoids annulment, and develops the law by opting for an interpretation compatible with the Constitution.²¹ The second method, rarely used, is when the Court neglects the provision of a law that is incompatible with the Constitution, but gives direct effect to a constitutional provision. This way out is usually resorted to when the legislation in question cannot be challenged. The condition is that the constitutional provision must be clear, detailed and possible of direct applicability. The third means developed is an interim decision: 'stay of implementation'. The Constitution has not given the Court the power to declare stay of implementation in a case brought before it. However, though until 1993 the Court refrained from doing so, since then, there has been an increase in the number of cases where the Court has granted this plea.²² There are strict conditions though: There must be serious indications that the law in question is contrary to the Constitution and that if implemented, this might give rise to damages that cannot be recovered. The Court has also developed the measure of 'proportionality', which it uses widely, specifically in cases where article 13 (as amended in 2001) of the Constitution is implemented by Parliament to restrict rights and freedoms in accordance with article 15 'to the extent required by the exigencies of the situation': Accordingly, a fundamental right or freedom can only be restricted for the specific reasons set forth in the relevant article of the Constitution, without

¹⁸ The 1961 Constitution allowed the trial court to decide on constitutionality in circumstances when the *Anayasa Mahkemesi* did not reach a decision within six months.

¹⁹ The proposals of the *Anayasa Mahkemesi* and the new draft amendments to the constitution reduce this to five years. There was no such provision in the 1961 Constitution.

²⁰ Özbudun, supra note 7, 45.

²¹ See 1984/18; 1984/10; 20.9.1984; AMKD: 20, 298.

²² In 1994 there were 16 such pleas, increasing to 21 in 2003. See Kılıç, H (2004) 'Türk Anayasa Mahkemesi'nin Yeniden Yapılandırılmasına İlişkin Öneri', *Anayasa Yargısı* No: 21 Anayasa Mahkemesi Yayınları: 51, Ankara, 82. This interim decision has been given a place in Art. 153 of the draft proposal of the *Anayasa Mahkemesi* and the draft constitutional amendments under discussion (Art. 117/3).

touching their 'cores', and only by legislation. These restrictions cannot be contrary to the wording and the spirit of the Constitution, the democratic social order and the necessities of the laic Republic and the principle of proportionality.

Upon invalidation, the law in question becomes ineffective as of the date of publication of the decision (*ex nunc*) in the *Resmi Gazete*. A date not later than one year from the date of the publication of the annulment decision may be set by the Court as the date the decision shall come into effect (Article 153).²³ In such a case, Parliament must debate and decide with priority on the draft bill or proposal designed to fill the legal void arising from the decision. Decisions of the Court cannot be retroactive and are final. Furthermore, according to the established jurisprudence of the Court, both the decisions and the reasoning are binding.²⁴ However, though the Court cannot act as law-maker and pass judgment leading to new implementation (Article 153), the legislature or the executive cannot modify or postpone the decisions of the Court, neither can a new law be passed to give life to an annulled provision.²⁵

Neither the 1961 nor the 1982 Constitutions accepted an individual's right to constitutional complaint. Neither do the new draft constitutional amendments consider this option, the emphasis being on review of constitutionality of laws rather than review of the application of laws.²⁶ However, in spite of problems related to a considerable increase in work-load, individual access through a 'constitutional complaint' to the Court has been proposed by the *Anayasa Mahkemesi* in 2004, following the German model.²⁷ One of the main reasons for the introduction of this gateway – though as an exceptional and subsidiary path – is so that the number of files against Turkey brought before the ECtHR would decrease. The scope of the complaint is limited to protecting basic rights in the Constitution, which are also regulated in the ECHR.²⁸ The *actio popularis* option has not been considered.

Under the 1961 Constitution, the Court based its decisions not only on the Constitution but also referred to international conventions and general principles of law. International conventions were not used as reference norms but as supportive norms. However, general principles of law were regarded as even a superior reference norm, though never used as an independent ground but considered as part of the '*Rechtsstaat*'.²⁹ Public interest has always been an important criterium. In assessing public interest 'core of rights' was the limit of limits, now, under the 1982 Constitution, the limit is the 'necessities of a democratic social order' and most decisions are based solely on the Constitution.

Concerning fundamental political choices and value judgements, the Court thinks strategically, with a view to the impact of its decisions on the public. The Court sometimes interprets the law to make it compatible with the Constitution, but often it decides on

²³ See e.g. 2005/99; 2006/8; 19.1.2006 AMKD: 42, 2006, 93.

²⁴ See the Court's view of this e.g. in 2006/22; 2006/40; 22.3.2006 AMK D: 43, 2006, 219-220.

²⁵ Ibid.

²⁶ In many respects this type of review is undertaken by the Turkish *Conseil d'Etat*, the *Danıştay*.

²⁷ See for extensive discussion supra note 13, 163-313.

²⁸ The proposed Art. 148/6 reads: 'All individuals claiming that one of their constitutional rights or freedoms in the scope of the ECHR has been violated by public power are entitled to apply to the *Anayasa Mahkemesi* on condition that they have exhausted legal remedies. The principles and procedures on admissibility and competence of pre-review commissions and on judgments of the Chambers shall be regulated by law'.

²⁹ Some of the general principles used in the 1982 Constitution period are good faith, *pacta sunt servanda*, respect for vested rights, non-retroactivity of laws and respect for *res judicata*.

annulment and lays down a single possible interpretation of the law, putting the Court into the position of a 'positive legislator'.³⁰

In April 2007, the *Anayasa Mahkemesi* was involved in the election of the Eleventh President of the Republic and had to decide a number of cases brought before it by the then President of the Republic and the opposition party. The opposition challenged the Parliamentary vote on the grounds that there was not the necessary quorum. The *Anayasa Mahkemesi* agreed and annulled the first round, which forced the government to hold early elections on July 22, 2007. In the process, Abdullah Gül, the new President elected after the general elections, accused the Court of acting as a Senate, a political organ, rather than as a legal one, in correcting political decisions taken by Parliament by its own political decisions.³¹

The *Anayasa Mahkemesi* can also try impeachment cases as a Supreme Court (*Yüce Divan*) and decide on unconstitutional activities of the political parties. The Chief Public Prosecutor of the Republic acts as public prosecutor in the Supreme Court.

Problems encountered and how these are dealt with

One important problem arises as a result of the long time lag between reaching an annulment decision and its publication. The only rule is that if the Court decides to postpone the coming into effect of such a decision, the date cannot be more than one year from the date of publication (Article 153/3). However, since annulment decisions cannot be made public without written reasoning and both the decision and its reasoning are binding, sometimes in exceptional cases, the Court takes a much longer period before it publishes a decision.³² Since usually, the decision is leaked to the public, in the interim period unconstitutional practices may continue.

Though binding on everyone, there are no sanctions for situations where the decisions of the *Anayasa Mahkemesi* are not followed by other High Courts in the system, and unfortunately the *Yargıtay* and the *Danıştay*, though to a lesser extent, at times give decisions contrary to the *Anayasa Mahkemesi* decisions purposefully, violating their Constitutional duty. This leads to a deep conflict of interpretations and there are no mechanisms to resolve this conflict.³³

Again, unfortunately, the legislature may re-introduce a piece of legislation annulled by the Court, albeit with minor changes. According to the Court this amounts to rendering *Anayasa Mahkemesi* decisions ineffective.³⁴ Obviously this practice can be regarded as

³⁰ This means that there is only one way to legislate after an annulment. An example of this is the second headscarf (*türban*) case to be seen below.

³¹ Reported in the *Zaman* newspaper on 23.06.2007.

³² See, for instance, 1997/61; 1998/59; 29.9.1998; *Resmi Gazete* No: 24937; 15.11.2002, related to a married woman's surname, discussed below. Also see 90/31; 29.11.1990, where the publication of the decision annulling the then Section 159 of the Civil Code, which stated that a wife needs her husband's permission to work outside the home, was delayed for two years, either because of the difficulty of composing a reasoning through which the Court could satisfy all sides, or in order to postpone the introduction of the change.

³³ For a discussion of this problem and some examples see Sağlam, F (1996) 'Yetki ve İşlev Bağlamında Anayasa Mahkemesi'nin Yasama Yürütme ve Yargı ile İlişkisi' *Anayasa Yargısı* No 13, *Anayasa Mahkemesi Yayınlar*: 32, Ankara, 53-60.

³⁴ See 1991/27; 1991/50; 2.9.1992; *AMKD*: 27, 700.

a violation of the Constitution (article 11). In such cases the *Anayasa Mahkemesi* simply annuls the new law.³⁵

Until recently, in reaching its decisions, the *Anayasa Mahkemesi* seldom considered Strasbourg case law and other International Conventions which give additional rights to the people. Article 90 of the Turkish Constitution deals with international treaties. Article 90/5 reads:

International agreements duly put into effect carry the force of law. No appeal to the *Anayasa Mahkemesi* can be made with regard to these agreements, on the ground that they are unconstitutional. In conflicts arising between different provisions of a domestic law and an international agreement related to fundamental rights and freedoms, the provisions of the international agreement will be taken as the basis.

In spite of the above, the last sentence of which entered the Constitution in 2004, there is continuing debate around this provision, and as to whether the ECHR has a special status, the future status of EU treaties, and what will be the hierarchical relationship between the Turkish Constitution and these agreements if Turkey joins the EU.³⁶

A number of academics and the judges of the *Anayasa Mahkemesi* regard the ECHR, as they do any other international agreement. The only difference from ordinary legislation is that the constitutionality of the Convention cannot be challenged. Therefore, the *Anayasa Mahkemesi* should not review its decisions in the light of ECtHR judgments, as national sovereignty belongs to the nation unconditionally (*egemenlik kayıtsız şartsız milletindir*). This dominant view also found support in the decisions of the *Anayasa Mahkemesi* – which upheld the Turkish Constitution above all else – until March 2007.³⁷

It has also been held that when a human right covered by the Convention but not by the Constitution is at issue, *lex posterior* (the Constitution for example) defeats *lex specialis* (the ECHR for example), and therefore the Constitution should prevail.

On the whole, the *Anayasa Mahkemesi* regards the extensive section on rights in the Constitution (articles 19-74) as the sole basis of review of constitutionality, and though at times it refers to articles of the ECHR, this is at the level of citing without analysis, showing parallels that exist between the provisions of the Convention and the articles of the Constitution. The review is one of constitutionality not of conventionality and there is a lack of creative and extensive interpretation. A reading of the decisions shows

³⁵ See 1993/26; 1993/28; 16.9.1993; *Resmi Gazete* No: 21772; 8.10.

³⁶ See the discussions and papers published in *Anayasa Yargısı* No: 17, *Anayasa Mahkemesi Yayınları*: 42, Ankara, 2000.

³⁷ Turkey introduced amendments to several Laws in August 2002. A clause has been added to the Code of Criminal Procedure, the Code of Civil Procedure and the Code of Administrative Procedure, departing from the long held official and academic views: When the ECtHR determines that a Turkish final decision has been given in violation of the European Convention or its Protocols, then the Minister of Justice, the Public Prosecutor for the *Yargıtay*, the applicant to the ECtHR or his/her representative can request a re-trial within one year of the judgment of the ECtHR, with the condition that in view of the quality and seriousness of the violation, payment of just satisfaction to be given under Article 41 would not redress the situation. These amendments came into force on 9th August 2003, and only apply to cases taken to the ECtHR after this date. The above interim decision was made in the first case where the process of re-trial has been extended to decisions of the *Anayasa Mahkemesi* by the Court itself. The case is pending.

that, traditional values and the social needs of the country usually override most other considerations.

THE TYPES OF ISSUE THE COURT HAS DEALT WITH AND ITS ACTUAL PERFORMANCE³⁸

We will now consider a number of cases from some significant areas.³⁹

(a) *Dissolution of political parties*

One group of cases dealt with by the *Anayasa Mahkemesi* relates to the permanent closure of political parties.⁴⁰ The Court is specifically empowered by the Constitution in this matter and must determine whether the party in question 'has become the centre for the execution of activities' banned by Article 69.

The majority of the dissolved parties are to the left in the political spectrum and/or parties advocating a separate homeland and/or autonomy for the Kurdish population. The *Anayasa Mahkemesi* bases its decisions on Law No: 2820 on Political Parties.⁴¹ The political parties and their representatives base their cases partly on the two relevant Articles of the ECHR, 11 and 17. The public prosecutor – and the Court following – rejects the claims, based on the limitations introduced in 11/2 and 17/2. In such cases, the *Anayasa Mahkemesi* typically takes into consideration existing Turkish laws first and then the prevailing political and social climate and conditions in Turkey.⁴² One case involving the closure of the German communist party is discussed in more detail and comparatively – it was the only other case the ECtHR decided on this issue, and the closure was not found to violate the Convention. Such references are superficial.⁴³

In two other cases related to the closure of religious parties, the *Anayasa Mahkemesi* discussed laicism in relation to democracy.⁴⁴ In the 1998 case closing the *Refah Partisi* (the Welfare Party), both the public prosecutor and the defenders brought extensive discussion of various international instruments, the concept of laicism as understood by

³⁸ An analysis of the applications to the Court between 1982 and 2004, both in principal and incidental proceedings, show that in 1982 there were two, in 1983, 12; 1984, 17; 1985, 33 applications, This number gradually increased to 86 in 2000, peaked at 495 in 2001, 171 in 2002 and 113 in 2003. See Kılıç, *supra* note 22.

³⁹ All translations of Turkish court decisions are by this author.

⁴⁰ Samples are: 1992/1; 1993/1; 14.7.1993 *Resmi Gazete* No: 21672; 18.8.1993; 1993/2; 1993/3; 30.11.1993 *Resmi Gazete* No: 22016; 9.8.1994; 1993/3; 1994/2; 16.8.1994 *Resmi Gazete* No: 21976; 30.6.1994; 1993/4; 1995/1; 19.7.1995 *Resmi Gazete* No: 23148; 22.10.1997; 1995/1; 1996/1; 19.3.1996 *Resmi Gazete* No: 23149; 23.10.1997; 1996/1; 1997/1; 14.2.1997 *Resmi Gazete* No: 23384; 30.6.1998; 1998/2; 1998/1; 9.1.1998 *Resmi Gazete* No: 23266; 22.2.1998; 1997/2; 1999/1; 26.2.1999 *Resmi Gazete* No: 24591; 22.11.2001; 1999/1; 2003/1; 13.2.2003 *Resmi Gazete* No: 25173; 19.7.2003, all brought to the Court by the Chief Public Prosecutor for the Republic. For an analysis of these cases see Koçak, M and Örucü, E (2003) 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' (9) *European Public Law*, 399-423.

⁴¹ This Law was passed during the years 1980-83, a period protected by article 15 of the Constitution noted above, whose constitutionality could not have been challenged until 2001. However, in 2000, while dealing with a party dissolution case brought before it, the *Anayasa Mahkemesi*, in an incidental proceeding acting as the appellant, annulled an amendment to section 103/2 of Law No: 2820, claiming that it was narrowing the powers bestowed upon the Court by article 69. 2000/86; 2000/50; 12.12.2000 *Resmi Gazete* No: 24268; 22.12.2000.

⁴² 93/2; 93/3; 30.11.1993; *Resmi Gazete* No: 22016; 9.8.1994.

⁴³ See 1992/1; 1993/1; 14.7.1993; *Resmi Gazete* No: 21672; 18.8.1993.

⁴⁴ 1996/3; 1997/3; 22.5.1997 *Resmi Gazete* No: 24067; 2.6.2000.

doctrine, and the law in some foreign jurisdictions such as the USA, the UK, Switzerland, Germany, France and Yugoslavia with some reference to the case law of the US Supreme Court. Freedom of expression was the major issue here and these cases tried to balance this freedom with the protection of the existing system in keeping with the official vision discussed earlier. The Court regarded the matter as solely Turkish.⁴⁵ However, this case was supported by the ECtHR.⁴⁶

(b) *Right to education, religion and laicism*

In one case related to Law No: 4307 of 1997 on Primary Education, extending education in primary schools from five to eight years, the claim was that this was contrary to a number of articles of the Constitution, and articles 9 and 10 ECHR and article 2 of its Protocol 1, as it would impede religious education. The appellant, the *Refah Partisi* (the main opposition party), made reference to foreign doctrine and decisions of the ECtHR on democracy, pluralism, equality, tolerance, fundamental rights and freedoms, conditions of social peace and laicism. There were references to a number of International Conventions, the ECHR, and foreign jurisdictions in the USA, France, Germany, Italy, the UK, Norway and even Japan. The *Anayasa Mahkemesi*, deciding solely within the framework of the Turkish Constitution held:

On the other hand, though not a direct basis for constitutional control, the ECHR has value and effect as a supplementary norm and its article 9 related to freedom of religion and conscience is in essence parallel to article 24 of the Turkish Constitution. There is no violation of Protocol 1 article 2, since there is no limitation or prohibition on the choice parents have on the child's religious education.⁴⁷ In this case nothing was found to be unconstitutional.

More important is the way the *Anayasa Mahkemesi* evaluates the headscarf (*türban*) cases in educational establishments within the context of laicism. The first decision reached on this issue was in 1989, annulling the amendment to the law lifting the ban on the wearing of the headscarf in such institutions.⁴⁸ The Court opined that,

[T]he fact that the wearing of the headscarf, giving a woman the appearance of being anachronistic, is gradually spreading, has obvious drawbacks for the Republican reforms and the principle of laicism. ... A laic legal order, laic education and laic administration cannot be thought of as separate from one another. ... Educational establishments cannot be set up contrary to the requirements of article 42 of the Constitution ... and higher education institutions are no exception. To separate students on religious affiliation by symbols indicating which belief they support in classes, laboratories, clinics, polyclinics and corridors, where students work

⁴⁵ 2000/86; 2000/50; 12.12.2000 *Resmi Gazete* No: 24268; 22.12.2000, applying directly the Constitution.

⁴⁶ See Koçak & Öricü, supra note 40.

⁴⁷ 1997/62; 1998/52; 16.9.1998 *Resmi Gazete* No: 24206; 30.10.2000; and AMKD: 36, 2001, 198.

⁴⁸ This is usually referred to in Turkey as the 'First *Türban* Decision'. See, 1989/1; 1989/12; 7.3.1989; *Resmi Gazete* No: 20216; 5.7.1989. The appellant was the President of the Republic.

together in a spirit of friendship and solidarity to reach the truth by being educated and applying scientific methods, would lead to conflict and hinder co-operation.

Later in 1991 in a second case⁴⁹ the *Anayasa Mahkemesi* decided that the regulation bringing 'freedom of attire' in higher education institutions did not apply to religious dress and 'covering the neck and hair with a scarf or *türban* due to religious belief', and that this regulation was unconstitutional and should be annulled. According to the Court, any symbol representing religious belief should be kept out of educational institutions and allowing the wearing of the *türban* in the universities cannot accord with a laic scientific environment.

The reasoning of the *Anayasa Mahkemesi* has also been accepted by the ECtHR⁵⁰ and the ban on the wearing of the *türban* in public institutions and educational establishments is regarded as essential to laicism, a *sine quo non* of democracy.

(c) *Sexual equality*

Equality before the law is regarded as one of the bases of the Turkish Republic and is the only fundamental right cited among the general principles in Part I of the Constitution as article 10 – an article widely referred to in Court.

For example, adultery used to be a punishable offence in the Turkish Penal Code in addition to being a ground for divorce in the Civil Code.⁵¹ In 1996 the *Anayasa Mahkemesi* annulled section 441 of the then Penal Code concerning adultery of the husband, finding a violation of article 10 of the Constitution on equality.⁵² Section 440 of the same Code regulated adultery of the wife saying that the penalty for a wife's adultery is imprisonment for from six months to three years. The same applied to a man who had sexual intercourse with a woman knowing that she was married. However, section 441 had additional conditions for a husband's adultery. Sexual intercourse, sufficient in the case of a wife's adultery, was not sufficient in the case of a husband.⁵³ This distinction in the requirement of fidelity was found unconstitutional, there being no legitimate reason to justify it, spouses being under the same obligation to be faithful to each other. Though there were references to the International Covenant on Civil and Political Rights, the ECHR and the Convention on the Elimination of All Forms of Discrimination Against Women, the decision was based solely on article 10. The Court adopted a purely 'legalistic approach'.

In cases related to equality in family law, one decision of the *Anayasa Mahkemesi* illustrates how cultural exceptionalism supported by the Constitution is the basis. Until amended in 2002, the Turkish Civil Code, modelled on the Swiss Civil Code, regarded the

⁴⁹ Referred to in Turkey as the 'Second *Türban* Decision'. See, 1990/36; 1991/8; 9.4.1991 *Resmi Gazete* No: 20946; 31.7.1991. The appellant was the *Sosyal Demokrat Halkçı Parti*, the main opposition party.

⁵⁰ The Grand Chamber of the ECtHR, following the Chamber decision of 29.6.2004, decided in the *Leyla Şahin v. Turkey* on 10.11.2005 that such a ban can be regarded as 'necessary in a democratic society' and that those who agree to undertake university education are to be deemed as having agreed to accept the principles of laicism, one of the fundamental principles of the state. Turkey was found not to violate the Convention.

⁵¹ See Özücü, E (1987-88) 'Turkey: Reconciling Traditional Society and Secular Demands', in (26) *J.FAM.L.* 221-236 at 230

⁵² 1996/15; 1996/34; 23.9.1996; *Resmi Gazete* No: 22860; 27.12.1996; 246.

⁵³ He must have lived with another unmarried woman as if she were his wife either in his marital home or a place known to others. Only in this case would they both be imprisoned for from six month to three years.

residence of the husband as the residence of the wife, and the court of his residence the competent court in divorce cases brought by either spouse. This provision was challenged as creating inequality for the wife and violating her freedom of choice of residence. The Court held:

Some rights of individuals have been transferred to the family unit. ... Public interest justifies this regulation. Rights can be limited for public interest, public morality, public health and other special grounds mentioned in the pertinent article, when these limitations are proper in a democratic society.⁵⁴

As to the right to one's surname, the wife takes the surname of the husband upon marriage. An option entered the then Turkish Civil Code in 1997, when section 153 (now 187) allowed the married woman to use her maiden name before that of her husband's surname, upon her written request.⁵⁵ A decision of the *Anayasa Mahkemesi* however, again helps us to reflect on the general attitude to equality between the spouses. Although the lower court saw the claims of violation of articles 10, 12, and 17 of the Constitution related to equality, personality rights and rights to development of personality, as serious, the *Anayasa Mahkemesi*, following a very conservative interpretation of the family and the place of the woman in it, and referring to long established traditions, saw no violation of the articles mentioned.⁵⁶ It took four years to publish this decision, which indicates how the *Anayasa Mahkemesi* finds it extremely difficult to pass judgement in cases related to equality of the sexes. Here again exceptionalism overrides universalism.

The same Court also decided on the issue of financial equality in marriage. A provision of the then Civil Code stated that a wife could only become a guarantor to her husband and a debtor to third parties in the interest of the husband with permission from a judge.⁵⁷ The claim before the *Anayasa Mahkemesi* was that this provision, which appeared at first glance to protect the rights of a wife, actually treated her as a minor since the husband in the same position did not need permission. The *Anayasa Mahkemesi* said that,

The aim of this provision is to protect the wife from entering into obligations unwittingly as she may not know the consequences, the scope and the aim of this debt. She may enter such an obligation under the husband's influence. This limitation is to protect the unity of the family and is in the public interest.⁵⁸

There were dissenting opinions stating that any discrimination based on sex was illegal and that national provisions should be viewed in the light of the Convention on the Elimination of All Forms of Discrimination Against Women, not only on the Turkish Constitution.

⁵⁴ 1993/23; 1993/55; 2.12.1993; *Resmi Gazete* No: 23917; 25.12.1999.

⁵⁵ This is still the case in the amended Civil Code (2002).

⁵⁶ 1997/61;1998/59; 29.9.1998; *Resmi Gazete* No: 24937, 15.11.2002.

⁵⁷ This requirement has been removed from the amended Civil Code (2002).

⁵⁸ 1997/27;1998/43; 30.6.1998; *Resmi Gazete* No: 23934; 15.1.2000; and 1999/47; 1999/46; 28.12.1999; *Resmi Gazete* No: 23989; 10.3.2000.

CONCLUDING REMARKS

The form and characteristics of the Turkish State are at present static. Within such a framework there is little flexibility or possibility for judicial interpretation to change the existing normative legal order or the officially accepted value system, though, some significant additional Constitutional and legislative amendments are on the way. As far as the *Anayasa Mahkemesi* is concerned, these amendments aim to have an impact on its composition, election of members, procedures and on those who can apply for abstract norm control. The legislature sees a conflict of power between itself and the Court, and resents the Court's role, which it perceives as correcting legislative decisions. Few of the restrictions on its activities are to be removed.

The judicial response to social and legal problems in Turkey is highly national, the system remaining mainly self-referential, the target audience being domestic. Though significant developments in the fields of democracy and fundamental rights and freedoms, and review of constitutionality have found their way into Turkish law, the last with the 1961 Constitution, the *Anayasa Mahkemesi* acts more as a protector of the system. Nevertheless, the Turkish Court has been labelled as one of the most activist courts in the world.⁵⁹

As judges begin to regard the member states of the EU as the audience to impress, in addition to the domestic audience of various shades, references to decisions of courts of foreign jurisdictions and the ECtHR and the ECJ may become more explicit and persuasive. Nevertheless, today, Turkish social and political needs and the cultural context, but above all the restraints posed by the Constitution, continue to carry more weight than any other consideration.

⁵⁹ Hazama, Y (1996) 'Constitutional Review and the Parliamentary Opposition in Turkey' *The Developing Economies*, XXXIV-3, 324-325.