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CONSTITUTIONAL REVIEW AND THE PARLIAMENTARY OPPOSITION IN TURKEY

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I. INTRODUCTION

A characteristic of the Turkish Constitutional Court is its open access to the parliamentary opposition and its high degree of independence from the executive branch of government. This paper will show that in Turkey constitutional review provides opportunities for the parliamentary opposition to compensate for its legislative weakness. In other words, constitutional review is the opposition's second chance to defeat some of the government's bills.

A. *Political Background*

Transition to a multiparty system in 1946. The political background for the introduction of constitutional review in Turkey can at least be dated back to an earlier attempt at democratization immediately after the Second World War. In the 1946 general election Turkey made a transition to a multiparty system from the one-party system dominated by the Republican People's Party (Cumhuriyet Halk Partisi; hereafter RPP) founded by Kemal Atatürk. The electoral outcome gave the governing RPP a bare majority to remain in office, but in the following 1950 general election the RPP had to give way to the emerging Democratic Party (Demokrat Parti; hereafter DP), which had originated from a splinter group that broke off from the RPP.

Tyranny of the majority ends in a coup. Turkey's democratization attempt, while bringing about a change of governing parties, did not engender institutionalized

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relations between the government and opposition. The DP, which won consecutive general elections in 1954 and 1957, grew increasingly authoritarian (as well as anti-secular) while in government and began to use repression on the parliamentary and extra-parliamentary opposition, especially on the RPP.[1] The political turmoil culminated in 1960 when student-led protest movements prompted the DP government to declare martial law in Istanbul and Ankara. In Ankara the army cadets joined the anti-government demonstration. The government ordered the military to fire on the demonstrators, but it refused and instead toppled the government in a coup.

Shared constitution-making. The military temporarily ruled Turkey from 1960 to 1961 during which time it participated with civilians in the process of drafting a new constitution. The bicameral Constitutional Assembly, composed of equipotent military and civilian chambers, was created in 1960. Members of the civilian chamber (Assembly of Representatives) were put into office by indirect election, cooptation, or quota, and they represented various functional groups as well as political parties excluding the banned DP. When the military chamber (National Unity Committee) did not entirely approve of the text of a bill which the civilian chamber had passed, or when the civilian chamber did not approve of the changes which the military chamber made to a bill's original text, the Constitutional Assembly would hold a joint session to vote on the text. Since the civilian chamber had more members than the military chamber, the former held the advantage in such voting [5, p. 31].

Constitutional rule against majority tyranny. The 1961 constitution was formulated in reaction to the DP era when the government was able to infringe upon the supremacy of the constitution and basic human rights. The 1961 constitution was distinct from the previous 1924 constitution because of the relative importance it placed on the following. First, the notion of democracy shifted from majority rule to pluralism. The 1961 constitution advocated pluralistic democracy based on the principles of (1) the supremacy of the constitution, (2) the separation of powers and a system of checks and balances, and (3) the structural development of a pluralistic society. Second, it also sought to expand and to strengthen basic human rights. Third, the concept of social state held the state responsible for securing social peace and justice while also justifying active intervention by the state in the social and economic activities of the nation [5, pp. 17–22]. This constitution has been regarded as the most liberal in Turkish history.

It was this constitution that for the first time in Turkey adopted constitutional review and established the Constitutional Court. The major features of Turkish

[1] The DP government confiscated an important part of the RPP's real estate in December 1953, modified law on press to increase control over newspapers in June 1956, and banned RPP activities for three months in April 1960.

constitutional review, as will be elaborated later, are the practice of abstract (besides concrete) review and the referral powers given to the major part of the parliamentary opposition. In the case of abstract review, the parliamentary opposition can ask the Constitutional Court to annul a constitutionally dubious bill which the governing party passed in Parliament. A resultant nullity decision by the court would not only embarrass the incumbent government but in some cases could force it to modify, if not revamp, its policy.

Political instability and a new constitution. The 1961 constitution, however, survived for no more than two decades. In the late 1970s political violence between the right and left escalated. The military in September 1980 intervened and declared martial law nationwide. The military detected defects in the 1961 constitution which it said had led to a divided Parliament and weak governments as well as to political violence associated with proliferating political groups and trade unions. The new leadership then monopolized the drawing up and promulgation of a new 1982 constitution. In the new bicameral Constitutional Assembly, the military chamber (National Security Council) had the power to reject or amend the text which the civilian chamber (Consultative Assembly) had approved, and those rejections or amendments did not have to be sent back for review to the civilian chamber [5, p. 31].

In comparison with the 1961 constitution, the 1982 constitution (1) was more casuistic or specific in details, (2) was more difficult to change, (3) was more transitional or temporary, (4) shifted the balance between authority and freedom towards the former, (5) strengthened the executive branch of government, (6) avoided deadlocks in the political decision-making mechanism, and (7) was less lenient towards participatory democracy [5, pp. 35–44]. In sum, the 1982 constitution was designed to support a strong central government at the expense of the greater political freedom envisaged in the previous constitution.

Institutional continuities. Given all restrictive clauses included in the 1982 constitution, the general structure of the 1961 constitution remained in tact and almost all of the pre-1980 legislative, executive, and judiciary institutions resumed functioning after transition to civilian rule in 1983. Constitutional review also has been exercised under the 1982 constitution. The powers of referral became more limited than those under the 1961 constitution, but they are still wider than most such powers provided for in European constitutional reviews (see below).

B. *Empirical Approach to Constitutional Review*

Legal approach. Research into constitutional review in Turkey, as in other countries until recently, has been mostly concerned with normative issues in legal studies. Most of the literature in Turkey either has introduced normative theories or models of judicial review to explain the Turkish system in those terms or has compared Turkey with other countries in terms of institutional characteristics of consti-

tutional review.[2] While it might be successful in its own right, this literature has rarely investigated how the Turkish system has functioned in practice.

Political-science approach. Outside of Turkey, political scientists recently have come to recognize their lack of research into judicial review. Their new-found interest in judicial review, and in constitutional review in particular, apparently stems from the scholarly interest in judicial policymaking or the judiciary as a policymaker [12] [6] [11]. The court, however, does not play an active role out of its own will. In the case of constitutional review, the activism of the court depends primarily on the extent of access to constitutional review and of judicial independence.

Institutional characteristics. In brief the major institutional characteristics of Turkish constitutional review include (1) the practice of abstract and concrete review, (2) access to review by the largest opposition parliamentary group[3] and one-fifth of the members of Parliament as well as the president and the prime minister, and (3) the relative independence of the judiciary which dominates the appointment process of the judges. While constitutional review is by definition exercised over the legislation of Parliament, in parliamentary systems as like that in Turkey, the Constitutional Court in practice can pass judgment on the decisions of the executive branch of government which in effect controls the legislature.

Abstract review. Constitutional review in general consists of concrete review and abstract review. In the former the Constitutional Court reviews the constitutionality of the law as applied to actual cases while in the latter the court reviews the constitutionality of the law directly. It is through abstract review that the opposition can challenge government legislations. Table I shows those European countries where abstract judicial review was exercised as of 1990. In Turkey, where both concrete and abstract review is exercised a posteriori, referral for abstract review can be made within sixty days after the law is put into effect. The Constitutional Court can nullify the whole or part of the law, reject the referral, or sparingly decide that no decision needs to be made. The decision of the Constitutional Court comes into effect on the day the decision, supplemented with a statement of reasons, is published in the official gazette.[4]

Access. The leader of the largest opposition parliamentary group and one-fifth of the parliamentarians as well as the leader of the governing parliamentary group,

[2] See, for a recent example, Kaboğlu [2].

[3] Parliamentary groups are the formal unit of legislative activities in the Turkish Parliament as is generally the case in other parliamentary systems. (Strictly speaking, the literal translation of "parliamentary group" in Turkey is "political party group.") Parliamentary posts as well as time in the General Assembly will be allocated to parliamentary groups in proportion to the number of seats each group holds.

[4] Out of the total of ten court decisions in 1990, for instance, five decisions were published in the official gazette by the year which followed the year of referral [10, 1992 and 1993 editions].

TABLE I

STRUCTURE AND MANDATE OF EUROPEAN COURTS THAT EXERCISE "ABSTRACT" REVIEW

	France (1958)	W. Germany (1951)	Austria (1920/1945)	Spain (1980)	Turkey (1962)
Institution	Conseil Constitutionnel[a]	Bundesverfassung-sgericht	Verfassungsgericht-shof	Corte Constitucional	Anayasa Mahkemesi
Number of members	9	16	14	12	11
Appointing authorities	President (3) Pres. of the National Assembly (3) Pres. of the Senate (3)	Bundestag (8) Bundesrat (8)	Federal govt. (8) Nationalrat (3) Bundesrat (3)	Congress (4) Senate (4) Govt. (2) Judiciary (2)	President (11)
Length of term	9 years	12 years	Until 70 years of age	9 years	Until 65 years of age
Requisite qualifications	None	6/16 must be federal judges; others must be qualified to be German judges	8/14 must be judges functionaries, or law professors; others must be lawyers or political scientists	All must be judges, lawyers, or law professors with at least 15 years experience	Candidates for 9 posts are nominated by and from the courts and by the education council from universities; two are public officials or lawyers
Referring authorities	President Pres. of the National Assembly Pres. of the Senate 60 deputies 60 senators	Fed. govt. Länder govts. 1/3 of Bundestag	Fed. govt. Länder govts. 1/3 Nationalrat 1/3 lower houses of Länder	Prime minister Pres. of Parliament 50 deputies 50 senators Executives Autonomous region	President Prime minister Major opposition 1/5 of Parliament[b]

TABLE I (Continued)

	France (1958)	W. Germany (1951)	Austria (1920/1945)	Spain (1980)	Turkey (1962)
A priori review	Yes	No	No	No[c]	No
A posteriori review	No	Yes	Yes	Yes	Yes

Sources: Adopted from Stone [7, p. 45, Table 4.1]; Turkish Constitution.
Note: Excluding Portugal where the Constitutional Court was established in 1983. The institutional characteristics of constitutional review listed here are as of 1990.

[a] The Constitutional Council of France, which exercises constitutional review, functions in practice more as a judiciary rather than as a legislative body.

[b] The 1982 constitution changed the previous bicameral national legislature to a unicameral one in order to hasten the legislative process.

[c] Abolished in 1985.

who is usually the prime minister, and the president have the right to appeal to the court (Turkish Constitution; hereafter TC, Article 150). Since the prime ministers have never and the presidents have rarely opened a suit over the constitutionality of laws, it is the opposition forces (either the largest opposition party or one-fifth of the parliamentarians, usually in opposition) that have made the most of constitutional review in Turkey. In terms of access, Turkish constitutional review is more open to the opposition's appeals than are the German and Austrian counterparts, where a ratio of one-third of the members of the relevant legislature is required, but is less open than are the French and Spanish review processes; the required ratio of member of the relevant legislature is 60/577 for the French lower house and 60/319 for the upper house, while it is 50/350 and 50/208 for the Spanish lower and upper houses, respectively (see Table I).

Relative independence. The relative independence of the Constitutional Court vis-à-vis the executive and the legislative branches of government can be discerned by the recruitment and tenure of the members of the court and by the requisite qualifications for membership. In European countries excluding Turkey it is either the executive branch of government or the legislature, controlled by the government party,[5] that appoints the members. In either case, it is the party in power that ultimately decides the members who fill the vacancies. In Turkey, however, none of the political parties play any institutional role in the appointment process of the Constitutional Court.

In Turkey all the eleven regular and four substitute members of the Constitutional Court are appointed by the president, whose political independence is constitutionally guaranteed.[6] However, the president's authority to appoint court members is restricted in that he must (1) choose seven of the eleven regular members and all of the four substitute members from candidates nominated by and from the judges of the higher courts,[7] with three candidates nominated for each of the seven regular and four substitute posts, and (2) choose an eighth member from three candidate who are law professors nominated by the Higher Education Council; only for the remaining three posts can the president appoint bureaucrats or lawyers at his own discretion (TC, Article 146). Once appointed a Constitutional Court member keeps his post until the retirement age of sixty-five, unless convicted of an offense which terminates his position in the legal profession or because of ill health (TC, Article 147).

[5] All the countries in Table I are parliamentary democracies, in which the governing party or parties control(s) in general the majority of the legislature.

[6] "The President-elect, if a member of a party, shall sever his relations with his party and his status as a member of the Turkish Grand National Assembly shall cease" (TC, Article 101) [1, p. 46].

[7] They are the High Court of Appeals (2), the Council of State (2), the Military High Court of Appeals (1), the High Military Administrative Court (1), and the Audit Court (1); the number in the parentheses indicating the number of posts allocated for that court.

The above institutional characteristics of the Turkish Constitutional Court have guaranteed it a high degree of independence. As one leading Turkish legal scholar commented:

> In its history of more than a quarter of a century, the Turkish Constitutional Court has displayed a very high degree of independence vis-à-vis the legislative and the executive branches. Both the extent of its powers and the independence accorded to it by the Constitution make the Turkish Constitutional Court one of the strongest in Europe and an effective guarantee for the supremacy of the constitution. [4, p. 206]

In sum, Turkish constitutional review exercised by the highly independent Constitutional Court in effect invalidates the governing party's/parties' numerical advantage in legislation and opens a rare opportunity for the parliamentary opposition to restrain the abuse of majority power.

II. METHODOLOGY

Data. The period of this study runs from 1964 through 1993, but the 1984–92 period was chosen for more intensive analysis for the following reasons. First, the data for the period of the 1961 constitution are not directly comparable with those for the period of the 1982 constitution since the institutional conditions for constitutional review as well as the contents of the constitution changed. This situation made it more worthwhile to analyze constitutional review under the present 1982 constitution. Second, after the introduction of the 1982 constitution, there were no cases for constitutional review in 1982 and 1983 when Parliament remained closed down under the military government (1980–83). Third, at the time this study was written, the latest volume of records available for intensive analysis contained data as of 1992.

For the 1984–92 period the author recorded from *Anayasa Mahkemesi kararlar dergisi* [The record of Constitutional Court decisions] [10, various issues], the name and the review number of the law, the articles of the constitution which the referring authority cited as reasons for referral, and the court's decisions as well as the reasons thereof into a computer text file. For the 1964–79 and 1993 periods the author relied on more aggregate tabulated data prepared by the Constitutional Court. The court kindly provided a copy of the above data to the author in August 1994.

Analysis. The author used the Statistical Analysis System (SAS) to classify all the data into several variables and later to apply them to his statistical analysis. The analysis examined (1) what portion of laws reviewed were nullified by the court, (2) which referring authorities and which referral reasons brought about a larger percentage of nullity decisions, and (3) what nullified laws were the most controversial and what implication their nullification had for Turkish politics.

III. COURT DECISIONS

A. *Overview*

Frequent review. There are more nullity decisions, as well as more cases of abstract constitutional review, in Turkey than in other European countries where the same review system exists. Since 1964 the Turkish Constitutional Court on an annual average has handed down 12.8 decisions, out of which 61 per cent or 7.8 nullified the law (Table II). In (West) Germany, for instance, between 1951 and 1992 there were 65 abstract reviews[8] finalized, or 1.6 decisions on an annual average [3, p. 473, Table 1]. In Spain between 1981 and 1985 the annual average number of a posteriori abstract reviews was approximately 8 [7, p. 47].[9]

Only in France is abstract review exercised as frequently as in Turkey although nullity decisions are fewer. Between 1974[10] and 1990 there were 169 cases (9.9 annually) of abstract review finalized, out of which 80 (4.7 annually) led to the amendment of the bill [8, p. 449, Table 2]. In France, however, concrete review is not exercised. Moreover, abstract review is exercised a priori. It would not be too wrong to say therefore that the Constitutional Council of France, which exercises constitutional review, functions in practice not as a judiciary but rather as a legislative body [7, p. 47]. Taking these into account, among those European countries which have "ordinary" constitutional courts,[11] Turkey stands out with the most frequent reviews and nullity decisions.

Constitutional change and consistency of review. Turkey's 1982 constitution, which sought to strengthen the government's authority for reasons the author explained earlier (see Subsection "Political Background" above), has restricted the referring authorities. The 1961 constitution had granted referring power to the president, parliamentary groups[12] in either house, political parties which have parliamentary groups in the lower house, political parties which obtained 10 per cent of the valid votes in the most recent general election, one-sixth of the members of either house, and, when it concerned their existence or duties, to the Supreme Committee of Judges, the Supreme Court, the Council of State, the Supreme Military

[8] In (West) Germany constitutional review has been exercised only a posteriori.

[9] The Spanish court also had the power to review a priori but that power was rescinded in 1985 since it was considered to be an illegitimate affront to parliamentary sovereignty [7, p. 47].

[10] Although constitutional review in France has been in practice since 1958, beginning in 1974 there was a huge increase in the number of referrals, decisions, and rulings of unconstitutionality partly because a 1974 constitutional amendment granting the right of referral to parliamentarians (already shown in Table I) radically expanded the system's capacity to generate review [8, p. 448].

[11] Those which exercise both abstract and concrete review a posteriori.

[12] The 1961 constitution allowed political parties which held at least ten seats in Parliament to form a parliamentary group whereas the 1982 constitution required twenty seats for any parliamentary group to be formed.

TABLE II

MEAN NUMBER OF DECISIONS BY THE CONSTITUTIONAL COURT, 1964–93

Periods	Nullity[a]	Rejection	Total
1964–79 (A)	8.1	6.4	14.5
1984–93 (B)	7.3	2.9	10.2
Difference[b] (A – B)	0.8	3.5**	4.3*
1964–93	7.8	5.0	12.8

Source: Compiled from [10, various issues] by the author.

[a] Including partial nullity.

[b] The *t*-test level of significance:

* $p < 0.10$.

** $p < 0.01$.

Court, and universities (TC, Article 149). The 1982 constitution limited the number of referring authorities, and the annual average number of referrals decreased from 14.5 during the 1964–79 period to 10.2 during the 1984–93 period. The *t*-test, when applied to the above data, shows that the difference between the two means was statistically significant at a level of 0.10.[13]

The 1982 constitution, however, did not change the essential features of the Turkish Constitutional Court. In the 1984–93 period, an approximate annual average of ten cases were reviewed out of which more than 70 per cent were nullified (see Table II). This shows that Turkey still ranks the highest in Europe in the number of referrals and nullity decisions. More important is the minimal impact that the change of constitution had on nullity decisions. The annual average number of nullity decisions was 8.1 and 7.3 in the 1964–79 and 1984–93 periods, respectively. The *t*-test, when applied to the above data, shows that there was no statistically significant difference between the two means. In other words, the restriction of referring authorities under the 1982 constitution did *not* lead to the reduction of nullity decisions. This shows that the reduced referrals did not hinder constitutional review of most of the potentially unconstitutional laws.

B. *Referring Authorities*

In terms of referring authorities (Table III), 87.7 per cent of the laws nullified between 1984 and 1992 had been referred by either the largest opposition parliamentary group (75.5 per cent) or one-fifth of the parliamentarians (12.2 per cent),

[13] The 1982 constitution also brought about an institutional change from bicameralism to unicameralism. But the above statistical result shows that the expected tendency of unicameralism to increase the number of referrals, since it prevents bills from being carefully scrutinized by two chambers, was insignificant at most.

TABLE III

REFERRING AUTHORITIES AND THEIR RESULTS, 1984–92

Referring Authorities	Total (A)		Nullity (B)		Nullity Rate (B)/(A) (%)
	Number	%	Number	%	
Largest opposition parliamentary group	54	70.1	37	75.5	68.5
One-fifth of the parliamentarians	16	20.8	6	12.2	37.5
President	7	9.1	6	12.2	85.7
Governing parliamentary group	0	0.0	—	0.0	—
Total	77	100.0	49	100.0	63.6

Source: Compiled from [10, various issues] by the author.
Note: Entries are the numbers and percentages of laws.

who were also in opposition.[14] Constitutional review is thus mostly used by parliamentary oppositions to nullify government-sponsored laws. This is mainly due to the large number of referrals from the opposition and its relatively high rate of success in getting nullity decisions. As many as 90.9 per cent of the referrals which concluded in a court decision have been made by the parliamentary opposition. Although the president, with a success rate of 85.7 per cent, was the most successful in having laws nullified, the largest opposition parliamentary group also won 68.5 per cent of its cases.

C. *Reasons for Referral*

Four types. What are major reasons for referral? Which reasons for referral are more likely than others to be accepted by the court? Referral texts contain a "statement of reasons" written by referring authorities arguing which part of the law in question violates which part of the constitution and why. The author will thus be able to categorize reasons for referral by the article of the constitution that the statement of reasons cited.

The Turkish Constitution consists of a preamble and seven parts. Each part consists of several chapters, each of which contains articles. The articles are numbered consecutively from 1 to 177 throughout the constitution. Table IV shows the reasons, aggregated by part(s) of the constitution. These are (1) general rules, (2)

[14] It is possible for one-fifth of the parliamentarians which include members of the government party to refer to the court, as happened in 1994 under the coalition government of the True Path Party and the Social Democratic Populist Party. But such cases are very rare, and during the 1984–92 period the author did not find any.

TABLE IV

REFERRAL REASONS AND COURT DECISIONS, 1984–92

Reasons for Referral and Part(s) of TC (Article Numbers of TC)	Court Decisions			
	Nullity (A)	Rejection (B)	Total (C)	Nullity Rate (A)/(C) (%)
General rules	159	58	217	73.3
Preamble				
Part 1: General Rules (1–11)				
Rights and duties	116	36	152	76.3
Part 2: Basic Rights and Duties (12–74)				
Separation of powers	126	61	187	67.4
Part 3: Organs of the Republic (75–160)				
Others	14	26	40	35.0
Part 4: Fiscal and Economic Clauses (161–73)				
Part 5: Miscellaneous Provisions (174)				
Part 6: Provisional Articles				
Part 7: Final Provisions (175–77)				
Total	415	181	596	69.6

Source: Compiled from [10, various issues] by the author.
Note: Excluding referrals by the president. Entries are the numbers and percentages of TC articles.

rights and duties, (3) separation of powers, and (4) others, for the opposition's referrals and the court's decisions during the 1984–92 period.

Among the four reasons for referral, (1) general rules, (2) rights and duties, and (3) separation of powers are more likely to induce nullity decisions than (4) others. The chi-square test, when applied, shows that the nullity rate (411 out of 556, or 73.9 per cent) for the aggregate of the first three reasons was higher than the nullity rate (14 out of 40, or 35.0 per cent) for the fourth reason at a 0.000 level of significance. Among the first three reasons for referral, however, there was no statistical difference in their nullity rates. The chi-square test, when applied to the above data, could not reject the null hypothesis that the nullity ratio differed among (1) general rules, (2) rights and duties, and (3) separation of powers.

More specifically, reasons for referral which concluded in nullity decisions can be broken down into articles, or chapters of articles, cited from the constitution. Tables VI and VII aggregate articles *by chapter* while Table V shows articles per se since these articles (excluding the Preamble) belong to single chapters.

General rules. Regarding general rules (Table V), the most frequent article cited in statements of reasons is the "Characteristics of the Republic," which states the secular, social, and democratic nature of the republic. The next two most frequently cited articles are "Equality before Law" and "Legislative Power." In other words,

TABLE V

GENERAL RULES: REFERRAL REASONS FOR NULLIFIED LAWS, 1984–92

Articles[a]	Number
Characteristics of the Republic	33
Equality before Law	24
Legislative Power	24
Preamble	20
Fundamental Aims and Duties of the State	20
Sovereignty	16
Judicial Power	9
Executive Power and Functions	6
Supremacy and Binding Force of the Constitution	5
Integrity of the State, Official Language, Flag, National Anthem, and Capital	2
Total	159

Source: Compiled from [10, various issues] by the author.
[a] Including the Preamble.

those principles of the democratic rule of law as well as of law-making and implementation are major reasons which will bring forth nullity decisions.

Rights and duties. Regarding rights and duties (Table VI), the most frequent chapter of articles cited is "Rights and Duties of the Individual." This chapter in fact consists of articles related only to rights except the article related to penalties. This is primarily because the structure of the constitution is such that whereas the chapter of "Rights and Duties of the Individual" lists the rights accrued to the individual, the chapter of "General Provisions of Fundamental Rights and Duties" conditionally restricts those rights.[15] The large number of cited articles related to "Rights and Duties of the Individual" thus seems to suggest the importance given in constitutional review to the rights, rather than the duties, of the individual.

Separation of powers. Regarding separation of powers (Table VII), the most frequent chapter of articles cited is the "Executive." The main concern of the parliamentary opposition seems to be that the executive should function within the

[15] It is logically true that the "General Provisions of Fundamental Rights and Duties," which are designed to limit the extensive rights acknowledged to the individual in the chapter of "Rights and Duties of the Individual," can be reasons for protecting the rights of the individual. In many practical cases, however, it is difficult to use the chapter of the "General Provisions of Fundamental Rights and Duties" to defend the rights of the individual since that chapter allows the restriction of rights of the individual in such highly abstract terms as in TC, Article 13: "Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution" [1, p. 7].

TABLE VI

RIGHTS AND DUTIES: REFERRAL REASONS FOR NULLIFIED LAWS, 1984–92

Chapters and Articles	Number
Rights and Duties of the Individual	50
Principles Relating to Offenses and Penalties	8
Freedom to Claim Rights	6
Freedom of Religion and Conscience	5
Right to Use Mass Media Other than the Press Owned by Public Corporations	4
Right of Property	4
Personal Inviolability, Material, and Spiritual Entity of the Individual	3
Freedom of Thought and Opinion	3
Freedom of Science and Arts	3
Prohibition of Forced Labor	2
Freedom of Residence and Movement	2
Freedom of the Press	2
Right to Publish Periodicals and Non-periodicals	2
Guarantee of Lawful Judge	2
Others	4
General Provisions of Fundamental Rights and Duties	24
Restriction of Fundamental Rights and Freedoms	18
Nature of Fundamental Rights and Freedoms	2
Prohibition of Abuse of Fundamental Rights and Freedoms	2
Others	2
Social and Economic Rights and Duties	22
Utilization of the Coasts	3
Health Services and Conservation of the Environment	3
Conservation of Historical, Cultural, and Natural Wealth	3
Expropriation	2
Right and Duty to Work	2
Others	9
Political Rights and Duties	20
Right to Vote, to Be Elected, and to Engage in Political Activity	6
Forming Parties, Membership, and Withdrawal from Membership in a Party	6
Obligation to Pay Taxes	6
Principles to Be Observed by Political Parties	2
Total	116

Source: Compiled from [10, various issues] by the author.

limits of duties and authorities defined by the constitution. Also in the chapter of the "Judiciary" the opposition cited articles which prevented intervention into the judiciary, especially by the executive, by providing for the functional as well as recruitment independence of the judiciary and the supremacy and binding force of

TABLE VII

SEPARATION OF POWERS: REFERRAL REASONS FOR NULLIFIED LAWS, 1984–92

Chapters and Articles	Number
Executive	53
Provisions Relating to Public Servants: General Principles	13
Local Administration	6
Integral Unity and Public Legal Personality of the Administration	4
Radio and Television Administration and News Agencies with State Connection	4
President of the Republic: Duties and Powers	3
Administration: Recourse to Judicial Review	3
Duties and Responsibilities, and Guarantees during Disciplinary Proceedings	3
President of the Republic: Oath	2
Formation of Ministries and Ministers	2
Declaration of a State of Emergency on Account of Widespread Acts of Violence and Serious Deterioration of Public Order	2
Rules Relating to the States of Emergency	2
By-laws	2
Others	7
Judiciary	41
Independence of the Courts	7
Decisions of the Constitutional Court	7
Judges and Public Prosecutors	5
The Constitutional Court: Functions and Powers	4
Audit Court	4
Security of Tenure of Judges and Public Prosecutors	2
The Constitutional Court: Organization	2
The High Court of Appeals	2
Council of State	2
Others	6
Legislature	32
Authorization to Enact Decrees Having the Force of Law	11
Functions and Powers of the Grand National Assembly of Turkey: General Provisions	9
Introduction and Debate of the Laws	5
Others	7
Total	126

Source: Compiled from [10, various issues] by the author.

the court decision. In the chapter of the "Legislature" the opposition cited those articles stipulating that legislative power lies in Parliament or that the power to issue a decree having the force of law will be delegated for a limited period and sphere to the Council of Ministers by Parliament upon the passage of the empowering law.[16]

IV. CASES OF GOVERNMENT DEFEAT: NULLIFIED LAWS

What kind of laws are opposed most vehemently by the parliamentary opposition and which are successfully nullified by the court? More specifically, does the parliamentary opposition refer to the Constitutional Court technical or nominal defects in the law with the primary intention of embarrassing the government? Or do they refer to the court substantive problems found in the law? To answer these questions, the author first classified the nullified laws into three groups by the type of referral reasons which were explained in the previous section, and then chose those laws referred to the court for the three most frequent referral reasons which were later nullified (Tables VIII–X). They are, in each of the three types of referral reasons, those laws or amendment laws which brought about major reaction from the parliamentary opposition and which were eventually nullified. In all nine cases the court approved at least one of the referral reasons for unconstitutionality. All nine laws were legislated when the Motherland Party (Anavatan Partisi), economically liberal and politically conservative, was in government (1983–91).

A. *General Rules*

Police-law amendment. Table VIII shows those nullified laws which were referred to the court for reasons related to the general rules of the constitution. In legislating the Law for Amending the Law of the Power and Duties of the Police, the Motherland Party government aimed at strengthening police authorities in order to increase internal security. The Motherland Party government's keen interest in a strong and effective police is reflected in the fact that as of 1993 out of the total twenty-four amendments made to the original law since its legislation in 1934, thirteen amendments were made by the Motherland Party government [9].

Some of the articles of the police-law amendment were judged to violate TC, Articles 2 and 5 for allowing the police to restrict for its own subjective reasons the freedom of the individual and to intervene in private life for the sake of public order, which was defined in highly abstract terms. Other articles of the amendment also violated TC, Article 10 since they allowed the police to interrogate those sus-

[16] The cabinet is able to issue a decree having the force of law upon the legislation of an empowering law which defines the purpose, scope, principles, and operative period of the decree (TC, Article 91).

TABLE VIII

LAWS NULLIFIED: GENERAL RULES

Laws (Review Number)[a]	Referral Reasons[b]
Law for Amending the Law of the Power and Duties of the Police (1986/27)	P, 2, 5, 6, 7, 8, 9, 10, 11
Law for Amending the Electoral Law and the Political Parties Law (1988/18)	P, 2, 5, 6, 7, 10, 11
Law for Amending the Land Registration Law and the Village Law (1986/24)	P, 2, 3, 7, 8, 9, 11

Source: Compiled from [10, various issues] by the author.

[a] The number given by the Constitutional Court to its decision. The first four digits represent the year and the next two digits the cumulative number of decisions.

[b] Articles of the constitution which the law in question allegedly violated. Excluded are referral reasons which were not related to the general rules. Underlined are referral reasons approved by the court in its nullity decision. "P" represents the Preamble.

pects already under arrest or in prison for other allegations, thus denying equality before the law for those who were arrested or imprisoned compared to those who were not.

Electoral-law and political-party-law amendment. The Law for Amending the Electoral Law and the Political Parties Law changed the date of general local elections from "once every five years," stipulated both by the constitution and the electoral law, to "an October Sunday in every five years." Given that the most recent general local elections were held on March 25, 1984, the amendment required the next general local elections to be held in either October 1988 or October 1989, which would deviate by half a year from the constitutionally required date of March 25, 1989. In addition, the amendment provided that "which Sunday of the October" would be determined not by law but "by a Parliament decision."

Some articles of the amendment law were judged to violate TC, Articles 2, 5, and 6 since the above changes neglected the principles of the rule of law, democracy, and the supremacy of the constitution. Other articles of the law were also judged to breach TC, Article 11 since it violated the right to vote as well as to be elected by making it procedurally difficult for independent candidates to run for and to be elected in mayoral elections.

It cannot be completely denied that the amendment laws originated mainly from the dimming electoral prospects for the Motherland Party. Although in the 1983 general election the Motherland Party recorded a landslide victory with 45 per cent of the votes and 53 per cent of the seats, in the following 1987 general election while still keeping a parliamentary majority, it saw the votes it gained fall to 36 per cent. This was partly because the mass public felt it could no longer bear the burden

TABLE IX

LAWS NULLIFIED: RIGHTS AND DUTIES

Laws (Review Number)[a]	Referral Reasons[b]
Law for Amending the Law of the Power and Duties of the Police (1986/27)	12, 13, 17, 19, 20, 21, 23, 26, 27, 35, 37, 38
Law for Amending the Law for Protecting the Children from Hazardous Publications and for Amending the Turkish Penal Law (1987/04)	13, 14, 17, 25, 26, 27, 28, 29, 31, 38, 63
Law for Combating Terrorism (1992/20)[c]	13, 17, 19, 26, 27, 35, 36, 38

Source: Compiled from [10, various issues] by the author.

[a] The number given by the Constitutional Court to its decision. The first four digits represent the year and the next two digits the cumulative number of decisions.

[b] Articles of the constitution which the law in question allegedly violated. Excluded are referral reasons which were not related to rights and duties. Underlined are referral reasons approved by the court in its nullity decision.

[c] Legislated in 1991.

of the economic stabilization policy which the Motherland Party government had taken over from the outgoing military government in 1983.

It was clear that in the constitutionally prescribed March 1989 general local elections the voting rate for the Motherland Party would decrease further. Thus it seems that the party tried to minimize the erosion of its public support by carrying out the pending general local elections half a year earlier without explicitly violating the constitution. The Motherland Party would also have liked to obstruct independent candidates, who were more powerful in local than general elections. The Motherland Party was formed in 1983 and thus had yet to develop its local organizational base.

Land-law and village-law amendment. The Law for Amending the Land Registration Law and the Village Law was judged to violate TC, Article 7 since it infringed upon the legislative power of Parliament by conferring on the cabinet the power to decide exceptional conditions under which the rules for estate sales to foreign countries or foreigners could be implemented. By this amendment the Motherland Party government would have not only exercised enormous patronage for land sale approvals but also consolidated political support from the rentier sector which had been developing rapidly since 1980 under economic liberalization.

B. *Rights and Duties*

Police-law amendment. Table IX shows those nullified laws which were referred to the court for reasons related to rights and duties. Certain articles of the Law for

Amending the Law of the Power and Duties of the Police (the same law as in Table VIII) was also judged to violate TC, Articles 13 and 19 since an excessive increase in police authority might well lead to the infringement of basic human rights. As the author has seen above, the amendment also violated those general rules related to basic human rights.

Publication-law and penal-law amendment. The Law for Amending the Law for Protecting the Children from Hazardous Publications and for Amending the Turkish Penal Law was intended to tighten control over legally undefined "hazardous" publications[17] for youth under the age of eighteen. Some of the articles of the amendments were judged to violate TC, Article 28 for endangering the freedom of publication since they imposed three times greater penalty on a repeated "crime." The amendments were legislated just prior to the November 1987 early general election, which points to a possible link between the amendments and a political appeal to the religious segment of the society.

It is well known that the largest faction of the Motherland Party consists of religious conservatives some of whom were former members of the defunct religious National Salvation Party (Millî Selâmet Partisi).[18] The first chairman and former prime minister, Turgut Özal, was a believer in the Nakşibendi sect of Sunni Islam. The party thus had a strong constituency in religious voters. The party, however, did not monopolize the religious votes but was competing for them with the more religious Welfare Party (Refah Partisi). Eventually in the 1987 general election, the Motherland Party is believed to have succeeded in receiving block votes from most of the domestic Islamic groups.

Anti-terrorism law. The Law for Combating Terrorism conferred the state with greater authority to prosecute individuals and groups suspected of committing "terrorism." The suspects would also be tried in the State Security Court instead of the normal criminal court. This law, introduced in reaction to the increasing militancy of the Kurdish Workers' Party (PKK), aroused fears and criticism within the society that the law in the name of combating terrorism violated basic human rights. This law, which was unpopular because of its anti-democratic nature, later became one of the first to be amended under "democratic reform" by the coalition government formed between the True Path Party (Doğru Yol Partisi) and the Social Democratic Populist Party (Sosyaldemokrat Halkçı Parti), which succeeded the Motherland Party government following the October 1991 early general election.

Different articles of the law were judged: (1) to violate TC, Articles 13 and 36 since they limited to three at most the number of attorneys a defendant was allowed

[17] Both the original and the amended laws provided that publications subject to this law would be decided by the committee dominated by representatives of government ministries.

[18] In 1981 the military government disbanded the party together with the other political parties. Following the transition to civilian rule in 1983, the party was revived with a new name, the Welfare Party.

TABLE X

LAWS NULLIFIED: SEPARATION OF POWERS

Laws (Review Number)[a]	Referral Reasons[b]
Law for Approving the Decree Having the Force of Law for Amending the Law of Judges and Prosecutors and Amending the Law of the Education Center for Judge and Prosecutor Candidates (1990/30)	91, 125, 138, 139, 140, 143, 144, 145, 146, 148, 154
Decree Having the Force of Law for Amending the Municipality Law (1989/07)	87, 91, 103, 104, 127, 128 138, 153
Law for Amending the Empowering Law (1990/02)	87, 91, 113, 128, 130, 133

Source: Compiled from [10, various issues] by the author.

[a] The number given by the Constitutional Court to its decision. The first four digits represents the year and the next two digits the cumulative number of decisions.

[b] Articles of the constitution which the law in question allegedly violated. Excluded are referral reasons which were not related to separation of powers. Underlined are referral reasons approved by the court in its nullity decision.

to have while the Turkish penal procedural law put no such limit, thus denying the freedom of claiming one's own rights; (2) to violate TC, Article 17 since they provided that those who committed a crime during the course of implementing the anti-terrorism law could be indicted without being arrested, thus allowing those who committed torture to be left at large until they were convicted; and (3) to violate TC, Articles 35 and 38 since they allowed the state to confiscate the property of the criminal thus denying his/her property rights as well as breaching the constitutional prohibition of confiscatory penalties in particular.

C. *Separation of Powers*

Law for judges-and-prosecutors-law amendments. Table X shows those nullified laws which were referred to the court for reasons related to the separation of powers. One article of the Law for Approving the Decree Having the Force of Law for Amending the Law of Judges and Prosecutors and Amending the Law of the Education Center for Judge and Prosecutor Candidates was judged to violate TC, Article 91, which regulated decrees having the force of law. The court pointed out that the Empowering Law which extended the duration of a previously legislated Empowering Law on which the above decree depended had been nullified by the Constitutional Court on the day the Law for Approving the Decree, after being legislated, had been put into effect. Another article of the law was judged to violate TC, Articles 138, 139, and 140 since it changed the ongoing *written* qualifying

examination of the Education Center for Judge and Prosecutor Candidates to an *oral* examination, thus neglecting the independence of the courts, protection of judges and prosecutors, and legal provisions required for the judge and prosecutor professions.

Decree for a municipality-law amendment. The Decree Having the Force of Law for Amending the Municipality Law increased central government control over local government in the case of mayoral vacancy. Before the amendment was made, a mayoral post vacated before the end of tenure would be filled by a temporary mayor (until the next local election) by and from the members of the municipal council within three months. After the amendment, however, the temporary mayor was appointed by the Interior Minister from the municipal council members. The amendment was judged to violate TC, Article 91 since the relevant empowering laws, which the decree relied on, neither encompassed the above Municipality Law nor alluded to any changes in the structure of the local government. It was thus the Motherland Party government's hasty bypassing of the conventional legislative process that was stopped short by the nullification of the law.

The government's haste, however, seems to explain the primary intentions behind this amendment. The amendment was legislated in July 1988, less than nine months before the general local elections in March 1989. The government, which in the 1987 general election saw its popular support decreasing, as was already mentioned, had to legislate this amendment in time to compete more advantageously in the general local elections. The party holding the mayoral post would be able to use for its electoral campaign the organization and personnel of the municipality as its political machine.

Empowering-law amendment for public sector salaries. Some of the articles of the Law for Amending the Empowering Law were judged to violate TC, Articles 87 and 91 since the law empowered the cabinet to issue a decree having the force of law on such an unurgent subject as the salaries of public servants. Other articles of the amendment also violated TC, Articles 130 and 133 since they provided that the government could decide the appointments and salaries of such public organizations as the Supreme Education Board and the Turkish Television and Radio Directorate, the independence of which is constitutionally guaranteed. The nullity decision thus prevented the government from exercising discretionary power to change the salaries of personnel in the politically sensitive, and therefore legally independent, public organizations.

Construction-law amendment. The Law for Amending the Construction Law was judged to violate TC, Articles 128 and 129 since in addition to the governor and the mayor, it authorized private construction/engineering firms to give a construction permits. The Constitutional Court reasoned that such permits could be issued only by the authority of public administration. It would have been possible to argue that the implementation of the amendment would have virtually allowed

the private construction sector to regulate itself, thus making it very difficult for the central or local governments to regulate illegal construction.

D. *Summary*

In sum, the above laws were referred to the court for a large number of reasons to be nullified mostly because these laws would either bring about grave consequences for the state and society or serve the political expediencies of the party in power. Thus, in general, when the parliamentary opposition strongly challenged the constitutionality of a law, the opposition was dealing not with nominal defects in the law but with substantive issues.

V. CONCLUSIONS

Summary. The Constitutional Court in Turkey, compared with its European counterparts, can be characterized by its open access to the parliamentary opposition and by its high degree of independence from the executive branch of government. This paper showed that these characteristics of Turkish constitutional review provided a second chance for the parliamentary opposition to defeat government bills. Under the 1982 constitution approximately ten abstract reviews were made annually, out of which more than 70 per cent led to nullity decisions. This shows that Turkey ranks among the highest in Europe in the number of referrals and nullity decisions in abstract constitutional review. At the same time, of those nullity decisions nearly 90 per cent had been referred by the parliamentary opposition. The selective analysis of the laws wholly or partly nullified after being referred to the Constitutional Court with the most extensive statements of reasons has revealed that these laws have included articles which would have either had grave effects on the state and society or served the political expediencies of the party in power.

Eroding the legislative process? Some may argue that constitutional review is invalidating or at least eroding the legislative process in Turkey. The author believes, however, that it is difficult for the parliamentary opposition to abuse constitutional review. As the court is substantially independent of the executive branch of government, so is it of the opposition in the legislature. The author has already seen that the decreased number of referrals in the 1984–93 period did *not* lead to a decrease in nullity decisions. The reverse would also be true. Therefore, it is not the number of referrals but the constitutional dubiousness of laws that *mostly* determines the number of nullity decisions.

Limitations and implications. This paper is a preliminary attempt to place Turkish constitutional review in comparative perspective as well as into the dynamics of Turkish politics. The comparative attempt was limited mainly to presenting an introductory framework for future research since data for other countries were either seriously lacking or were hard to come by. Most of the newly democratized or

redemocratized countries which sprang from the "third wave of democratization" have established constitutional courts. This shows the universal recognition of the importance of constitutional courts as a guarantor of democracy under the rule of law. Thus, it will be necessary for a wide range of country specialists to come up with original data for comparative studies sharing the same analytical framework. In terms of Turkish political dynamics, more comprehensive studies will be needed about shared or differing characteristics of reviewed as well as nullified laws. That will be one of the ways for systematically analyzing the importance of constitutional review in Turkish politics.

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