Relations between Politics and Constitutional Review in Turkey with Special Reference to the Referrals of Republican People's Party: 2002-2010 Period

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Abstract *: In this article, relations between constitutional review and politics will be examined within the framework of referrals of the main opposition party in Turkey, the Republican People's Party (RPP), to the Turkish Constitutional Court (TCC). Decisions of the TCC have, in recent years, engendered discussions about the relations between politics and judiciary. Compared to constitutional courts in western countries, the TCC has followed a statist approach vis-à-vis the individual, which is difficult to understand given that constitutional courts are established primarily to protect individual rights and freedoms. It can be argued that the main reason behind Court's line of decisions is the ideological outlook of its members. However, it should be borne in mind that in order for the court to reach a decision, a claim should be filed with the court by one of the bodies which are given the constitutional right to go to the court. At this point the main opposition party, RPP, emerges as an important actor in Turkish political life. Characteristics of the cases which are taken to the court by the main opposition party have considerably affected the nature of the court's decisions. Getting a good grasp of this issue seems to be of importance since there have been some debates on the boundaries of constitutional review in Turkey. Within this framework, first, judiciary-politics relations will be examined in the context of judicialization of politics. Then, the content of referrals of RPP to the Constitutional Court will be analyzed.*

Keywords : Constitutional Review, Judicial Review, Turkish Constitutional Court, Republican People's Party, Judicialization of Politics in Turkey

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Introduction

The main objective of modern constitutionalism is to achieve limited government. To realize this end, the principle of the supremacy of the constitution is used. Constitutional review, in turn, is one of the mechanisms to guarantee the superiority of the constitution. Marbury v. Madison case[1] in the United States of America formed the basis for the practice of constitutional review. Constitutional review was later adopted by European and other constitutional systems.

Constitutional review has undergone some changes and according to the "new constitutionalism"[2] approach, it has become an important factor in the political sphere[3] rather than being a means of protecting individual rights and freedoms.[4]

Turkey is one of the countries where debates surrounding the judicialization of politics have intensified recently. The reason behind judicialization of politics in Turkey has been the activist attitude of the constitutional court. The so-called activist attitude of the Turkish Constitutional Court (TCC) can be illustrated by the fact that the TCC puts constitutional amendments to a substantive examination for which it is not authorized. The TCC carries out stay of execution[5], makes its decision public without providing justification for those decisions, limits government's decrees which have the force of law, and exerts control over the rules of procedure of the Turkish Grand National Assembly (TGNA) concerning such issues as the election of the head of the state. The TCC also follows a hardline outlook in cases concerning the closure of political parties and intervenes in the economic policies of the governments.[6]

An increasing interest in academia towards the activist attitude of the TCC has been noticed recently.[7] Some studies assess the TCC by looking at its decisions. The TCC's system of work is that it looks at cases and reaches decisions upon referrals. At this point, the main opposition party plays a crucial role in that it is one of the actors that are given the right to take cases to the TCC. Therefore it is possible to argue that the nature of the referrals affects the decisions that the TCC gives. However, the number of studies that examine referrals to the TCC is limited, and it is difficult to measure the effect of the nature of the referrals on the decisions of the TCC.[8]

Upon the lack of literature in mind, the present work looks at the relations between constitutional review and politics by focusing upon the actions of the opposition party, namely the Republican People's Party (RPP). Thus, the extent to which the RPP plays a role in the judicialization of politics will be clear. Within this framework, this article first examines the advent of constitutional review in Turkey, and then analyzes the referrals of the main opposition party to the TCC during 2002-2010 period.

The material for the present work comes from the official website of the RPP where referrals are published. An effort is made to examine and analyze the reasoning behind those referrals, which are sometimes made by the party group as a whole and sometimes by individual Member of Parliaments. Constitutional justifications used in these referrals are classified by the sections of the constitution,

which have the following headings: "preamble", "general rules of the state", "general provisions of fundamental rights and duties", "rights and duties of the individual", "social rights and duties", "political rights and duties", "legislation", "executive", "judiciary", "financial and economical provisions". Finally, under each heading, the most frequently cited articles of the constitution are identified.

Judicialization of Politics and the TCC

A hegemonic political system was established in Turkey by the promulgation of the 1961 Constitution. Among many changes in the constitution, which helped the establishment of a hegemonic political system in Turkey, was the creation of a Constitutional Court in 1961. Although there are a lot of views regarding the creation of the court, it seems that the perspective of Hirschl puts the establishment of the Court in the right context, which argues that the reason behind the foundation of the Court is the wish of the political elites to maintain their hegemony.[9] In other words, political elites aimed at stifling democratic demands emanating from the society, which are in conflict with their interests, by judicializing politics through the TCC. Thus, the 1961 Constitution was a turning point in triggering the judicialization of politics in Turkey.

The 1924 Constitution, which had been in practice until 1961 Constitution was put in force in 1961, did not include any articles on protecting individual freedoms and rights, which opened the way for an authoritarian form of government to take shape. In fact, both in one party period of the RPP between 1923 and 1950 and during the government of the Democratic Party (DP) between 1950 and 1960, the absence of arrangements concerning protecting rights and freedoms in the 1924 Constitution led to a lot of authoritarian practices. Accordingly, 1961 Constitution specifically had the intention of preventing a single political force such as the DP from having majority and thereby coming to political power. This intention can be seen in the discussions held in the lower house of the bicameral parliament, the Assembly of Representatives (*Temsilciler Meclisi*)[10], which was regarded as the civic wing of the Constituent Assembly. What can be termed as "majority phobia"[11] paved the way for the creation of certain institutions and mechanisms in the constitution. One of the noticeable mechanisms was the TCC.

It is particularly noticeable that in the representative assembly policies of the DP government were discussed.[12] DP's policies, which were regarded as simply ruling out individual rights and liberties, were utilized as justification for the establishment of the TCC so that, against the protective umbrella of the TCC, such a government as that of DP's would not dare to infringe upon individual rights and freedoms.[13] Therefore, protecting individual rights and liberties was cited as the most important justification for creation of the TCC. In addition, it can be inferred from the discussions on the creation of the TCC that the TCC was to serve as one of the checks and balances against the parliament. However, although the establishment of the TCC was justified with reference to protecting individual rights and freedoms, the main intention behind the initiative was, as pointed out earlier, to enable political elites to preserve their hegemony.

The TCC, which came into being with the 1961 Constitution, has been re-designed with the promulgation of the 1982 Constitution.

1982 Constitution and the TCC

The 1982 Constitution, which gave the constitutional court its present shape, adopted the European type (centralized)[14] of constitutional review which was first accepted with the 1961 Constitution.

The TCC's duties and powers are regulated by Article 148/1 according to which;

> *The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly and make ultimate decision for individual referrals. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional 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.*[15]

Article 148/2 determines which organs have the power to go to the court and it also puts forward the criteria according to which an inspection is done:

> *The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Turkish Grand National Assembly. Referrals for annulment on the grounds of defect in form shall not be made more than ten days after the date on which the law was promulgated; nor shall objection be raised.*[16]

Article 150 of the constitution regulates annulment action:

> *The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of laws in form and in substance, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof...*[17]

Plea of unconstitutionality of other courts to the TCC is organized in the article of 152:

> *If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue.*[18]

With the amendment in the article 148 of the constitution individual referrals were introduced. According to this amendment, everybody can go to the court with the allegation that a fundamental right which is guaranteed in the constitution and falls within the scope of the European Convention of Human Rights is violated by the public authority.

As it can be seen from Table 1, the constitution mentions three different ways of going to the TCC. "Annulment action" seems to be the most common way of referral which causes democratic legitimacy problems concerning constitutional review. The reason behind these problems is that the laws enacted by the assembly are frequently subjected to annulment action.[19] Therefore, that kind of referral results in the parliament's law-making activity affected by constitutional review.[20] The main opposition party, by utilizing annulment action on the laws and law decrees proposed by the government and accepted by the parliament, restricts the room for maneuver of the political power (government).

Table 1. The TCC in 1982 Constitution

Scope of Review	*On Litigation Authority*	*Types of Referral*	*Time*
laws law decrees constitutional amendment (only with regard to their form)	president of the Republic parliamentary groups of the party in power and the main opposition party	annulment action (abstract review) contention of unconstitutionality before other courts (concrete review)	the right to apply for annulment directly to the Constitutional Court shall lapse sixty days after publication in the Official Gazette of the contested law
rules of procedure of the TGNA	a minimum of one-fifth of the total number of members of the TGNA	individual referral	referrals for annulment on the grounds of defect in form shall not be made more than ten days after the date on which the law was promulgated

A Hegemonic Actor in Turkish Political Life: Republican People's Party

According to the concept of new constitutionalism, the role that is played by constitutional review leads to preserve the hegemonic power of political elites. If looked at from this perspective, constitutional review serves as insurance. Through constitutional review political elites can guarantee their position in the political system. At this point, it can be argued that Ginsburg's insurance theory and Hirsch's hegemonic preservation theory complete each other within the Turkish context. According to Ginsburg, in a multiparty system when a political party is unable to get political power and is accorded the duty of main opposition party, that political party tries to minimize its losses that are caused by coming second in the elections. One of the ways of minimizing the losses is a mechanism such as constitutional review. This way, the opposition parties gain an alternative platform to struggle against the political power,[21] and utilize constitutional review as a means for constitutional bargain.[22]

As in many constitutional systems, constitutional review in Turkey is an insurance system for opposition parties.[23] However, this role is played not for protecting basic human rights and freedoms, but for getting a say in political power. Utilizing constitutional review to share in political power started in the 2000s and has become a salient feature of the political system since then.

As the main opposition party in Turkey, the RPP's utilization of constitutional review should be examined in retrospect. As is well-known, the RPP was the main actor in the establishment of the Republic in 1923 and remained in power until 1950 elections. Accordingly, the RPP is closely associated with the central values of the new republic. Principles of the RPP are "republicanism", "populism", "nationalism", "statism", "secularism" and "revolutionism" which are also foundational values of the Turkish Republic. However, these values were interrupted with the coming of the DP to political power in 1950. Thus, the RPP had to fight an alternative value system. There was a common belief that the alternative value system was represented by the DP. The RPP's attitude towards DP government between 1950 and 1960 seems to be repeated against the Justice and Development Party (JDP) which has been holding the office since 2002.

However, the opposition role of the RPP since 2002 seems to have been quite different from that of its position between 1950 and 1960 in that the RPP has regarded the TCC as a key ally since 2002. To get a good grasp of the RPP's role in the Turkish political system since 2002 and its relations with the TCC, it is important to look at the reasons behind the RPP's referrals to the TCC.

TCC as "Insurance" for the RPP

In November 2002 General Elections, the JDP had 34.43% of the valid votes while the RPP's share of the votes was 19.41% of the valid votes and they were both qualified to take part in the parliament. The JDP formed the government while the RPP stayed as the main opposition party. Then, on July 2007 General Elections,

the JDP had 46.66% of the valid votes and remained in power alone. The RPP had 20.85% of the valid votes and, again became the main opposition party.

Table 1 shows that since the formation of the new parliament in 2002, the main opposition party, the RPP has made frequent use of the constitutionally given right to refer laws and decrees, easily passed by the JDP majority in the parliament, to the TCC. In this period, the RPP made many referrals to the TCC. The JDP's quantitative advantage in the parliament gave rise to annulment actions and demands for stay of execution on the part of the RPP in its effort to block various laws and decree laws.

Table 2 shows the frequencies and percentages of constitutional provisions that were used in the RPP's referrals to the TCC.

Table 2. Constitutional Provisions Used by the RPP in Referrals to the TCC in the 2002-2010 Period

Constitutional Provision	*Frequency*	*%*
Preamble	26	3.11
General Rules of State	383	45.76
General Provisions of Basic Rights and Duties	105	12.54
Rights and Duties of the Individual	64	7.65
Social Rights and Duties	60	7.17
Political Rights and Duties	16	1.91
Legislature	39	4.66
Executive	90	10.75
Judiciary	19	2.27
Financial and Economic Provisions	35	4.18
TOTAL	**737**	**100**

Table 2 shows that of the total number of annulment actions brought and stays of execution demanded by the RPP, 3.11% is based on the "preamble" section of the constitution, 45.76% is based on "rules of state", 12.54% is based on "general provisions of fundamental rights and duties", 7.65% is based on "rights and duties of the individual", 7.17% is based on "social and economic rights and duties", 1.91% is based on "political rights and duties", 4.66% is based on "legislature", 10.75% is based on executive, 2.27% of is based on judiciary and 4.18% of the total referrals is based on "financial and economic provisions".

Preamble Section

Preambles to constitutions are the beginning sections which encapsulate philosophy and structure of the constitution. This section lays the foundations for constitution-making and the general principles of the state. 1982 Constitution includes a preamble section, and contrary to the practice in other constitutions in the world[24], Article 176 rules that the preamble is an essential part of the main text of the constitution.

The preamble of the 1982 Constitution includes abstract, vague and ideological expressions which differentiates it from other constitutions in the world. Abstract, vague and ideological expressions are exemplified by such expressions as "Turkish national interests", "the Turkish presence", "the indivisible integrity of the state and country", "the separation of powers", "nationalism, principles, reforms and modernism of Atatürk", "Turkish historical and moral values", "an honorable member of the family of nations of the world" and so on.

Considering the referrals filed by the RPP, 3.11% of the total referrals were based on the preamble. The RPP uses principles such as "Turkish national interests", "the indivisible integrity of the state and country", "an honorable member of the family of nations of the world", "the separation of powers" in its referrals to the TCC.

Section on the General Rules of the State

As can be seen from Table 2, 45.76% of referrals of the RPP is about general rules of the state. This means that almost half of all referrals the RPP made were based on general rules of the state. This is quite compatible with the theoretical framework laid out above. The RPP's opposition to the government of the JDP since 2002 is structured around the general rules of the state and is in correspondence with the RPP's historical mission.

Articles 1 to 11 of the constitution constitute the section on the general rules of the state and when RPP's referrals regarding this section to the TCC are analyzed, it will be noticed that Article 2 is cited more frequently than any other article in this section. Table 3 shows that, of all referrals concerning the general rule of the state, 23.24% cite Article 2. Article 2 organizes general principles of the Republic of Turkey. According to Article 2, the Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyalty to the nationalism of Ataturk, and based on the fundamental tenets set forth in the Preamble. These principles are also crucial since they function as criteria for other provisions of the constitution.

When we look at the uses of Article 2 in more detail, the following observations are in order: In almost all referrals citing this article, the principle of the rule of law is used. In its referrals to the TCC, the RPP uses two important principles of the rule of law, namely legal security and non-retroactivity of law. In addition to the provision regarding the rule of law, the RPP also uses other provisions of the Article 2. For example, the constitutional amendment in 2008, which decreed that individuals are free to choose their way of dressing[25], was taken to the TCC by the RPP on the allegation that this amendment was in conflict with Atatürk nationalism and secularism. The RPP took the constitutional amendment package to the TCC in 2010 this time by referring to whole content of the Article 2.[26]

Table 3. Section on the General Rules of State

Article No.	*Title*	*Frequency*	*%*
2	Characteristics of the Republic	89	23.24
11	Supremacy and Binding Force of the Constitution	85	22.19
10	Equality before the Law	49	12.79
7	Legislative Power	45	11.75
8	Executive Power and Function	43	11.23
6	Sovereignty	43	11.23
5	Fundamental Aims and Duties of the State	14	3.66
9	Judicial Power	7	1.83
3	Integrity of the State, Official Language, Flag, National Anthem, and Capital	3	0.78
4	Irrevocable Provisions	3	0.78
1	Form of the State	2	0.52
TOTAL		**383**	**100.0**

The second most often used article of the section on general rules of the state is the eleventh article of the constitution, which is titled "supremacy and binding force of the constitution". As can be seen from Table 3, referrals citing Article 11 constitute 22.19% of all referrals based on this section.

According to Article 11, "the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals". One remarkable point is that Articles 2 and 11 are employed together as justification for the referrals. The main reason behind using these two articles together is the assumption that if a constitutional amendment contradicts the constitution it automatically is in conflict with Articles 2 and 11.[27]

Apart from Articles 2 and 11, other articles from the section on general rules of the state which are used by the RPP in its referrals are as follows: Article 7 on "legislative power" with a proportion of 11.75%; Article 8 on "executive power and function" with a proportion of 11.23%; and finally, Article 6 on "sovereignty" with a proportion of 11.23%.

Section on the General Provisions of Fundamental Rights and Freedoms

Of the total referrals by the RPP, 12.54% cite Articles 12 to 16, which deal with general provisions of fundamental rights and duties. As shown in Table 4, of the referrals within this section, Article 13, which regulates "restriction of fundamental rights and freedoms"[28], has a share of 95%.

Table 4. Section on the General Provisions of Fundamental Rights and Duties

Article No.	*Title*	*Frequency*	*%*
13	Restriction of Fundamental Rights and Freedoms	19	95
16	Status of Aliens	1	5
TOTAL		**20**	**100.0**

An interesting point is that under referrals made within the framework of "general provisions of fundamental rights and freedoms", Article 16, which regulates the status of aliens, has a proportion of 5%.

Section on the Rights and Duties of the Individual

Individual rights and duties, which constitute the basis of liberal doctrine, reflect the philosophy that individual is the primary value of society. These rights and freedoms recognize the right of the self to shape his or her thoughts and behaviors freely.[29] These rights and freedoms, at the same time, determine the private sphere which cannot be violated and surpassed by the state.[30]

The 1982 Constitution deals with these rights and freedoms in Articles 17 to 40 under the heading "rights and the duties of the individual". Of the total referrals of the RPP, 7.65% are based on this section of the constitution. As can be seen from Table 5, interestingly, 62.50% of the referrals which are made on the basis of the section "rights and duties of the individual" fall within the scope of Article 35 which deals with property rights. In referrals based on Article 35, the argument that property rights are impinged upon is frequently made use of.[31]

Sensitivity of the RPP towards protecting property rights seems to be in contradiction with the RPP's statist attitude in its referrals to the TCC, which was dealt with earlier in the present work.

Table 5. Rights and Duties of the Individual

Article No.	*Title*	*Frequency*	*%*
35	Property Rights	40	62.50
36	Freedom to Claim Rights	8	12.50
17	Personal Inviolability, Material and Spiritual Entity of the Individual	5	7.81
38	Principles Relating to Offences and Penalties	3	4.69
40	Protection of Fundamental Rights and Freedoms	2	3.13
18	Prohibition of Forced Labor	2	3.13
24	Freedom of Religion and Conscience	2	3.13
27	Freedom of Science and the Arts	1	1.56
33	Freedom of Association	1	1.56
TOTAL		**64**	**100.0**

In addition to Article 35, the following articles in the section on "rights and duties of the individual" were cited in the referrals: Article 36 on "freedom to claim rights" with a proportion of 12.50%; Article 17 on "personal inviolability, material and spiritual entity of the individual" with a proportion of 7.81%; Article 38 on "principles relating to offences and penalties" with a proportion of 4.69%; Article 18 on "prohibition of forced labor" with a proportion of 3.13%; Article 24 on "freedom of religion and conscience" with a proportion of 3.13%; Article 40 on "protection of fundamental rights and freedoms" with a proportion of 1.56%; Article 27 on "freedom of science and the arts" with a proportion of 1.56%, and Article 33 on "freedom of association" with a proportion of 1.56%.

The considerably large number of RPP referrals to the TCC citing "property rights" and "personal inviolability, material and spiritual entity of the individual", which reflects a sensitivity on these issues, is in conflict with the RPP's sensitivity to upholding the preamble and general rules of the state vis-à-vis the individual.

Section on the Social and Economic Rights and Duties

Social and economic duties are a consequence of welfare state which provide a minimum standard of living for citizens.[32] The state is given a positive duty so that these rights can be enjoyed. These rights and freedoms are placed in Articles 41 to 65 of the Turkish Constitution of 1982 under the heading "social and economic rights and duties".

Of the total referrals of the RPP, 7.17% makes use of the articles in the section on "social and economic rights and duties." As can be seen from Table 6, the most cited article within this section is Article 60 which regulates the "right to social security".

Table 6. Section on the Social and Economic Rights and Duties

Article No.	*Title*	*Frequency*	*%*
60	Right to Social Security	9	15.00
56	Health, the Environment and Housing	8	13.33
47	Nationalization and Privatisation	6	10.00
48	Freedom to Work and Conclude Contracts	6	10.00
49	Right and Duty to Work	6	10.00
44	Land Ownership	4	6.67
45	Protection of Agriculture, Animal Husbandry, and of Persons Engaged in These Activities	4	6.67
42	Right and Duty of Training and Education	3	5.00
55	Guarantee of Fair Wage	3	5.00
43	Utilisation of the Coasts	2	3.33
50	Working Conditions and Right to Rest and Leisure	2	3.33
63	Conservation of Historical, Cultural and Natural Wealth	2	3.33
46	Expropriation	1	1.67
51	Right to Organize Labour Unions	1	1.67
53	Right of Collective Bargaining	1	1.67
54	Right to Strike and Lockout	1	1.67
59	Development of Sports	1	1.67
TOTAL		**60**	**100.0**

Percentage distribution of the referrals based on articles in this section, reported in Table 6, are as follows: 13.33% falls within the scope of Article 56 which is titled "health services and conservation of the environment"; 10% is based on Article 47 which deals with "nationalization and privatization"; 10% goes to Article 48 which regulates "freedom to work and conclude contracts" ; another 10% stems from Article 49 which is titled "right and duty to work"; 5% emanates from Articles 42 and 55 each of which regulates "right and duty of training and education" and "guarantee of fair wage" respectively. In addition, certain articles which organize working life are utilized for the referrals to the TCC. Article 51, which is concerned with the "right to organize labor unions", Article 53 on the "right of collective bargaining", and Article 54, which regulates the "right to strike and lockout", each makes up 1.67% of the referrals in this section.

Section on the Political Rights and Duties

Political rights and duties provide people with opportunity to participate in state administration and to conduct political activities.[33] As Table 2 shows, among all RPP referrals to the TCC, the lowest ratio belongs to political rights and duties.

Table 7. Section on the Political Rights and Duties

Article No.	*Title*	*Frequency*	*%*
73	Obligation to Pay Taxes	9	56.25
67	Right to Vote, to be Elected and to Engage in Political Activity	4	25.00
70	Entry into Public Service	3	18.75
TOTAL		**16**	**100.0**

As can be seen from Table 7, Article 73, which regulates the "obligation to pay taxes" is the most frequently cited article in this section, with a ratio of 56.25%. It should be pointed out that RPP's referrals within the context of Article 73 use the argument that taxes should be fair and balanced.[34]

Besides Article 73, other articles within the political rights and duties section that are cited by the RPP are as follows: Article 67, titled the "right to vote, to be elected and to engage in political activity" with a proportion of 25%, and Article 70 with a proportion of 18.75% which organizes "entry into public service".

Section on the Legislature

The third part of the 1982 Constitution is titled "fundamental organs of republic", and it comprises the sections on the legislature, the executive and the judiciary. As Table 2 shows, RPP's referrals concerning the section on the legislature have a proportion of 4.66%.

Table 8. Section on the Legislature

Article No.	*Title*	*Frequency*	*%*
90	Ratification of International Treaties	14	35.90
88	Proposal and Debate of Laws	9	23.08
87	The Functions and Powers (of the TGNA)	7	17.95
89	Promulgation of Laws by the President of the Republic	5	12.82
95	Rules of Procedure, Political Party Groups and Security Affairs	2	5.13
79	General Administration and Supervision of Elections	1	2.56
96	Quorums Required for Sessions and Decisions	1	2.56
TOTAL		**39**	**100.0**

Table 8 points to the fact that Article 90, titled "ratification of international treaties", was the most frequently cited article in RPP's legislature-related referrals, with a percentage of 35.90. Article 88, which regulates "proposal and debate of laws" has a proportion of 23.08%, whereas "the functions and powers of the Turkish Grand National Assembly", regulated in Article 87, has a proportion of 17.95%. The lowest percentage in this section belongs to Article 89 with 12.82%, which is titled "promulgation of laws by the president of the republic".

Section on the Executive

Issues concerning the executive are regulated in a separate section in the part on "fundamental organs of republic". As can be seen from Table 2, 10.75% of all referrals by the RPP belongs to this section. Of the referrals which are made in the context of the section on the Executive, Article 123, titled "integral unity and public legal personality of the administration" occupies the first place with a proportion of 25.56%. One of the reasons behind the high percentage of references to this article in the referrals of the RPP is the fact that the RPP is sensitive towards the *raison d'être* of the state, much similar to the behaviour of the same political party concerning the section on "general rules of the state".[35]

Table 9. Section on the Executive

Article No.	*Title*	*Frequency*	*%*
123	Integral Unity and Public Legal Personality of the Administration	23	25.56
127	Local Administrations	18	20.00
128	General Principles (of Provisions Relating to Public Servants)	17	18.89
126	Central Administration	9	10.00
130	Institutions of Higher Education	6	6.67
104	(President of the Republic's) Duties and Powers	3	3.33
105	Presidential Accountability and Non-Accountability	3	3.33
131	Superior Bodies of Higher Education	3	3.33
124	(Administration) By-Laws	2	2.22
125	Recourse to Judicial Review	2	2.22
135	Public Professional Organizations	2	2.22
102	(President of the Republic's) Election	1	1.11
133	Radio and Television Administrations and State-Financed News Agencies	1	1.11
TOTAL		**90**	**100.0**

It is quite safe to argue that the RPP utilized Article 123 against regulations which were issued to strenghten special provincial administration[36], metropolitan municipalities[37] and local development agencies[38], which are altogether regarded as an integral part of the public administration reforms. Of the referrals made under the executive section, Article 127, which is quite similar to Article 123 in terms of its content, and which regulates local government, has a ratio of 20%. It is followed by Article 128 titled "general principles (of provisions relating to public servants)", with a proportion of 18.89%.

Section on the Judiciary

Judicial bodies are regulated in the third section of the part on "fundamental organs of republic". This section represents 2.27% of the total referrals. Compared to the executive and the legislature, referrals which are made on the basis of judiciary have a lower percentage.

Table 10. Section on the Judiciary

Article No.	*Title*	Frequency	%
138	Independence of the Courts	7	36.84
153	Decisions of the Constitutional Court	6	31.58
148	Functions and Powers (of the TCC)	3	15.79
140	Judges and Public Prosecutors	2	10.53
160	Audit Court	1	5.26
TOTAL		**19**	**100.0**

The most frequently cited article in this section was Article 136. Titled "independence of the courts", this article made up 36.84% of the referrals within this section. Disputes between political parties concerning the independence of the courts seem to be an important issue in Turkish political life.

Article 153 of the constitution, which regulates issues concerning the "decisions of the TCC", was the second most frequently cited article in this section with a percentage of 31.58. Finally, Article 148, titled "functions and powers of TCC", constituted 15.79% of RPPS's judiciary-related referrals to the TCC.

Section on the Financial and Economic Provisions

As Table 2 shows, 4.18% of the RPP's total referrals is based on financial and economic provisions. Article 161, titled "preparation and implementation of the budget" has the highest proportion in this section with 22.86%, followed by Article 162, titled "debates on budget", with 17.04%. Article 163, which regulates "principles governing budgetary amendments", has a proportion of 14.29% in RPP's referrals concerning this section.

Together, these three articles on the budget make up the largest portion of referrals in the section on Financial and Economic Provisions.

Table 11. Financial and Economic Provisions

Article No.	*Title*	*Frequency*	*%*
161	Preparation and Implementation of the Budget	8	22.86
162	Debate on the Budget	6	17.74
163	Principles Governing Budgetary Amendments	5	14.29
169	Protection and Development of Forests	5	14.29
168	Exploration and Exploitation of Natural Resources	3	8.57
175	Amendment of the Constitution, Participation in Elections and Referenda	3	8.57
170	Protection of the Inhabitants of Forest Villages	2	5.71
174	Preservation of Reform Laws	2	5.71
167	Supervision of Markets and Regulation of Foreign Trade	1	2.86
TOTAL		**35**	**100.0**

Conclusion

The nature of the role that the TCC plays in the Turkish political system is shaped by the political choices made during the creation of the TCC. In constitutional democracies the motive behind the creation of judicial review is the aim of protecting individual rights and freedoms against political power. When evaluated from this perspective, it can be argued that appointed judges obtain democratic legitimacy vis-à-vis the members of the parliament, who are elected.

However, the basic motive behind the creation of the TCC was to ensure the influences of state elites over the political system. Therefore, it can be argued that the TCC played a role in judicialisation of politics.

One of the actors that helped the TCC in judicializing politics in the recent period was the RPP, which made frequent use of its constitutionally given right to refer amendments to the laws to the Constitutional Court. The most important means that was used by the RPP within this framework was annulment action. In the period between 2002 and 2010, the RPP frequently resorted to annulment action to guarantee its control over the political system. It is interesting to note that in democratic systems constitutional review functions as a guarantee to protect individual rights and freedoms, whereas in Turkey the TCC seems to be far away from playing this role, which can be seen in its decisions taken upon RPP's referrals to the court. The role that the RPP played in the judicialisation of politics can be better understood by looking at the reasons which are used by the RPP in its annulment actions. Concerning the reasons which are put forward for annulment actions, the preamble and general rules of the state parts of the constitution are used much more frequently than those parts of the constitution that arrange individual rights and freedoms. As a

consequence, the RPP, by giving priority to the state against the individual, created a room for the TCC to play an active role in political system in Turkey.

NOTES

1 See William E. Nelson, *The Origins and Legacy of Judicial Review* (Kansas: University Press of Kansas, 2000).
2 For further information, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Massachusetts and London: Harvard University Press, 2004).
3 For a study focusing on this differentiation, see Ozan Ergül, *Türk Anayasa Mahkemesi ve Demokrasi* (Ankara: Adalet Yayınevi, 2007).
4 For the main studies in this area, see Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford: Oxford University Press); C. Neal Tate and Torbjörn Vallinder, "The Global Expansion of Judicial Power: The Judicialization of Politics", in *The Global Expansion of Judicial Power: The Judicialization of Politics*, eds. C. Neal Tate and Torbjörn Vallinder, (New York and London: New York University Press, 1995), 1-10; Ran Hirschl, "The Judicialization of Politics", *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel and Gregory A. Caldeira, (Oxford: Oxford University Press, 2010), 119-141.
5 TCC is not authorized to "stay of execution" in the 1982 Constitution, but it often makes decision stay of execution. For further debates, see Zehra Odyakmaz, "Yürürlüğü Durdurma", *Anayasa Yargısı*, No. 12, (Ankara: Anayasa Mahkemesi Yayınları, 1995), 143-170; İlyas Doğan, *Alman ve Türk Anayasa Yargısında Yürürlüğü Durdurma*, (İstanbul: İstanbul Büyükşehir Belediyesi Yayınları, 1997).
6 Ergun Özbudun, "Türk Anayasa Mahkemesi'nin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi", *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Vol. 62, No. 3 (2007): 264; Yavuz Atar, "Anayasa Mahkemesi'nin Yeniden Yapılandırılması", *Anayasa Yargısı*, No. 25, (Ankara: Anayasa Mahkemesi Yayınları: 2008), 98.
7 Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey", *Law and Society Review*, Vol. 40, No. 3 (2006): 653-692; Nur Uluşahin, "Yargı Kıskacında Siyaset", *Birikim*, No. 232-233 (2008): 33-46; Güneş Murat Tezcür, "Judicial Activism in Perilous Times: The Turkish Case", *Law and Society Review*, Vol. 43, No. 2 (2009): 305-336; Zafer Gören, "Siyasal Güç Faktörü Olarak Anayasa Mahkemesi", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, Vol. 7, No. 14 (2008); Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies*, Vol. 11, No. 1 (2002): 9-25; Yusuf Şevki Hakyemez, *Hukuk ve Siyaset Ekseninde Anayasa Mahkemesinin Yargısal Aktivizmi ve İnsan Hakları Anlayışı*, (Ankara: Yetkin Yayınları, 2009); Cenap Çakmak and Cengiz Dinç, "Constitutional Court: Its Limits to Shape Turkish Politics", *Insight Turkey*, Vol. 12, No. 4 (2010): 69-92; Abdurrahman Saygılı, "What is Behind the Headscarf Ruling of the Turkish Constitutional Court?", *Turkish Studies*, Vol. 11, No. 2 (2010): 127-141; Ergun Özbudun, "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights", *Democratization*, Vol. 17, No. 1 (February 2010): 125-142.
8 A study for this subject, see Yasushi Hazama, "Constitutional Review and The Parliamentary Opposition in Turkey", *The Developing Economies*, Vol. 34, No. 3 (September 1996): 316-338. Also, referrals of RPP's some statistics, see "CHP'den Anayasa Mahkemesine 33 Başvuru", *Zaman*, 16 June, 2009; "CHP'nin Anayasa Mahkemesi Karnesi", *Cumhuriyet*, 13 June, 2010.
9 See, Ran Hirschl, "The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions", *Law & Social Inquiry*, Vol. 25, No. 1, (2000): 91-149; Ergun Özbudun, "Anayasa Yargısı ve Demokratik Meşruluk Sorunu", in *Demokrasi ve Yargı Sempozyumu Bildiriler Kitabı*, ed. Ozan Ergül (Ankara:

Türkiye Barolar Birliği Yayınları, 2005), 336–352. However, contrary to these works Hazama argues that the Court undertakes the role of horizontal accountability rather than acting as a means of preserving hegemony. See Yasushi Hazama, "Hegemonic Preservation or Horizontal Accountability: Constitutional Review in Turkey", Annual Meeting of the American Political Science Association, September 2-5, 2010, papers.ssrn.com/sol3/papers.cfm?abstract_id=1642116.

10 Representative Assembly consisted of president of republic, the committee of national unity, provincial representatives, council of ministers, representatives of political parties (only Republican People's Party and Republican National Peasants' Party), representatives of bar associations, representatives of war veterans unions, representatives of craftsman organizations, representatives of youth, representatives of trade unions, representatives of chambers, representatives of teacher organizations, representatives of agriculture organizations, representatives of university, representatives of judiciary. See Hikmet Özdemir, "Siyasal Tarih (1960-1980)", in *Çağdaş Türkiye 1908-1980*, Vol. 4, ed. Sina Akşin (İstanbul: Cem Yayınevi, 1989), 202-203.

11 Zühtü Arslan, "Anayasa Mahkemesi'nin 'Yorum Tekeli' Yargısal Üstünlük ve Demokrasi", in *Prof. Dr. Ergun Özbudun'a Armağan*, eds. Serap Yazıcı, Kemal Gözler and Ece Göztepe, (Ankara: Yetkin Yayinlari, 2008), 83.

12 See *Representatives Assembly Records*, Vol. 2, Part 35, Session 2, (31.03.1961): 435.

13 See *Representatives Assembly Minutes*, Vol. 4, Part 53, (25.04.1961): 213-214; *Representatives Assembly Minutes*, Part 56, Session 3, (28.04.1961): 434.

14 For European style constitutional courts, see Mauro Cappelletti, "Judicial Review in Comparative Perspective", *California Law Review*, Vol. 58, No. 5 (October 1970): 1038-1050.

15 "The Constitution of the Republic of Turkey (As Amended on October 17, 2001)", The Constitutional Court of the Republic of Turkey, http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf.

16 Ibid.

17 Ibid.

18 Ibid.

19 Erdoğan Teziç, *Anayasa Hukuku*, 5th ed. (İstanbul: Beta, 1998), 201.

20 C. Neal Tate, "Comparative Judicial Review and Public Policy: Concepts and Overview", Donald W. Jackson and C. Neal Tate (ed.), *Comparative Judicial Review and Public Policy*, (Westport, Connecticut, London: Greenwood Press, 1992), 6.

21 Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, (Cambridge, Cambridge University Press, 2003), 24-25.

22 Mary L. Volcansek, "Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance", *West European Politics*, Vol. 33, No. 2 (February 2010): 280-296, 283.

23 The changing role of constitutional review in Turkey, see Zeki Sarigul, "The Judicialization of Politics: The Case of Turkey", *Paper Presented Annual Meeting of Midwestern Political Science Association*, The Palmer House Hilton Chicago, (2009).

24 See Serdar Gülener, "Karşılaştırmalı Bir Perspektiften Anayasalar ve Temsil Ettikleri Değerler", *Liberal Düşünce*, Vol. 16, No. 61-62 (Spring 2011): 36-66.

25 See Constitutional Court Decision No. 2008/116.

26 See Constitutional Court Decision No. 2010/87.

27 See Constitutional Court Decision No. 2008/165.

28 For examples, see Constitutional Court Decision No. 2008/148; Constitutional Court Decision No. 2009/48.

29 İbrahim, Ö. Kaboğlu, *Özgürlükler Hukuku*, 6th ed. (Ankara: Imge Kitabevi, 2002), 267-268.

30 Kemal Gözler, *Türk Anayasa Hukuku Dersleri*, 9th ed. (Bursa: Ekin Kitabevi, 2010), 111.

31 For examples, see Constitutional Court Decision No. 2005/14; Constitutional Court Decision No. 2009/141.

32 Münci Kapani, *Kamu Hürriyetleri*, 7th ed. (Ankara: Yetkin Yayınları, 1993), 121.

33 Gözler, op. cit., 114.

34 For examples, see Constitutional Court Decision No. 2009/144; Constitutional Court Decision No. 2008/63.
35 Kemal Gözler, *İdare Hukuku Dersleri*, 8th ed. (Bursa: Ekin Kitabevi, 2009), 106-107.
36 See Constitutional Court Decision No. 2007/3.
37 See Constitutional Court Decision No. 2007/6.
38 See Constitutional Court Decision No. 2007/91.