The impact of judicial preferences and political context on Constitutional Court decisions: Evidence from Turkey

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Many scholars have asserted that in countries where one political party dominates the political sphere, the likelihood of judges deciding against the government diminishes. Although the underlying logic of this argument is quite appealing, it does not explain why in certain cases judges ignore possible political retaliation and give anti-government decisions. Arguing that judicial preferences and the political context under which judges operate are in constant interaction, the goal of this article is to explain whether, and to what extent, the judges' preferences moderate the impact of political fragmentation on the court's invalidation of laws. The study uses an original data set including all decisions made by the Turkish Constitutional Court between 1984 and 2010. The empirical findings show that while the court's political preferences vastly attenuate the impact of the political context on judicial behavior, its legal preferences have a trivial moderating effect. To put it more specifically, the results show that the effect of political fragmentation on judicial behavior highly decreases when there is a weak political alignment between the court and the government enacting the law under review. Moreover, the findings show that even under favorable political conditions for assertive behavior, the judges abstain from annulling laws based on individual rights violations.

1. Introduction

One of the central debates in judicial politics literature is about whether, and to what extent, political context affects higher court decisions. The existing literature asserts that when one political party dominates the political sphere and has the power to curtail the jurisdiction or overrule judicial decisions, the likelihood of judges deciding against the government diminishes. The causal mechanism underlying this argument

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posits that under a unified government, political actors will not encounter coordination problems to curb judicial authority. As such, in order to prevent some political sanctions under a unified government, the judges will behave strategically and be less likely to defy the incumbent government.[1] This argument perceives judicial preferences as irrelevant in an unfriendly political environment and suggests that the judges' key motivation is to protect themselves from possible political retaliation.[2]

Under a divided government, however, the judiciary is expected to be more independent and more likely to challenge the incumbent government. The basic feature of this mechanism is that political fragmentation reduces the capability of incumbents to overturn judicial decisions or interfere in judicial decision-making because the dispersion of power makes it more difficult to pass new legislation or put together a legislative coalition to curtail the autonomy of judges. Assuming that the judges have different policy preferences from the government, the expectation is that only in environments where political power is highly fragmented will they cast their true preferences and be more willing to decide against government decrees.[3]

Although these strategic models of judicial behavior acknowledge the importance of judicial preferences, they still predict the rational foresight of the judges as the key determinant of their behavior and seem to envision that the judges will give their decisions based on their true preferences only when the political context is friendly and there is no threat. But then, why do we still observe judicial assertiveness under unfriendly political environments in which the judiciary meets certain political constraints?

Unlike the strategic models for judicial behavior, the attitudinal models for judicial behavior argue that the court will strike down the acts of its partisan opponents and uphold the acts of its partisan allies regardless of the strength of the government.[4] In this regard, judges are expected to vote only according to their individual ideologies without engaging in any strategic calculations.[5] As such, the attitudinal approach

[1] *See, e.g.*, Lee Epstein & Jack Knight, The Choices Justices Make 1 (1998); Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 Emory L. Rev. 583 (2001); Forrest Maltzman, James F. Spriggs, & Paul J. Walbeck, Crafting Law on the Supreme Court: The Collegial Game 1 (2000); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J. L. Econ. Org. 1 (1990); William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Calif. L. Rev. 613 (1991).

[2] Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64(4) World Pol. 587 (2012); Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 1 (2003); Rebecca B. Chavez, The Rule of Law in Nascent Democracies: Judicial Politics in Argentina 1 (2004).

[3] Matías Iaryczower, Pablo T. Spiller, & Mariano Tommasi, *Judicial Independence in Unstable Environments: Argentina*, 46(4) Am. J. Pol. Sci. 699 (2000); Julio Ríos-Figueroa, Judicial Independence: Definition, Measurement, and Its Effects on Corruption: An Analysis of Latin America (2006) (unpublished PhD dissertation, New York University); Chavez, *supra* note 2; Rebecca Bill-Chávez, John A. Ferejohn, & Barry R. Weingast, *A Theory of the Politically Independent Judiciary*, *in* Courts in Latin America 219 (Gretchen Helmke & Julio Rios-Figueroa eds., 2001).

[4] Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 1 (2002); Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts: Explaining Justices' Responses to Constitutional Challenges*, 60(1) Pol. Res. Q. 71 (2007); Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57(1) Pol. Res. Q. 131 (2004).

[5] Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am. Pol. Sc. Rev. 28 (1997); Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83(June) Am. Pol. Sci. Rev. 557 (1989); Segal & Spaeth, *supra* note 4.

overlooks the explanatory power of the political context within which the judges act and rejects the perception of judges as strategic actors.

Arguing that the preferences and strategic calculations of judges interact, the goal of this article is to explain whether, and to what extent, the court's preferences moderate the impact of political fragmentation on judicial assertiveness. The theoretical framework of the study posits that situational characteristics across cases can trigger different preferences of judges so that the importance that a court places on a possible reaction from political branches will vary across different types of cases. As a result, under very risky political conditions (e.g. under single-party government), the court may choose to engage in assertive behavior.

To account for this implication, I focus on the political fragmentation in Turkey and the preferences of the Turkish Constitutional Court (TCC) and analyze the TCC's decisions made between the years 1984 and 2010. Using this original data set, I examine to what extent the impact of the government structure on the Court's decisions is mediated by judicial preferences. Turkey presents an ideal case for testing the relationship between government structure, judicial preferences, and the behavior of the constitutional courts in developing democracies with parliamentary systems. First, starting with the rule of Justice and Development Party in 2002, Turkey moved from fragmented parliaments to single-party dominance, and this provides an opportunity to test the impact of the political fragmentation on judicial behavior. Second, the oppressive policies of single-party governments in Turkey have not prevented the Turkish Constitutional Court from invalidating laws or making anti-government decisions. This shows that not only the political context but also judicial preferences are useful for understanding judicial behavior. As a result, this study will help us to integrate the workings of the Turkish Constitutional Court into the excellent body of existing research on comparative political institutions and judicial politics.

This article proceeds in five stages. Based on the existing literature, Section 2 reviews some expectations about how political fragmentation and judicial preferences affect judicial behavior and presents the key hypotheses of the study. Section 3 draws on the institutional design and preferences of the Turkish Constitutional Court, as well as the political context under which judges decide to defy the incumbent government. Section 4 presents the data, describes the empirical model that is used to test the hypotheses, and discusses the operationalization and measurement of the key variables. Section 5 is the empirical section in which the hypotheses are tested and the results presented. Section 6 concludes the study by discussing both the theoretical and practical implications of the findings.

2. Political context and judicial preferences in interaction: The theoretical framework

Especially in developing democracies when the Constitutional Court decides to defy the incumbent government it may encounter various court-curbing and court-packing practices. Those retaliatory reactions by the incumbent government may include

curbing the power of the Constitutional Court through constitutional reforms, reducing the number of its members, impeaching individual justices, packing the court with more friendly judges, cutting the court's budget, passing laws aimed at reversing court decisions, or simply failing to implement court rulings.[6] The strategic model of judicial behavior states that when reviewing the constitutionality of a public policy bill, the court will take into consideration all these potential threats and try to avoid taking adverse decisions. Yet, many different examples show us that despite high levels of attacks and threats against the courts, the judiciary may be willing to take anti-government decisions.[7] Then why do the threatened courts decide to make risky decisions?

Some proponents of strategic models of judicial behavior argue that despite a credible threat judges may act against the government in order to show their institutional preferences. Deciding against the government can make the court feel that it controls the constitutional order.[8] As such, protecting the regime and individual rights can be presented as the key judicial preferences that may push the judges to ignore the external threat and make anti-government decisions.[9] For instance when the court reviews a governmental law or decree that is believed to jeopardize the security, interests, and values of the regime, the strategic calculations of the court may change and the court may decide to act assertively. Protecting the judicial prestige might be another reason for the judicial assertiveness. Especially when the public is watching, a strategy of deference can create inaccurate beliefs about judicial preferences.[10] Thus, in order to protect the judicial prestige, the judiciary can annul governmental policies despite the possibility of retaliation by the government.

Under certain conditions, the government might be unwilling to punish the court for its anti-government decisions and this might be another reason for the assertiveness of the judiciary in risky environments. Introducing the concept of "tolerance intervals," for instance, Epstein et al. argue that elected actors will be unwilling to challenge the court decisions placed within this tolerance interval.[11] As such it is argued that the less salient the case, the more likely the incumbent government will be to tolerate adverse decisions.[12] Similarly, focusing on the Columbian Constitutional Court, Rodriguez-Raga argues that when the case is salient for the government the court is less likely to strike down the norm.[13] Epstein et al. and

6 Julio Rios-Figueroa, *Institutions for Constitutional Justice in Latin America*, *in* Courts in Latin America 27 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

7 Gretchen Helmke & Jeffrey K. Staton, *The Puzzle of Judicial Politics in Latin America: A Theory of Litigation, Judicial Decisions and Inter-branch Conflict*, *in* Courts in Latin America 306 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

8 *Id.*

9 Daniel M. Brinks, *Faithful Servants of the Regime: The Brazilian Constitutional Court's Role under the 1988 Constitution*, *in* Courts in Latin America 128 (Gretchen Helmke & Julio Rios-Figueroa eds., 2001).

10 Helmke & Staton, *supra* note 7.

11 Epstein et al., *supra* note 1.

12 Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35(1) Law & Soc'y Rev. 117, 130 (2001).

13 Juan C. Rodriguez-Raga, *Strategic Deference in the Colombian Court, 1992–2006*, *in* Courts in Latin America 81 (Gretchen Helmke & Julio Rios-Figueroa eds., 2001).

Rodriguez-Raga assume that the costs of annulling an important law will be higher than the benefits of annulling it.[14]

While annulling a law on a public policy issue might not provide a considerable benefit to the court, annulling a politically contentious law that is believed to threaten the security, values, or interests of the regime might considerably increase public support for the court. As such, while in the former case the court might abstain from defying the incumbent government, in the latter case the court might choose to challenge the policies of the power-holders despite the unfriendly political environment. Under these circumstances, the judiciary may not see retaliation by the incumbent government as a credible threat. This is because, even if the government is affected by the annulment of a governmental law, the costs for reacting against the court might be high and credibly imposed by another external actor such as a powerful military or the "public." Epstein et al., for instance, argue that the closer the courts' policy is to the public's preference and the more confidence the public has in the court, the more likely the incumbent government will be to tolerate adverse decisions.[15] As such, it is stated that if there is a high probability of public backlash against the hostile policies of the government or when the judiciary has high public support the judges would feel free to follow their sincere preferences and strike down the laws enacted by the ruling government.[16] As a result, the court will locate its decisions as close as possible to its preferences but within the space defined by the preferences of the relevant outside actors.

All these theoretical explanations show us that—depending on the bill under consideration—the judges' strategic calculations might change across cases. Since different laws under consideration trigger different judicial motivations, in order to better account for judicial behavior, one should not only take into consideration the strength of the incumbent government but also the political preference of the court.

Arguing that the judges' preferences and the political context under which they act are equally important in judicial decision-making, this study proposes an interactive model to account for judicial behavior. Our theoretical framework posits that situational characteristics across cases trigger different preferences of judges so that the importance that a court places on a possible reaction from political branches will vary across different types of cases. In other words, by influencing the court's cost-benefit calculations, the court's preferences might attenuate the impact of the political fragmentation on judicial assertiveness. As such, under very risky political conditions (e.g. under single-party government), the court may choose to engage in assertive behavior.

Accordingly, the first hypothesis of the study is:

> *Hypothesis 1:* Under a unified government the court's likelihood of invalidating laws will increase when the court reviews an unfavorable law.

The judges' preferences vary not only along a single political dimension but also in line with their conception about the professional role they should take in a democratic

[14] Epstein et al., *supra* note 1; Rodriguez-Raga, *supra* note 13.

[15] Epstein et al., *supra* note 12.

[16] George Vanberg, The Politics of Constitutional Review in Germany 1 (2005); Jeffrey K. Staton, Judicial Power and Strategic Communication in Mexico 3 (2010); Helmke & Staton, *supra* note 7.

system.[17] Thus, protecting fundamental legal principles, individual freedoms, and other constitutional rights appear as another important judicial motivation that influences judicial assertiveness. I do not argue that judges are pure legalists but suggest that these legal preferences influence the judges' perceptions of and responses to the opportunities and risks of the political context within which they act. On the one hand, since judges are perceived by the public as protectors of the rule of law and guarantors of individual rights, by annulling a law or governmental decree that is claimed to violate individual freedoms, the court will be able to expand public support for the judiciary and build judicial legitimacy. On the other hand, the cases involving human rights violations might not be of great concern for the incumbent government so that it may not feel threatened by the court's annulment of these types of cases and may not retaliate. In this regard, when reviewing cases in which the government is accused of violating individual rights, the benefits that judges might retain from making an anti-government decision might outweigh the related costs. As a result, the possible political retaliation can be taken as a worthwhile risk and the court may act independently despite the unfriendly political environment.

Thus, the second hypothesis suggests:

> *Hypothesis 2:* Under a unified government the court's likelihood of invalidating laws will increase when the referral reason for striking down a law includes individual rights violations.

All in all, when the judges' political preferences are not in line with the ruling government's preferences, or when the legal preferences of judges are at stake, I argue that the importance judges attach to the immediate political threat will decrease. Under these conditions, the court will be more inclined to defy the incumbent government despite the unfriendly political environment, and we will observe the diminishing impact of the political context on judicial behavior. In this regard, evidence will be inconsistent with the given hypotheses if we find that the judges' political and legal preferences do not significantly moderate the effect of the political environment.

3. The Turkish Constitutional Court in action

Before moving to the empirical analysis of the hypotheses, it is important to understand whether, and to what extent, the political context and judicial preferences affect the constitutional review in Turkey. Accordingly, this section of the article draws on the institutional design and preferences of the Turkish Constitutional Court (TCC), as well as the political context under which judges decide to defy the incumbent government.

The 1982 Turkish Constitution attributes no role to the parliament in appointing the constitutional court judges. Until the 2010 constitutional amendments, the president of the Turkish Republic, an official elected by the parliament who should remain politically independent, has appointed all TCC judges from among candidates nominated by other high courts.[18] Regarding the dismissal of the TCC judges, the court itself

[17] Hilbink, *supra* note 2.

[18] Constitution of Republic of Turkey, 1982, art. 146 [hereinafter TR. Const.]

is stated to decide on the termination of its members.[19] Taking into consideration the appointment and dismissal of the TCC judges one might argue that the constitutional structures leave the Court immune from constraints imposed by a ruling government. Although the Constitution does not give the ruling governments the power to control the composition and regulation of the TCC, the judges have certain reasons to fear retaliatory action from the incumbent governments. First, a political party that holds a majority in the parliament can easily change the constitutional articles that protect the judiciary from political intervention. Second, the parliament has always held the authority to control the budget and financial resources of the judiciary and this has been another factor that has prevented the judges from perceiving themselves as completely independent. Despite the possible threat from the incumbent government, in practice, the TCC did not refrain from challenging the acts of a powerful single-party government. For instance, based on certain technical grounds the TCC declared the first round of the 2007 presidential elections null and void.[20] This decision was obviously challenging the ruling AKP (Justice and Development Party) government since the AKP's presidential candidate was Abdullah Gul—the co-founder of the AKP and a close friend of Prime Minister Erdogan—whose victory was seen as certain.[21]

In addition to this decision, in June 2008 the TCC annulled the government-backed bill that proposed to lift the headscarf ban in universities. The reasoned decision of the court stated that the proposed constitutional amendment was an attempt to change non-amendable articles of the Turkish Constitution and violate the principles of secularism.[22] Going one step further, in 2008, Turkey's chief prosecutor also asked the TCC to ban the AKP for its "anti-secular activities." Although a majority of the court members voted to ban the AKP, the "qualified majority"[23] that was necessary for a party closure was not realized. As a result, the court declared that the AKP was a focal point of anti-secular activities and decided to cut its public funding by half.[24]

After all these antigovernment decisions of the TCC, the ruling AKP government has started to increase its control over the judiciary. Having won the national referendum in 2010, the AKP restructured the number of and selection process for the constitutional court judges and the members of the Supreme Council of Public Prosecutors and Judges. Holding the majority of the seats in the parliament, the AKP increased the

[19] TR. Const. art. 147: The Constitution says that the office of constitutional court judges may be terminated upon conviction of an offense requiring dismissal from the judicial profession, for reasons of health or when it is understood that they are not "eligible" for office.

[20] Güneş Murat Tezcür, *Judicial Activism in Perilous Times: The Turkish Case*, 43(2) Law & Soc'y Rev. 305 (2009).

[21] *Court Ruling Annuls Turkish Elections, Sending Currency Higher*, N.Y. Times, May 1, 2007, http://www.nytimes.com/2007/05/01/world/europe/01iht-turkecon.4.5521235.html?_r=0.

The election was repeated in August 2007 and Gul was elected in the third round of the second attempt of the presidential election. As such, the AKP government found the chance to impose greater control over the appointment of judges to the higher courts.

[22] *Turkish Top Court Annuls Headscarf Law*, Hurriyet Daily News, Nov. 29, 2012, http://www.hurriyet.com.tr/english/turkey/9107525.asp?gid=231&sz=39508.

[23] According to the constitutional amendment that of 2001, at least 7 of 11 constitutional court members need to vote in favor of the political party closure. In the closure case against the AKP, six judges voted in favor of the closure so that the qualified majority could not be realized.

[24] Tezcur, *supra* note 20.

number of judges sitting in the constitutional court from 11 to 17. Moreover, before the 2010 amendments the judges of the court had only been appointed by the president, but with the new amendments, three judges were stated to be elected by the parliament.

All these examples show that despite the possible threat from the incumbent government, the TCC did not abstain from assertive behavior. Collecting original data on the TCC decisions taken between the years 1984 and 2010, we see that even under the influence of powerful centralized governments the TCC successfully challenged the ruling governments. Showing the annual trends for the percentages of cases in which a law (or a portion of it) was annulled by the TCC, Figure 1 displays that under single-party governments[25] the TCC did not refrain from annulling problematic bills.

Many scholars have explained the assertiveness of the TCC by emphasizing its motivation to protect the values and interests of the state-elites including, especially, the military.[26] After the 1980 military coup in Turkey, the armed forces have taken a direct control of the constitution-making process and tried to formulate a strong judiciary in order to protect the civilizing mission of the outgoing military. Thus after 1982, the TCC and other Turkish courts have functioned as administrative agents of the military in order to bring the society "to the level of contemporary civilization" and protect secularism.[27] Sharing similar preferences the Turkish military has been a powerful

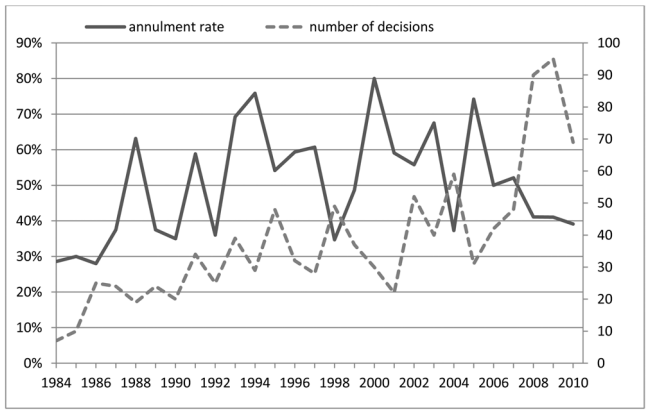

Figure 1. Number of decisions and percentage of annulments by year

Source: Data was compiled by the author from the decisions of the Turkish Constitutional Court, published on the official website of the court (http://www.anayasa.gov.tr).

Note: Between the years 1984 and 2010, the TCC decided on 1,028 analytically distinct constitutional cases. The y-axis on the right shows the total number of valid constitutional review decisions excluding party closures, other types of cases, and procedural rejections. The y-axis on the left shows the percentage of annulments. It is calculated as annulments over the total number of valid decisions excluding party closures, other types of cases, and procedural rejections.

[25] For the information about the type of the ruling parties in Turkey between 1984 and 2010, *see* Appendix A.

[26] Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 Law & Soc'y Rev. 653 (2006); Hootan Shambayati & Esen Kirdiş, *In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey*, 62(4) Pol. Res. Q. 767 (2009).

[27] Shambayati & Kirdiş, *supra* note 26.

ally of the judiciary and due to this coalition while reviewing certain cases the TCC did not abstain from challenging the popularly elected governments.

4. Data, measurement, and model

The central goal of this article is to explain whether, and to what extent, the court's preferences moderate the effect of political fragmentation on the constitutional court's likelihood of striking down laws. With this goal in mind, I used an original data set of all constitutional decisions resolved between January 1, 1984,[28] and December 31, 2010.[29] The data set includes all cases where the TCC reviews the constitutionality of laws, decrees, and procedures of the parliament.[30] The cases related to the dissolution and financial audit of political parties, the trial of statesmen before the Grand Tribunal (*Yüce Divan*), procedural rejections, and dismissals on merits are excluded from the data set.[31]

Looking at the Turkish Constitutional Court as a whole, the dependent variable of this study, *strike*, is a binary variable that measures whether the court invalidated a law/decree (or a portion of it) through constitutional review actions. *Strike* is coded 1

[28] Turkey's last military rule ran between 1980 and 1983. The first national election after the military coup was held on November 6, 1983, and the Motherland Party (*Anavatan Partisi*, ANAP) came to power in December 1983. For this reason the analysis of the TCC's decisions begins from January 1, 1984.

[29] The constitutional reviews between 1962 and 1982 and 2010 and 2015 were not included in the data set because the institutional design of the Turkish Constitutional Court at these time periods show considerable variations that would have negatively affected the comparability of the data. Before 1984, the structure of the TCC has been formulated by the 1961 Constitution which shared appointment powers between the Parliament and the president. The 1982 Constitution, however, gave the appointment power only to the president. The 2010 Constitutional Amendment, on the other hand, has changed the structure of the TCC (the number of the judges sitting in the Court as well as their removal and appointment processes). The structural differences between the pre-2010 and post-2010 TCC would have affected our measurement of the judges' political preferences as well as their perception of the political conditions.

[30] One can claim that collecting as data the final decisions of the constitutional court might pose a selection bias problem. Nevertheless, one should note that unlike its counterpart in the USA, the TCC cannot select its cases. In the USA, for instance, the Supreme Court enjoys discretionary docket, meaning that its cases are chosen by the judges themselves. For this reason, the selection process of the cases may be affected by political actors' policy preferences. In other words, the US Supreme Court may refrain from granting *certiorari* because it can anticipate its own deferential response (Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, Nw. U. L. Rev. 95, 1437, 1476; Lee Epstein & Jack Knight, The Choices Justices Make 84 (1998). Nevertheless, the Turkish Constitutional Court does not have a discretionary docket privilege. The judges, in concrete or abstract review cases, cannot choose the cases they want to rule on based on their a priori preferences and cannot avoid ruling on contentious issues. This aspect ensures that the court decisions that are analyzed in this study do not suffer from selection bias based on the preferences of the constitutional court judges.

[31] Arguing that under single-party governments the Court may avoid deciding controversial cases and choose to keep only the "safe" cases, one can claim that excluding procedural rejections from the sample can be a problem. Yet when we check the docket of the TCC we see that while under single-party governments 40 cases per year were decided, under coalition governments 36 cases per year were decided. So the sample of the cases decided under a unified government is roughly the same as that under a divided government. This shows that TCC does not seem to use procedural rejections as a mechanism to avoid deciding controversial cases.

if the court declares a law/decree (or a portion of it) unconstitutional and invalidates it on constitutional grounds. It is coded 0 if the court finds the law/decree constitutional in its entirety and upholds it. The key independent variables include political fragmentation and the court's political and legal preferences. To analyze to what extent the hypothesized judicial preferences moderate the effect of political fragmentation, I use the following structural model:

$$ln\left(S / 1 - S\right) = \alpha + \beta_1\left(ug\right) + \beta_2\left(ul\right) + \beta_3\left(irv\right) + \beta_4\left(ug * ul\right) + \beta_5\left(ug * irv\right) + \left(\alpha_1 X_1\right) + \varepsilon$$

S refers to the probability of the court's binary decision on each case to *strike* down a law (or a portion of it). In this model *ul* refers to *unfavorable law* and measures the political identification of the court with the government under whose ruling the challenged law was promulgated; and *irv* refers to *individual rights violations* and is used as a proxy measure for the court's legal preferences, which can be identified as individual rights protection. X_1 refers to vectors of control variables; α is the intercept; β_k are *k* coefficients to be estimated; and ε is the error term. Given the structure of the dependent variable, this model will be estimated via binary logistic regression.

4.1. Unified government

The theoretical framework of this study suggests that the constitutional court's decisions reflect the incumbent government's preferences when the sitting political actors have the political strength to constrain the court. Given the institutional structure of the Turkish political system, this will depend on the incumbent government's degree of control over the parliament. An incumbent government that holds the majority of the seats in the parliament can make constitutional reforms, decrease the financial resources of the judiciary, or pass a law similar to the one annulled by the constitutional court. To capture the governmental control over the parliament, I create a binary variable, *unified government*, which refers to whether the incumbent government (at the time the constitutional decision was made) was a unified (single-party government) or a divided government (coalition party government).

"Unified government" refers to a situation where a single political party controls the executive, has a majority in the parliament and has the capacity to enact laws. In this regard, "unified government" is coded 1 when the sitting government was a single majority party at the time the court made its decision. On the other hand, "divided government" refers to a situation where a single political party does not have the capacity to enact laws by itself. Hence, the variable "unified government" is coded 0 when the incumbent government was a coalition government at the time the constitutional court made its decision. In the Turkish case, while single-party governments held power for 15 years, coalition party governments ruled for 9 years,[32] and since the fragmentation in the parliament under coalition governments has been very high it

[32] *See* Appendix A.

has been much more difficult to pass legislation under coalition governments.[33] The data shows that 62 percent of the decisions were made under unified governments, but the TCC found only 45 percent of these claims unconstitutional. On the other hand, although 38 percent of the decisions were made under the rule of coalition governments, the TCC found 57 percent of these claims unconstitutional.

4.2. Unfavorable law

The theoretical framework of this study posits that the political preferences of the court affect the court's strategic voting. When we look at the Turkish case the existing literature asserts that the primary objective of the TCC is protecting the secular structure of the state and defending the interests of the state elite.[34] As such it is assumed that all constitutional court judges share similar political preferences. Nevertheless, this study aims to provide a systematic measure of the political preferences of the TCC by taking into consideration the ideological preference of each judge. In order to measure the court's political preferences, I look at the majority of the judges' political identification with the government enacting the law/statute whose constitutionality is challenged. To measure the political alignment between the court and the enacting government, we need a proxy measure for the partisan affiliation of the individual judges. In the Turkish case, the president is given broad discretionary power with regard to the appointment of the constitutional court judges.[35] The president appoints three of the constitutional court judges directly and eight of them from among three candidates nominated by other high courts (the High Court of Appeals, the Council of State, the Military High Court of Appeals, the High Military Administrative Court, the Audit Court) and the Higher Education Council.[36] Although the president selects the majority of the constitutional court judges from a pool of candidates, she or he will appoint like-minded judges or at least try to prevent the appointment of judges whose preferences she or he does not like. Thus, we will measure the political preference of a judge by looking at the president who has appointed him or her.

In the American context, for instance, judges are appointed by the president, who is politically affiliated to either the Republican or the Democratic Party. For that reason, in this context, one can easily show the political party with which the majority of the judges are affiliated. In the Turkish case, however, this task is quite challenging because the Turkish Constitution clearly states that the president—who is elected by the members of parliament[37]—should be politically independent of any political

[33] What really counts for threatening the position of judges at the court is the political and ideological fragmentation of the national parliament, specifically, the amount of seats that the political opposition holds to oppose the governments' proposals. Thus, it is important to note that in the Turkish case it has been more difficult to pass legislations under coalition governments compared to single-party governments.

[34] Belge, *supra* note 26; Shambayati & Kirdiş, *supra* note 26.

[35] Ergun Özbudun, *Turkey's Search for a New Constitution*, 14(1) Insight Turkey 39 (2012).

[36] TR. Const. art. 146

[37] According to the 1982 constitution, the president is elected by the members of the parliament from among the parliament members or proposed from outside the parliament by at least one-fifth of the total number of members of the parliament (TR. Const. art. 101). Yet, the 2007 constitutional amendments initiated by the AKP ruling government enabled election of the president by popular vote.

party. To deal with this problem I use the classification presented by Yasushi Hazama, who categorizes Turkish presidents into two main groups: state-elite presidents and non-state-elite presidents.[38]

Hazama argues that a past affiliation to a non-elected state institution or current or past membership in a state-elite party distinguishes the state-elite presidents from the non-state-elite presidents.[39] In line with this definition, Kenan Evren (former Chief of the General Staff, 1982–1989) and Ahmet Necdet Sezer (former President of the Turkish Constitutional Court, 2000–2007) are defined as state-elite presidents since they did not have any affiliation to a political party before being elected as presidents. On the other hand, the other three presidents who served between 1984 and 2010 are defined as non-state-elite presidents: Turgut Özal (1989–1993), Süleyman Demirel (1993–2000), and Abdullah Gül (2007–present). These presidents were former prime ministers who were affiliated with non-state-elite political parties such as ANAP (Motherland Party), DYP (True Path Party), and AKP, respectively. In this regard, the political preferences of judges are assigned based on whether they were appointed by a state-elite president or non-state-elite president.

Hazama uses the state-elite and non-state elite categorization for the Turkish political parties as well.[40] CHP (Republican People's Party), for instance, played a central role in the establishment of the Turkish Republic and is considered a state-elite party. As the descendants of this party, SHP (Social Democratic People's Party) and DSP (Democratic Left Party) are also considered state-elite parties. All other political parties in the parliament are considered non-state-elite parties.

To capture the political alignment between the court and the enacting government I look at the origin of the law and create a binary variable, *unfavorable law*. I code it 1 if the law under review is passed by a government whose political preferences are quite different from the majority of the judges' political preferences and 0 otherwise. To put it more specifically, the law under review is considered unfavorable and coded 1 whenever (i) it was passed under the ruling of a state-elite political party and the majority of the judges in the court were appointed by a non-state-elite president or (ii) it was passed under the ruling of a non-state-elite political party and the majority of the judges in the court were appointed by a state-elite president; otherwise the law under review is coded 0 (see Table 1). Including the number of cases decided by the TCC, Table 1 also shows that both types of cases are balanced in the measure of the unfavorable law. The data shows that between the years 1984 and 2010, unfavorable laws constituted 44 percent of the cases, and 53 percent of these unfavorable laws were found to be unconstitutional.

4.3. Individual rights violations

To operationalize the court's legal preferences, I focus on its motivation to protect individual rights. In order to measure this concept, I look at the nature of the legal issues

[38] Yasushi Hazama, *Hegemonic Preservation or Horizontal Accountability: Constitutional Review in Turkey*, 33(4) Int'l Pol. Sci. Rev. 421 (2012).

[39] *Id.*

[40] *Id.*

Table 1. Judicial review of a favorable law and an unfavorable law

	Majority of judges appointed by a state-elite president	Majority of judges appointed by a non-state-elite president
Law passed by the state-elite party	Favorable law *N = 209*	Unfavorable law *N = 193*
Law passed by the non-state-elite party	Unfavorable law *N = 256*	Favorable law *N = 370*

Note: If the law is passed by the Parliament *under the rule of a single-party government*, state-elite or non-state elite party refers to the ruling party under whose rule the laws were enacted. On the other hand, if the law is passed by the Parliament *under the rule of a coalition government*, state-elite non-state elite party refers to the political party that is part of that coalition and to which the Prime Minister belongs to. *N* refers to the number of cases decided by the Turkish Constitutional Court.

brought before the court and specifically focus on the legal challenges that are based upon individual rights violations. I suggest that a claim of individual rights violations will provide the appropriate condition for observing the court's legal preferences since it will trigger the judges' willingness to protect individual rights. For this reason, the litigants' indication of individual rights violations is used as a proxy measure of the court's legal preferences. As such, a dummy variable *individual rights violations* is created and coded as 1 when the litigant mentions the violation of the constitutional articles that deal with individual rights and coded as 0 otherwise.

The articles in the 1982 Turkish Constitution that deal with individual rights (Articles 12 to 74) refer to the fundamental rights and duties of the individual, as well as social, economic, and political rights and duties. The data shows that in 57 percent of the cases decided by the TCC, litigants have presented the violation of individual rights as a referral reason. Forty-five percent of these challenges have been found to be unconstitutional.

4.4. Control variables

In the empirical model of this study I control for four potential influences on judicial decision-making. First, I control for the type of legislative acts that are being reviewed. Laws passed by the parliament are the most common type of acts reviewed by the TCC. Additionally, the court may review governmental decrees and rules of parliamentary procedures. To capture the type of legislative act that is reviewed by the TCC, a dummy variable, *type of law,* is created and coded as 1 when the court reviews a law passed by the Turkish Parliament and coded as 0 when it reviews a governmental decree or a parliamentary procedure. Our data reveal that 88.5 percent of the legislative acts that are reviewed by the TCC are laws passed by the parliament. The data also demonstrates that while governmental decrees or parliamentary procedures constitute only 11.5 percent of the cases, almost 91 percent of these governmental decrees and procedures are found to be unconstitutional.

Second, one might argue that the judiciary will strike down a law not because it is an unfavorable law but because the enacting government of that law is not in power anymore. In order to control for this factor, I include a dummy variable, *enacting/incumbent*

same party, taking on the value of 1 if the enacting and incumbent governments were under the control of the same political party (or parties), and 0 otherwise. In the literature, it has been asserted that judges typically decide more politically sensitive issues in a way that is broadly consistent with the preferences of other power-holders and "almost never engage in policy-making that challenges those power-holders who are in a position to assault their nominal independence."[41] If the TCC tends to avoid challenging the policies of the incumbent government, then this variable should be negatively associated with judicial assertiveness. The data shows that in about 55 percent of the cases decided by the TCC, the enacting and incumbent governments are identical.

Another control variable is the identity of the litigant. Judges know that at different times, the majorities of different political inclinations will dominate the political system. Thus, they will not simply serve the incumbent government at the expense of other political actors' interests.[42] This argument shows that while making strategic calculations the judges take into consideration not only the possible reprisals by the incumbent government but also the reprisals that might be taken by future incumbent politicians. In this regard, I suggest that regardless of the ideological inclinations of the political actors who bring the cases for constitutional review, the court has a greater tendency to invalidate the laws that are brought by political actors rather than the laws whose constitutionality is challenged by other courts.

To measure the identity of the litigant I have created a dummy variable, *political litigant*. This variable is coded as 1 when the litigant is a political actor (the main opposition party or a minimum of one-fifth of the total number of members of the parliament) and coded as 0 when the litigant is another type of court (the general, administrative, or military courts). The data shows that 32.5 percent of the cases decided by the TCC are brought by political parties. But more interestingly, in 71.8 percent of these cases, the court found unconstitutional grounds and nullified the laws in question.

The final control variable that is of interest here is whether the behavior of the court changes over time. I suggest that the number of years an incumbent government stays in office may influence the court's decision-making. In the first years of the incumbent government's ruling, for instance, the court may be more inclined to uphold laws since the government has just come to power and will stay in power for a long time. On the other hand, as the years go by the court may be more prone to strike down laws, because, with the approaching elections, the probability of power changing will increase. To account for this possibility, I have included a continuous variable, *months in power*, which measures the number of months an incumbent government has been in power. The data shows that in Turkey, between 1984 and 2010, the average time that an incumbent government stayed in power was 53 months.

[41] Howard Gillman, *Judicial Independence Through the Lens of* Bush v. Gore*: Four Lessons from Political Science*, 64 Ohio St. L.J. 249, 251 (2003).

[42] The logic is somewhat similar to that employed by Gretchen Helmke, who analyzes the behavior of the Argentinian Constitutional Court. One of her interesting findings is that when judges have reason to believe that the incumbent regime is close to losing power, they will shift their decisions to favor the incoming government. As such, judges signal their willingness to serve the interests of a new majority. Gretchen Helmke, Courts under Constraints: Judges, Generals, and Presidents in Argentina 1 (2005).

5. Empirical analysis

Table 2 displays the results from two binary logistic estimations. In these models the dependent variable is *strike* and it measures whether the TCC invalidates a law or not. In the first model, only the key variables of interest and the control variables are included. On the other hand, in the second model, to test the hypotheses of this study, interactions between the court's preferences (*unfavorable law* and *individual rights violations*) and political fragmentation (*unified government*) are included. These interactions test whether, and to what extent, the preferences moderate the impact of political fragmentation on the TCC's assertiveness.

In Model 1 the coefficient of unified government shows that in line with the existing theories and our expectation, the impact of political fragmentation on the court's nullification of laws is negative and statistically significant. This finding tells us that compared to its behavior under a coalition government the TCC is less likely to strike down laws under a unified government. On the other hand, regardless of the political fragmentation, the coefficient of judicial political preferences presented in Model 1 shows that when the court reviews an unfavorable law the probability of the TCC annulling the law under consideration is significantly higher compared to when the TCC reviews favorable laws.

Table 2. Binary logistic analysis of the Turkish Constitutional Court's decisions

	Model 1	Model 2
Unified government	–0.42*	–1.35***
	(0.19)	(0.29)
Unfavorable law	0.32*	0.69*
	(0.15)	(0.29)
Individual rights violations	–0.61*	–0.75**
	(0.17)	(0.24)
Unified government*Unfavorable law		1.06**
		(0.35)
Unified government*Individual rights violations		0.82**
		(0.30)
Type of law	–2.02***	–2.01***
	(0.34)	(0.34)
Months in power	0.004	0.005
	(0.003)	(0.003)
Political litigant	1.35***	1.27***
	(0.18)	(0.20)
Enacting/incumbent same party	–0.32	–0.50**
	(0.18)	(0.18)
Constant	2.02***	2.31***
	(0.36)	(0.36)
N	1028	1028
Prob > chi^2	0	0
Pseudo *R* square	0.14	0.15

Note: The unit of analysis is the constitutional court's decision, coded 1 when the court invalidates a law (or a portion of it) or 0 when the court upholds a law. Cell entries are logistic regression coefficients. Standard errors are in parentheses. * < 0.05, ** < 0.01, *** < 0.001.

The negative and significant sign of *individual rights violations* variable presented in Model 1 shows that regardless of the political context within which the TCC acts, when the court reviews a law that is claimed to violate the individual rights principle, the probability of the court annulling such a law is significantly lower compared to the laws that have been claimed to violate other constitutional principles. This finding is not compatible with the conventional view of the courts, which suggests that the courts act in a counter-majoritarian fashion to protect the rights of individuals.[43] Yet it supports the findings of Belge who analyzes the TCC decisions taken between 1962 and 1999 and finds that while the TCC frequently ruled against the government, it rarely made bold decisions on civil liberties.[44] In other words, judicial activism in Turkey seeks the protection of the values and interests of the state rather than that of fundamental individual rights. For this reason, we observe that the judges' desire to protect individual freedoms is not a strong determinant of judicial assertiveness in Turkey.

In Model 2 the significance of the interaction terms confirms that the impact of political fragmentation on the Court's invalidation of laws significantly changes in line with the TCC's preferences. While the coefficient of a unified government is significantly negative, the coefficients of the interaction terms are significantly positive. In order to better explain the conditional effect of political fragmentation, Figure 2 presents the probabilities of striking down laws under a unified government in conjunction with the political and legal preferences of the TCC. A baseline probability is included as a reference point through which one can compare the predicted probabilities of striking down laws when certain judicial preferences are at stake and when they are absent.[45] Accordingly, Figure 2 shows that under a unified government and

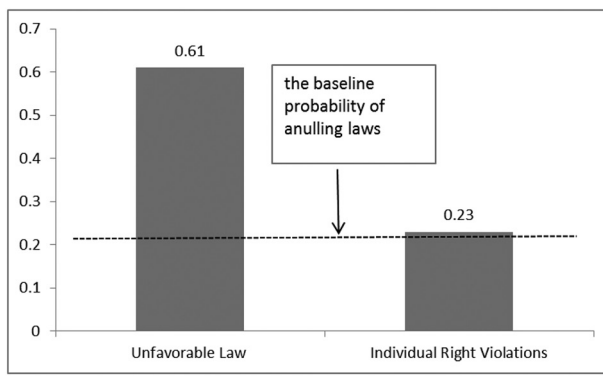

Figure 2. Predicted probabilities of striking down laws under a unified government: the influence of judicial preferences

Note. The baseline probability of striking down laws refers to the probability of the Turkish Constitutional Court striking down laws under a unified (single) government and when all relevant judicial preferences are set to zero.

[43] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (1962).

[44] Belge, *supra* note 26.

[45] The baseline probability of striking down laws is calculated by holding the "months in power" variable to its mean, unified government and other control variables constant to 1, and all preference variables to 0. As such, the baseline probability represents the probability of the court striking down a law under

when the relevant judicial preferences are set to zero, the TCC's probability of striking down laws is just 22 percent. When the TCC reviews unfavorable laws and its political preferences are at stake, the probability of striking down laws almost triples and increases from 22 percent (baseline probability) to 61 percent. The high levels of annulment probability suggest that when the Court reviews unfavorable laws under the ruling of a unified government, the judges' consideration of political constraints and strategic calculation appears to diminish.

Model 2 presents another finding that supports our first hypothesis. It reveals that the coefficient on the *unified government*unfavorable law* interaction term is positive and statistically significant so that when the unfavorable law variable is equal to 1, the coefficient of the unified government variable decreases and becomes (–1.35 + 1.06*1) = –0.29. This result tells us that the net impact of a unified government on the annulment of laws is still negative, but its effect tremendously decreases when the political alignment between the majority of the judges and the enacting government is weak. In other words, reviewing an unfavorable law significantly decreases the impact of political fragmentation on the court's behavior. All these findings show that the political preferences of the TCC judges significantly affect their strategic calculations. One should note that one of the most important factors that provides judges with the freedom to make decisions in line with their preferences is the existence of an external actor's support. If the judges are supported by powerful actors outside the parliament they will have little to worry in confronting the incumbent governments. In the literature, the public is stated to be an important external actor that may prevent the incumbent government from reacting against the judiciary.[46] Regarding the Turkish case, the public backlash may not be considered as a credible threat against the ruling government. Yet, the strong alliance between the military and the TCC can be presented as the most important factor that has provided the Court with significant latitude.

Model 2 in Table 2 also demonstrates whether the inclusion of individual rights violations as a referral reason moderates the effect of political fragmentation. The coefficient on the *unified government*individual rights violations* interaction term is positive and statistically significant. When the referral reason includes the violation of individual rights, the coefficient of the unified government variable becomes (–1.35 + 0.82*1) = –0.53. This finding reveals that the net impact of a unified government on the annulment of laws is still negative, but the importance of a unified government as a predictor appears to slightly decrease for cases where the violation of individual rights is included among the referral reasons. To put it more specifically, under the ruling of a unified government when the court reviews the constitutionality of bills that are claimed to violate individual freedoms, the court's probability of striking down laws increases by only 1 percent (see Figure 2).

a unified government that has been in office 53 months and when the litigant is not a political actor, the law under review is a favorable law, the litigant does not bring the violation of individual rights as a referral reason, and when the enacting and incumbent governments are the same.

[46] Vanberg, *supra* note 16; Staton, supra note 16.

In the literature, it has been argued that judges will challenge the incumbent political actors in defense of individual rights principles only if the political context allows them "room for maneuver."[47] Yet our findings show that even under favorable conditions for assertive behavior, the judges abstain from protecting individual rights and liberties. Regarding the impact of individual rights protection on judicial behavior, Model 2 reveals that even under the ruling of a coalition government (when unified government = 0), the coefficient of the individual rights-violations variable is negative (–0.75 + 0*0.82) = –0.75. This result tells us that even under a fragmented political context the net impact of the individual rights violations variable on the annulment of laws is negative. Thus, under the ruling of a coalition government, when the TCC reviews a law that is claimed to violate the individual rights principle, the TCC's probability of annulling such a law is significantly lower compared to its probability of striking down a law that is claimed to violate other constitutional principles. This finding supports Robert Dahl's argument, which states that the preservation of rights and liberties "can depend only on the beliefs and cultures shared by its political, legal, and cultural elites and by the citizens to whom these elites are responsive."[48] One should also recall the hegemonic preservation theory which identifies the empowerment of courts as a calculated move by political elites to secure their interests against the emerging counter-elites.[49] As a result, especially in developing democracies, the judiciary can prioritize the protection of the interests of the state elite or the regime over the protection of individual rights.

Finally, regarding the impact of control variables, both models presented in Table 2 reveal that the TCC is more likely to strike down governmental decrees rather than the laws passed by the legislature. Similarly, the probability of invalidating laws significantly decreases when the court decides cases where the enacting and contemporary governments are controlled by the same political party. This finding suggests that the TCC does not tend to challenge the policies favored by the incumbent government. Regarding the impact of the identity of the litigant, the empirical results show that the Court has a greater tendency to invalidate the laws that are brought by political actors rather than those laws whose constitutionality is challenged by other courts. The findings of this study also display that the number of months an incumbent government stays in office does not have a significant influence on judicial behavior.

6. Discussion and conclusion

While most of the existing literature has assumed that political context exhibits uniform effects across cases, this study highlights the importance of the court's preferences

[47] Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 Ann. Rev. Pol. Sci. 345, 361 (2009).

[48] Robert Dahl, How Democratic Is the American Constitution? 1, 99 (2001).

[49] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 1 (2004).

and argues that the impact of political fragmentation on the court's decisions changes across cases where different judicial preferences are at stake. In this regard, independent from the political context within which the court acts, I have hypothesized that the court *wants* to challenge a specific law when the political alignment between the court and the enacting government is weak and when a specific law violates the principle of individual rights. I suggest that these case-specific characteristics, which are closely correlated with the court's preferences, moderate the strategic calculations of the court and lower the impact of the political context on judicial decision-making. This is not to deny the fundamental rationale of strategic theorists who argue that judges assess the risks of their decisions. Yet, I suggest that to better explain and predict judicial behavior we should approach the external political constraints in conjunction with the attitudes the judges hold. The empirical results show that in the Turkish case, the effect of political fragmentation on judicial behavior decreases when there is a weak political alignment between the court and the enacting government. To put it more specifically when the majority of the judges represent state-elite preferences and the ruling elite is from the non-state-elite party the possibility of the court to annul the regarding laws triples. Regarding the moderating impact of the TCC's legal preferences, the empirical findings show that when the TCC reviews a law that is argued to violate the individual rights principle, the Court's tendency to annul such a law is significantly lower compared to those laws that were claimed to violate other constitutional principles. Another result shows that although the moderating influence of the violation of individual rights on the relationship between political fragmentation and the annulment of laws is significant, its impact appears to be minor. All these findings show that the judiciary will locate its decisions as close as possible to its preferences, but within the space defined by the preferences of the relevant outside actors. In countries where there is a strong external actor—the public or another institution such as the military—who supports the judiciary, the judges will not fear political retaliation and defy the incumbent government. Moreover, especially in developing democracies where the protection of individual rights and liberties is not internalized by the public and political institutions, the legal preferences of the courts would not significantly affect the assertiveness of the judiciary. Despite all these conditions, the empirical results from the Turkish case show that the situational characteristics across cases can trigger different preferences of judges so that the importance that a court places on a possible reaction from political branches will vary across different types of cases.

Appendix A

Incumbent Governments in Turkey, 1983–2010

Period	Governing party(ies)	Type of government
December 1983–December 1987	ANAP	Single-party government
December 1987–November 1989	ANAP	Single-party government
November 1989–June 1991	ANAP	Single-party government
June 1991–November 1991	ANAP	Single-party government
November 1991–May 1993	DYP, SHP	Coalition government
June 1993–October 1995	DYP, SHP	Coalition government
October 1995	DYP	Minority government
October 1995–March 1996	DYP, CHP	Coalition government
March 1996–June 1996	ANAP, DYP	Coalition government
June 1996–June 1997	RP, DYP	Coalition government
June 1997–January 1999	ANAP, DSP, DTP	Coalition government
January 1999–May 1999	DSP	Minority government
May 1999–November 2002	DSP, MHP, ANAP	Coalition government
November 2002–July 2007	AKP	Single party government
July 2007–June 2011	AKP	Single party government

Party Names: ANAP (Motherland Party), SHP (Social Democratic People's Party), DYP (True Path Party), CHP (Republican People's Party), RP (Welfare Party), DSP (Democratic Left Party), DTP (Democratic Turkey's Party), MHP (Nationalist Movement Party), FP (Virtue Party), AKP (Justice and Development Party).