STRATEGIC INTERACTION BETWEEN CONSTITUTIONAL COURTS AND POLITICAL ACTORS IN DEVELOPING DEMOCRACIES

by

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ABSTRACT

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Until the 1990s, studies on democratic political institutions usually neglected the behavior of the courts outside the United States. However, recent research on comparative judicial politics sought to remedy this important shortcoming in the literature. Following the findings of these recent studies, I begin my dissertation by constructing a general model that explains the incentives of the incumbent governments to maintain the independence of the judiciary. Conducting a cross-country analysis of 97 democracies in the world, I show that under similar political conditions the incumbent governments in advanced and developing democracies adopt different incentives to maintain the independence of the judiciary. Cross-country analyses and the international indicators used in these types of analyses are not without their weaknesses. Thus, to better determine the influence of political factors on the independence of the judiciary, I continue my analysis by focusing on a single developing democracy. Using Turkey as a case study, I seek to find out if the structure of the government influences the invalidation of the laws by the Constitutional Court and if this changes across certain case level characteristics. In the last section of the dissertation, I seek to explain why the opposition political parties frequently bring cases to the constitutional court and choose to judicialize politics although the judiciary is not fully independent. I argue that the approaching time of the next general election affects the frequency of the main opposition party's referrals to the constitutional court. My argument is that this effect is conditioned by the opposition party's predictions about its chances in the election. Based on the empirical evidence from the Turkish case, I refer to this phenomenon as strategic litigation theory.

ÖZET

GELİŞMEKTE OLAN DEMOKRASİLERDE YÜKSEK MAHKEMELER VE POLİTİK AKTÖRLER ARASINDAKİ STRATEJİK ETKİLEŞİM

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1990'lı yıllara kadar demokratik kurumlar üzerine yapılan araştırmalar çoğunlukla ya mahkemelerin çalışmalarını göz ardı etmiş ya da ABD'nin dışında kalan yargı sistemlerine önem vermemişlerdir. Son yıllarda literatürdeki bu boşluğu doldurmayı amaçlayan çalışmaları takip eden bu tez, gelişmekte olan demokrasilerde, yüksek mahkemeler ve politik aktörler arasındaki etkileşime odaklanmaktadır. Tezin ilk bölümü, idaredeki hükümetlerin yargı bağımsızlığının korunması konusunda sergiledikleri eğilimleri açıklayan genel bir model oluşturarak başlamaktadır. 97 ülke üzerine yapılan istatistiksel analiz, benzer siyasal şartlar altında gelişmiş ve gelişmekte olan demokrasilerde hükümetlerin yargı bağımsızlığını koruma konusunda farklı eğilimler sergilediklerini göstermektedir. Siyasal faktörlerin yargı bağımsızlığı üzerindeki etkisini daha ayrıntılı açıklayabilmek için, bu tezde ayrıca hükümet yapısının yüksek yargı kararları üzerindeki etkisi ve bu etkinin davadan davaya ne derece değiştiği Türkiye örneği ışığında açıklanmaktadır. Siyasal faktörlerin yargı bağımsızlığı üzerindeki etkisi incelendikten sonra, tezin son bölümünde ise "Gelişmekte olan demokrasilerde yargı sistemi tam olarak bağımsız olmadığı halde, neden muhalefet partileri sık sık anayasa mahkemesine başvurmaktadır?" sorusuna cevap aranmaktadır. Bu doğrultuda, yaklaşan genel seçim tarihinin ana muhalafet partisinin anayasa mahkemesine başvurma sıklığını etkilediği, ancak bu etkinin ana muhalefet partisinin seçim sonucu tahminine bağlı olduğu savunulmaktadır. Tezde bu duruma stratejik dava açma teorisi adı verilmekte ve Türkiye örneğinden toplanan verilerle bu teori desteklenmektedir.

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CHAPTER 1

INTRODUCTION

Institutions determine the rules by which the game of politics is played. Influenced by the new-institutionalist approach, many political scientists have directed a substantial amount of energy toward understanding how electoral systems, executive-legislative arrangements, or party systems shape politics. Yet despite the vital role of the judiciary in the consolidation of democracies, the studies on democratic institutions mostly overlook the behavior of courts or their relationship with the politicians. Focusing on the interaction between the constitutional courts and political actors in the context of developing democracies, my dissertation consists of three essays each of which investigate this interaction from three different perspectives.

The central question that motivates the first essay is "Why and when do the political actors try to create and maintain judicial independence?" To answer this question the proponents of 'insurance theory' propose a positive relationship between political competition and judicial independence (Ramseyer, 1994; Ginsburg, 2003; Finkel, 2008; Landes and Posner, 1975; Stephenson, 2003). Focusing on this theory, the main goal of my first essay is to test the insurance logic of judicial independence and explain whether -and if so how- the impact of political competition on judicial independence changes across advanced and developing democracies. The central motivation of my second essay emanates from the studies in the judicial politics literature that have accounted for the political contexts where judges will adopt strategic behavior (e.g. Segal and Spaeth, 2002; Segal, 1997; Spiller and Gely, 1992; Bergara et al., 2003). These studies have examined a limited set of situations under which the judges may be constrained, but they have not mentioned whether and to what extent the explanatory power of political factors on the high court's decisions changes across cases. Hence, the goal of my second essay is to explain to what extent the

explanatory power of government structure on the constitutional courts' invalidation of laws changes across cases and account for whether –and if so how- how certain case-level factors influence the degree of the constitutional court's strategic voting. Finally, my third essay addresses the question "Why and when do the opposition political parties frequently bring cases in front of the constitutional court and choose to judicialize politics although the judiciary is not fully independent?"

Focusing on the scholarship that deals with the interaction between courts and the elected branches, in this brief introduction to my dissertation, first I will provide an overview of the central debates and recent developments in the field of judicial politics. I will then present my research as well as its potential contribution to the existing research in the field**.**

1.1 Central Debates and Recent Developments in Judicial Politics Literature

Most early works in the field of judicial politics that focused on the interaction between the courts and political actors primarily examined the U.S Supreme Court. These studies concentrated on the effect of institutional constraints and judges' strategic responses to these constraints. This early scholarship of judicial politics outlined two approaches of judicial behavior: attitudinal approach and separation-of-powers approach. The proponents of attitudinal approach propose that political institutions are unlikely to be effective in restraining the court from enacting its policy preferences. For that reason, they claim that the judges vote only according to their own ideological preferences (e.g Segal and Spaeth, 2002). The proponents of the separation-of-powers approach, on the other hand, suggest that political actors have the capacity to overturn the decisions of the Supreme Court and assuming that the Supreme Court has rational foresight, they have argued that the Court will anticipate the reaction of the Congress, act strategically, and would not always decide cases in accordance with their own preferences (e.g Epstein and Knight, 1998).

Although this debate is still prevalent in the field of judicial politics, since the 1990s there have been several other developments. First, attention to comparative judicial politics has been steadily increasing in the field. For instance, many scholars have been able to show that the courts outside the United States behave strategically as

well. Some of these studies have included applications to executive–judicial relations in Russia (Epstein, Knight and Shvetsova, 2001), Argentina (Iaryczower, Spiller and Tomassi, 2002) and post-communist countries (Herron and Randozzo, 2003). Others have focused on the strategic behavior by Argentinean judges during periods of regime change (Helmke, 2002); accounted for the strategic use of media by the Mexican Supreme Court (Staton, 2010); and explained the impact of public monitoring and transparency of the political system on the final decision of the German Constitutional Court (Vanberg, 2005).

Second, in the field of comparative judicial politics a growing number of scholars focused mainly on the question of whether and when courts check the elected branches. A group of scholars have accounted for the political conditions under which justices or courts rule against the government (Iaryczower, Spiller, and Tommasi 2002; Helmke, 2005; Chavez, 2004; Finkel, 2003; Scribner, 2004). Others have questioned the extent to which public support has permitted courts to challenge the executives (Staton, 2010; Vanberg, 2005). Focusing on the importance of institutional factors, other scholars accounted for whether institutional factors such as judicial reforms or constitutional designs affect the ability of courts to act independently of the executive (Domingo, 2000; Brinks, 2005; Ríos-Figueroa, 2006).

Third, in line with the increasing attention to comparative judicial politics and the fact that there is a great deal of variation in the independence of the courts across countries and across time, a number of scholars have turned to the question of 'Why do the executives delegate power to courts and tend to maintain it?'. As Hirschl (2004: 49) argues, "Judicial power does not fall from the sky; it is politically constructed." Hence the empowerment of courts is understood as a calculated move by political elites to secure their interests against the emerging counter elites. Introducing the insurance theory a group of scholars argued that political elites who are confronted with electoral uncertainty and foresee themselves being ousted from power are more prone to arrange a constitutional bargain in which they empower courts as a means of protecting and pursuing their agenda after their political removal (Ginsburg, 2003; Finkel, 2008; Magalhaes, 1999). Hirschl (2004) proposed a similar elite-driven theory of hegemonic preservation in which political elites believe their interests are more likely to be served by independent judiciary with compatible elite views than normal democratic processes that favor the people.

Fourth, usually couched in terms of the judicialization of politics (Tate and Vallinder, 1995) another group of scholars has tried to find out the causes and consequences of the process where courts are being increasingly drawn into political debates (Stone Sweet, 2000; Guarnieri and Pederzoli, 2002; Dotan and Hofnung, 2005; Gauri and Brinks, 2008). The judicialization of politics has been defined as a process by which "courts and judges come to make or increasingly dominate the making of public policies that had previously been made by other governmental agencies" (Vallinder, 1995: 13). As a result, the pursuit of politics through the "medium of legal discourse" appears as the central aspect of a judicialization process (Shapiro and Stone-Sweet, 2002).

1.2 Overview of the Dissertation

Following the recent developments in the field of judicial politics this dissertation starts by constructing a general model that accounts for the incentives of the incumbent governments in maintaining judicial independence. Conducting a cross-country analysis I show that under similar political conditions the incumbent governments in advanced and developing democracies adopt different incentives in maintaining the independence of the judiciary. Cross-country analyses and the international indicators used in these types of analyses are not without their weaknesses. Thus, to better determine the influence of political factors on the independence of the judiciary, I continue my analysis by focusing on a single developing democracy. Taking Turkey as a case study, I try to account for whether the government structure influences the courts' invalidation of laws and whether this impact changes across certain case level characteristics. Finally, focusing on the same developing democracy, Turkey, I seek to explain why the opposition political parties frequently bring cases in front of the constitutional court and choose to judicialize politics although the judiciary is not fully independent.

In Chapter 2, I test the insurance logic of judicial independence and explain whether the explanatory power of political competition on judicial independence varies across advanced and developing democracies. Attributing high levels of judicial independence to intense political competition, the advocates of this theory envision a

positively-sloped relationship between these two aspects. But, do high levels of political competition have similar impact in both advanced and developing democracies? In particular, in developing democracies –which are characterized by high levels of corruption, weak party systems and high electoral volatility- the immediate short-term benefits that incumbents may obtain from creating a politically dependent judiciary may be higher than the long-term benefits that incumbents may reap from supporting the existence of an independent judiciary. Hence, in developing democracies where political competition is highly intense, the incumbents may be more inclined to create a politically dependent judiciary as a mechanism that increases the probability of remaining in office. Accordingly, in the context of developing democracies high levels of political competition may not generate as powerful control mechanisms as it generates in advanced democracies but may even hamper the judicial independence.

Based on a large-N cross-country statistical analysis over 97 democratic countries, this chapter shows that as democratic quality across countries changes, the impact of political competition on judicial independence changes as well. The empirical findings reveal that while in advanced democracies high levels of political competition enhance judicial independence, in developing democracies political competition significantly hampers and even negatively affects the independence of the courts. In other words, in developing democracies high levels of political competition may boost uncertainty and incumbents' fear about the results of the next election. Hence, in the countries with very low levels of democratization whose political environment is very competitive the ruling political parties may exert higher pressure on courts in order to avoid power alteration.

In Chapter 3, I investigate how a variety of case-level characteristics (origins of the law under review, identity of the litigant, and the constitutional ground on which the litigant brings the case) influence the relationship between the government structure and the judicial invalidation of laws. The proponents of separation-of-powers approach have examined a limited set of political contexts under which the judges may be constrained and adopt strategic behavior (Epstein and Knight, 1998; Spiller and Gely, 1992; Bergara et al., 2003). Yet these scholars have not mentioned whether and to what extent the explanatory power of these political factors changes across cases. I assume that cases provide justices with different contexts and situations, which in turn interact with their perception of external political impacts and hence shape their decisions.

Because situational characteristics across cases can trigger different motivations and considerations, the importance that the court gives to a possible reaction from the political branches are expected to vary across cases. Hence, the goal of Chapter 3 is to explain variation in the relationship between government structure and the court's invalidation of laws across cases and account for how certain case-level factors influence the degree of the court's strategic voting.

I analyze the Turkish Constitutional Court's decisions taken between the 1984-2010 periods. Using this dataset and taking the behavior of the court as a whole, I examine to what extent the impact of the government structure on the court's decisions is shaped by the varying situations that confront the court from case to case. This research both helps to fill a substantial gap in our understanding of the judicial review conducted by the Turkish Constitutional Court and shows to what extent the impact of political factors on judicial decision-making changes across cases in the context of parliamentary democracies.

Chapter 4 aims to explore why and when the opposition political actors frequently turn to the judiciary instead of using political channels in their efforts to affect public policies. Assuming that opposition parties are rational actors who tend to use litigation as a tool to achieve their political objectives, I hypothesize and find that the approaching time of the national election would affect the frequency of the main opposition party's referrals to the Court. Furthermore, this effect is hypothesized to be conditioned on the opposition party's prediction of the upcoming general election results. The preceding local election results are used as a proxy measure for the opposition party's prediction and the empirical results show that once the opposition party believes that it will lose the upcoming general election, it will begin facing incentives to increase its referrals to the constitutional court. I refer to this phenomenon as "strategic litigation theory".

The strategic litigation theory and evidence is derived from Turkey. I constructed an original data set including all the acts promulgated by the parliament between the years 1984 and 2011, and analyzed all the cases which are brought to the Turkish Constitutional Court by the opposition parties in the same time period. Building on an original data, this study also integrates the Turkish Constitutional Court – which is understudied to this point - into the large body of existing research in comparative political institutions and judicialization of politics.

CHAPTER 2

JUDICIAL INDEPENDENCE ACROSS DEMOCRATIC REGIMES: UNDERSTANDING THE VARYING IMPACT OF POLITICAL COMPETITION

2.1 Introduction

A judiciary that is insulated from legislative and executive influence as well as from other private interests is not only the fundamental principle of the rule of law but also the central precondition for good governance and consolidation of democracy. Independent courts serve as an effective mechanism of accountability that controls and constrains the operations and power of the legislature and executive. Independent judges, for instance, have the power to punish political authorities who abuse or misuse their position. On the other hand, through judicial review independent courts can declare legislative acts or government policies unconstitutional. Being insulated from electoral accountability and other political interferences, an independent judiciary may also produce counter-majoritarian decisions. But then why do the elected representatives of democratic countries construct an independent judiciary in the first place and try to maintain it even when the courts do not render decisions in conformity with their interests or policies?

According to the insurance logic of judicial independence, politicians facing the possibility of losing power seek to limit their opponents by supporting judicial independence. This logic posits that the ruling elites, who expect to fall into minority status after elections, might want to strengthen the courts in order to protect their own rights and liberties once they become political minorities (Ginsburg, 2003). In other words, the advocates of the insurance theory emphasize that in the long-run the incumbents may have long-term benefits under an independently performing judicial

system. Independent courts are perceived by these incumbents as a mechanism that would protect them from the opposition's attack after future electoral change (Ginsburg, 2003; Finkel, 2008) or ensure that legally enacted policies continue to be implemented even after they leave office (Landes and Posner, 1975). As a result, the proponents of the insurance theory argue that politicians offer independent courts when political competition is intense and incumbents' expectation of winning the future elections is low (Ramseyer, 1994; Ginsburg, 2003; Finkel, 2008; Landes and Posner, 1975; Stephenson, 2003). Thus, attributing high levels of judicial independence to intense political competition, the advocates of this theory appear to envision a positive relationship between these two aspects.

Although the underlying logic of the insurance theory is quite appealing, it does not explain why we do not see high levels of judicial independence in all democratic countries with high levels of electoral competition. I argue that the cost-benefit analysis that the rational political elites have to undertake while choosing their judicial policies would reflect different trends across advanced and developing democracies. Hence intense political competition would not inevitably lead to high levels of judicial independence across all democratic countries. Thus we should not expect a similar impact of political competition both in advanced and developing democracies.

By advanced democracies I mean regimes where democratic values are fully consolidated and political processes are successfully institutionalized. In these types of regimes democracy and its rules are perceived to be "the only game in town" (Linz and Stepan, 1996). Citizens and leaders conclude that no alternative form of regime has subjective validity. The party system is stable and the political parties have strong networks of grassroots organizations. Democratic values are highly internalized by the citizens. Individual rights and civil liberties are protected by the rule of law. Developing democracies, however, are regimes that meet the procedural minima for democracy but lack consolidation of democratic values and institutionalization of political processes. The weakness in protecting individual rights and civil liberties makes opposition difficult. Media is often controlled by the state and strongly supports the regime. The party system is underdeveloped and volatile. With high volatility, the entry barriers to new parties are lower, and the likelihood that personalistic politicians can become the head of government is much higher (Minwaring and Zoco, 2007).

In line with these differences between advanced and developing democracies, it seems logical to presume that the cost-benefit analysis that incumbents engage in when

they decide whether to offer independent courts or not, might be different. Especially in developing democracies - which are characterized by high levels of corruption, weak party systems and high electoral volatility- the immediate short-term benefits that incumbents may obtain from interfering in judicial decisions may be higher than the long-term benefits that incumbents may reap from high levels of judicial independence. Given the fact that in developing democracies citizens have lower levels of confidence in the judiciary; the media is highly controlled by the government; citizens have limited awareness and willingness to participate in politics; and the political and civil rights of the citizens are not efficiently institutionalized, the power holders may be less fearful of public reaction than their associates in advanced democracies. This situation may lower the costs of the intrusive behaviors for the politicians who aim to offer a dependent judiciary. Hence, in the context of developing democracies when political competition is highly intense, the incumbents may be more inclined to interfere in judicial decision-making.

This chapter does not present political competition as the only factor and insurance logic as the only mechanism that accounts for high levels of judicial independence. It acknowledges that there are many contextual and institutional factors that account for high levels of judicial independence[1]. Yet the main objective of this chapter is to test the insurance logic of judicial independence and albeit indirectly show whether - and if so how- the impact of political competition on judicial independence changes across advanced and developing democracies. I suggest that while in advanced democracies political competition has positive impact on judicial independence, in developing democracies it has negative impact. In this regard, I develop an empirical model and test it across 97 democratic countries.

The article proceeds as follows: the first part of the study gives the theoretical framework about the varying relationship between political competition and judicial independence across advanced and developing democracies. The second part introduces

[1] In addition to the notion of insurance logic, in the literature there are other explanations about why the politicians maintain an independent judiciary. In this regard some scholars perceive the judiciary as a mechanism which is able to enforce legislative deals (Carrubba, 2009), monitor lower level bureaucrats (McCubbins and Shwartz, 1984; Moustafa, 2007), allow politicians to avoid blame (Salzberger 1993; Whittington, 1999; Magaloni, 2008), provide legislatures with valuable information about legislation (Rogers, 2001), and ensure that the state promises to respect individual rights which in turn would breed foreign investment (North and Weingast, 1989).

the data, key variables and the empirical model. The third part is the empirical section where the main hypothesis is tested and results presented. The last part will conclude the study by discussing both theoretical and practical implications of the findings.

2.2 Political Competition and Judicial Independence: Theoretical Framework

Although the literature on judicial independence is characterized by various conceptual debates about the meaning of judicial independence[2], a judge is independent when, "…she does not face undue external or internal pressure (as say from hierarchical superiors) to resolve cases in particular ways" (Rios-Figueroa and Staton, 2009: 12). On this account, a judge is independent when she can take decisions based on her own preferences and interpretation of law. Thus, judicial independence refers to independence of the judicial system from external political, economic and social influence, and to the ability of individual judges to make independent decisions based on their own interpretation of law. In line with this meaning of judicial independence, two of its characteristics are evident. The first is "impartiality" and refers to the idea that judges will base their decisions on law and facts (Shapiro, 1981). A second trait of independence is "political insularity" (Fiss, 1993) and refers to the condition that judges should be protected from political interference that might affect their impartiality. While identifying judicial independence, one should recall that the courts do not operate in vacuum. A number of exogenous factors will influence the judges' opinions and will have varying impacts on their impartiality and insularity (Larkins, 1996). Although constitutional protections are presented as critical determinants of judicial independence, the independent performance of the courts cannot be achieved unless politicians and political factors construct the appropriate context.

One of the central debates in judicial politics literature is about whether - and if so how- the political institutions constrain the judicial decision-making. In this regard, a vast body of literature focuses on the relationship between political competition and judicial independence. While the proponents of the insurance theory focus on the

[2]For a discussion of the meaning of juidicial independence, see Burbank and Friedman, 2002; Larkins, 1996; and Rios-Figueroa, 2006.

relationship between the politicians and the courts from the political decision-making perspective -which aims to understand the politicians' calculations and decisions to maintain judicial independence-, another strand of research focuses on the same relationship from the judicial decision-making perspective (see Marks, 1989; Ferejohn and Weingast, 1992; Gely and Spiller, 1992; Epstein and Knight, 1998). Formulating their analyses through separation-of-powers models, the basic idea of the latter group of studies suggests that the concentration of political power across the branches of government forces judges to behave strategically in order to avoid having their decisions overturned or to prevent some political sanctions. In line with this logic, some scholars designate political fragmentation as a proxy for political competition and assert that when political power is highly fragmented the judiciary would be more independent[3] (Chavez, 2004; Harvey and Friedman, 2006; Rios-Figueroa, 2007; Iaryczower, Spiller and Tommasi, 2002).

Nevertheless, political fragmentation is just one of the mechanisms through which political competition affects the performance of the courts. The basic feature of this mechanism entails that political fragmentation reduces the capability of incumbents to interfere in judicial decision-making because the dispersion of power makes it more difficult to obtain the political support to curtail the autonomy of judges. Although political fragmentation or high number of veto players/sanctioning players may help to control and constrain the incumbents' intervention in the judiciary, the real independence cannot be achieved without a real intention among the political elites. In this regard, electoral competition appears as another key mechanism through which political competition affects the incumbent politicians' preferences for maintaining judicial independence.

Under a democratic regime the ruling government can only maintain its power through re-election, but intense electoral competition increases the probability of losing its office. Hence, the extent of competition between politicians affects the policy choices of the incumbents. According to one strand of research, respecting the independence of the courts may increase the politicians' expected payoff. This logic has led some scholars to think of judicial independence as a form of political insurance that incumbents buy to reduce the cost of being out of office. Thus political insurance is

[3] Assuming that judges have different policy preferences from the government's, the expectation is that in environments where political power is fragmented the judges would cast their true preferences.

perceived by the incumbents as protection from the opposition's attack or preservation of policy stability after future electoral change. And several scholars have accounted for the maintenance and efficacy of judicial institutions as functions of the parties' prospective share of power.

Ginsburg (2003), for instance, argues that when political incumbents expect to win future elections, they have little incentive to empower the judiciary. However, when political competition is intense and the incumbents have low expectation of retaining their positions, they are more likely to support an independent judiciary through which they will be able to challenge the policies of the incoming government. Extending Ginsburg's thesis to Mexico, Finkel (2008) contends that the 1994 judicial reform in Mexico, with its introduction of new judicial review powers and independence guarantees, was motivated by the ruling party's fear of losing power. Thus, political incumbents delegated power to courts to preserve their rights in case they were to later become the opposition. This argument foresees political incumbents who will give up current opportunities to attack opponents through the courts in exchange for insurance that they will not be attacked once they find themselves in the opposition. This logic necessitates high levels of trust between the political actors. However especially in developing democracies which are characterized by deep-mistrust among political actors, the credibility of this commitment would attenuate (Popova, 2010).

According to Landes and Posner (1975), on the other hand, independent courts are likely to ensure that legally enacted policies continue to be implemented even after the politicians who put them in place leave the office. The scholars argue that incumbent politicians who pressure the courts will not be able to attract interest groups to support their policy proposals because interest groups would know that the policy will not endure after those politicians leave the office. Yet assuming that interest groups would value long-term policy stability over short term benefits of short lived policies is proved to be empirically wrong in the context of developing democracies (Hellman, 1998).

Adopting a similar logic to Landes and Posner (1975), Ramseyer (1994) argues that by appointing judges who are ideologically close to them, the incumbent politicians increase the probability that when they are out of office these friendly judges will prevent future incumbents from completely scrapping existing policies. In Ramseyer's account, the main objective of the incumbent politicians is ensuring policy

stability and enlarging their influence during periods when they are out of power. Yet, all this they do, at the cost of decreasing their influence over policy while in power. In this regard Ramseyer (1994: 742) says "… because politicians will have to run the country with independent judges that their predecessors appointed, they will necessarily have less impact over policy while in office." This argument assumes that incumbent politicians would value future policy stability and they would expect to be in politics for a long time. Yet, especially in developing democracies, where the rule of the game is not fully established, the incumbent politicians may not care about future. Thus they may not prefer to sacrifice their current policy control in order to increase their future policy control.

Finally, including forward-looking politicians as a necessary condition for inter-temporal calculus, Stephenson (2003) offers a formal model of the mechanism presented by Ramseyer (1994) and finds empirical support for his prediction. Focusing on 159 countries he argues that judicial independence is sustainable only when the political system is competitive and contends that political parties find judicial independence less attractive as they do not fear of losing the next election.

As a result, the insurance theory suggests that the long-term benefits that the incumbents expect to reap from an independent judiciary is either an insurance that they will not become the subject of harassment once they find themselves in opposition or the protection of their policies even after they leave office. Although the underlying logic of the insurance theory is quite appealing, it does not explain what happens when a hostile government confronts a newly empowered court. Why would incumbents believe that the next government will continue to support the independence of a judiciary? The insurance theory assumes that the incumbents make an inter-temporal calculus and expect to be in politics for a long time to credibly commit to such an arrangement. But especially in the context of newly democratized countries the deep seated mistrust among the politicians would undermine the credibility of this commitment. Thus, while the proponents of the insurance theory emphasize the long-term benefits of an independent judiciary, they seem to neglect the short-term benefits of providing a subservient judiciary. In other words, under certain conditions the incumbents might not give up current opportunities to harass opponents through the courts in exchange for the long–term benefits of an independent judiciary. For that reason, a closer scrutiny of the politicians' cost-benefit calculations in offering subservient courts would provide a theoretical explanation about whether – and if so,

why – the impact of political competition on judicial independence may change across advanced and developing democracies.

2.2.1 The Cost-Benefit Analysis of Pressuring the Judiciary

The politicians' immediate consideration usually hinges on the upcoming election so that they tend to make decisions that will bear fruits in the coming elections. In this regard, when political competition is intense, the outgoing incumbent - current government that faces a high probability of being replaced in the upcoming elections - can reap immediate benefits from interfering in the judiciary. The major benefit of a subservient judiciary would be its aptitude to increase the incumbent government's probability of remaining in office. In other words, a subservient judicial system can help the incumbent government to maximize its chance of re-election by weakening the social credibility, financial and even legal standing of the opposition parties.

Especially in the context of developing democracies where political parties lack well-developed grassroots organizations and stable financing, a few court decisions can cause considerable damage. Through one single trial a court can undercut a party's campaign budget and close down a party's newspaper that will have negative impact on that party's legitimacy. Nevertheless, in the context of advanced democracies the same court decision might have a smaller effect on established parties that have a strong network of grassroots organizations to energize their base (Popova, 2010). Moreover, many parties in developing democracies are used only as vehicles for their leaders to participate in elections. Thus, a court decision to remove the party leader from the ballot could destroy the whole party (Popova, 2010). In some developing democracies such as Turkey, the Constitutional Court may also frequently close down political parties, ban their members from political participation or cut their budget to an extent that would directly affect their very existence.[4] Yet, in the context of advanced democracies where personalistic parties are not the common trend and where the political processes are fully institutionalized these kinds of judicial decisions would not generate the same impact. Thus, in the context of developing democracies the

[4] Only in the 2000s the Turkish Constitutional Court closed down three political parties (Virtue Party (FP) in 2001, the People's Democracy Party (HADEP) in 2003, and the Democratic Society Party (DTP) in 2009).

immediate short-term benefits that incumbents can obtain from offering a politically dependent judiciary may be higher than the long-term benefits that power holders may reap from supporting the independent performance of a judiciary.

Under highly competitive political environment, while an incumbent government tries to decide between the long-term or short-term benefits of dependent courts, it should also take into consideration the corresponding costs very carefully. Rebolledo and Rosenbluth (2010), for instance, emphasize that in the countries with a relatively short experience with democracy, voters have only weak incentives to monitor politicians and to punish them at the polls for irregular political actions. Thus it will not be wrong to argue that the costs of pressuring the judiciary are closely related to the overall democratic structure of the society.

The major potential cost that an incumbent government would have to deal with due to its interference in the judiciary is public backlash. Thus if incumbent politicians expect that a strong public reaction would follow any attempt to pressure the judiciary, they will refrain such actions. Especially as political competition increases the incumbent politicians would be more sensitive to public backlash. But in order for the citizens to efficiently hold the officials, who intervene in the judiciary accountable, the electorate 1) has to be informed about the wrongdoings of the incumbents and able to discern the executive's attempts at interfering in the judiciary 2) has to have high levels of confidence in the judiciary and 3) has to be capable and willing to punish the incumbent.

In order for a public enforcement mechanism to work the conflicts the courts resolve and the relationship between the courts and political actors must be sufficiently transparent (Vanberg, 2005). As an individual becomes better informed about the political processes, and her/his interest in such processes increases s/he forms better informed preferences and attitudes. The more informed the individual the more likely that s/he will understand how the political process works and this increased knowledge about the system is expected to generate stronger attitudes about the independence of the judicial system. In this sense, an independent and free media is the most crucial mechanism that would help to provide transparency and increase the public awareness. Yet, one should recall that in developing democracies media is largely controlled by the government and is itself an object of attack (Simon, 2004). In some developing democracies media is also almost inexperienced in investigative journalism (Waisbord, 2002). Because of all these reasons in the context of developing democracies the level

of transparency is low and this aspect decreases the public awareness of the wrongdoings of the incumbent politicians.

A strong public belief in the courts' legitimacy is another important factor that will make incumbents perceive public backlash as a credible threat. Many scholars have pointed out judicial legitimacy as the key for an independent and powerful judiciary (e.g. Caldeira, 1986; Gibson, 1989; Gibson et al., 1998; Murphy and Tanenhaus, 1990). Accordingly, Staton (2010:13) argues that: "If we continue to assume that public preferences constitute the primary incentive for political action in the elected branches, then we can conclude that the public will influence the choice to respect judicial decisions." In this regard, if the electorate has low confidence in the judiciary, it may tolerate the political interference and the judges will lack the leverage to exercise authority. In contrast, if the electorate is unwilling to accept any interference in the judiciary, the judges will have the leverage to influence policy outcomes effectively (Carrubba 2003; Stephenson 2004). Yet, does public confidence in the judiciary changes across advanced and developing democracies? Looking at the public confidence in the justice system across 49 countries, a recent study finds that in advanced democracies the confidence in the judiciary is higher than the confidence levels in developing democracies[5] (Aydın and Şekercioğlu, 2010). Hence, in developing democracies where the society does not hold strong confidence in the judiciary, an incumbent's attempt to create subservient courts may not lead to considerable public backlash.

Finally, one should recall that incumbents would perceive public backlash as a credible threat only when the citizens are capable and willing to punish the politicians who attempt to pressure the judiciary. Yet, having enduring memories inherited from their countries' previous authoritarian regime, the people living in developing democracies are usually accustomed to political interference in judicial affairs. The incumbents still have access to the mechanisms for pressuring the judiciary because it is quite difficult to root out these types of informal channels (Solon and Foglesong, 2000). The existence of these informal channels and memories of political intervention in the judiciary lowers the cost of implementing an attack on judicial independence. A

[5] Using the World Values Survey which asks the respondents how confident they are in the justice system (1=not at all; 4= gret deal) and the Freedom House democracy status categories, the authors find that the mean confidence in the judiciary in Free countries is 1.53 / 4, in Partly-Free countries it is 1.31 /4 and in the Not-Free category the mean confidence is 1.14 / 4.

good example for this discussion might be Argentina under the Presidency of Menem. After a peaceful transfer of power at the end of a competitive election, the Menem administration publicly stated that a judiciary that was able to resist Menem's economic reforms would ruin any chance for economic recovery (Larkins, 1996). So, Menem turned his attention to pacifying the Court. When questioned why he was not trying to improve the judiciary's capacity to protect the rule of law, Menem responded: "Why should I be the only president in fifty years who hasn't had his own court?" (Walker, 2006: 784).

A society's strong commitment to individual freedom and protection of liberal rights would also affect the individuals' willingness to punish the political elites who would intervene in the judicial decision-making. Moreover, high levels of political participation and interest in politics indicate a higher engagement with the political system, a better understanding of the political processes and a higher motivation and/or ability to evaluate the system. Contrarily, the lack of these democratic values would not only lower the willingness of the citizens to punish the incumbents who intervene in the judiciary but would also lower the legitimacy of the justice system.[6] Hence, in developing democracies where the society does not hold strong democratic values, an incumbent's attempt to create subservient courts may not lead to considerable public backlash.

For all of these reasons, in developing democracies the incumbents, who decide to pressure the judiciary, may have less fear of a public backlash compared to their counterparts in advanced democracies. Contrary to the insurance theory that envisions the benefits of judicial independence would outweigh the related costs; in the context of developing democracies the benefits of subservient courts may outweigh the related costs. In a simplified manner, the logic of the argument can be illustrated by the following specific examples.

Consider for example, Pakistan, wherein a number of opposition parties called for the resignation of President Musharraf to ensure free and fair elections. In October 2007, however, Pakistan's Electoral College re-elected Musharraf to a new five-year

[6] A group of scholars argue that individuals express greater confidence in judiciaries if they participate more frequently in the political system (Caldeira, 1986). Moreover, it is asserted that public support toward the judiciary is embedded within a larger set of relatively stable democratic values. On this account, individuals with higher commitments to individual freedom and other democratic values are observed to give higher support to the Supreme Courts (Gibson et al., 1998).

term in a controversial vote that many called unconstitutional. The interesting turning point in this sequence of events is the fact that five months before this flaw re-election, Musharraf had dismissed the country's Chief Justice (*Washington Post*, 21 February 2008). Since in its recent history the Supreme Court's rulings damaged Musharraf's standing and credibility, it can be said that he tried to restore the public support by attempting to create a subservient court. Moreover, the powerful criticisms from the opposition parties signaled an imminent threat for Musharraf who decided to use whatever tools were available, including judicial manipulation, to stay in office. As a result, the case of Pakistan shows that in a developing democracy – which is characterized by political crises, institutional weakness and where two-thirds of the public is unable to provide a meaning for the term "democracy"[7] – intensified political competition would lead the incumbent leader to curtail the independence of the judiciary in order to use it as a tool to remain in power.

Ecuador can be given as another example in this regard. In 2004, a group of opposition deputies signed a petition to create a committee in order to investigate certain charges against the President Gutierrez who was accused of corruption. However, the impeachment trial request against the President was unsuccessful. After this incidence, claiming that the Supreme Court was loyal to his political opponents, the President Gutiérrez and his congressional allies dismissed 27 of the Supreme Court's 31 judges and replaced them with their own political allies (*BBC News*, 9 December 2004). The interesting turning point in this sequence of events is the public rioting that started after the new Supreme Court justices dropped corruption charges against two former presidents. After those riots the Ecuadorian Congress ousted President Gutierrez (*BBC News*, 17 February 2005). The President was arrested and detained on charges of endangering national security but he was released in 2006 after a judge dismissed the charges. Yet, the judicial independence in Ecuador is still under siege[8]. As a result, the

[7]CRS Report for Congress (2008) "Pakistan's Elections: Results and Implications for U.S Policy" p.2, http://fpc.state.gov/documents/organization/104699.pdf (accessed February 12, 2011)

[8] This situation can be explained by two important factors. First, the political incumbents in Ecuador still have access to the mechanisms for pressuring the judiciary because it is quite difficult to root out these types of channels. Second, the public is used to political intervention in the judiciary so that one might argue that public backlash is not a credible threat for the incumbents' intervention attempts. Although in 2005 a number of public protests broke out against the President's interference in the judiciary, in order to prevent a similar public backlash and take the public awareness

Ecuadorian case reveals three important aspects that characterize the relationship between the courts and political actors in the context of developing democracies. First, in these types of democracies the incumbents perceive the creation of a subservient court as an important mechanism to remain in power and fight with corruption charges. Second, given that the Ecuadorian society has not fully consolidated the key values of democracy[9], in his cost-benefit calculation in pressuring the judiciary the President Gutierrez does not appear to perceive the public backlash as a credible threat. Third, the public protests which were sparked by the President to restructure the Supreme Court and were successful at ousting the President showed that the public backlash can be an efficient and credible control and constrain mechanism.

As a result, I suggest that the impact of political competition on judicial independence changes across advanced and developing democracies. And the main hypothesis to be tested is:

> *Hypothesis:* While in advanced democracies political competition has a positive impact on judicial independence, in developing democracies it has a negative impact.

In the case of the main hypothesis being verified, it would be safe to conclude that in the context of developing democracies as political competition increases, the incumbent governments tend to manipulate the judiciary and use it as a mechanism for re-election. At this point assuming that political competition has similar impacts on judicial independence across all types of democracies would be quite misleading.

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under control, the President Correa who was elected in 2007 has created a state dependent media. For instance, the Press Freedom Index that is published annually by the Reporters without Borders Organization shows that while Ecuador was 67th out of 178 countries (in 2004) it is 102nd (in 2010).

[9] For instance, the Latinobarometer Public Opinion Survey conducted in 2004 shows that 58.4% of the respondents think that discussing political issues would hurt democracy; only 21.8% of the respondents talk about politics in their daily lives and around 66.4% of the respondents would never sign petition or attend authorized demonstrations.

2.3 Data, Measurement and Model

There are many aspects emphasized by the scholars as possible determinants of judicial independence. These aspects range from institutional characteristics of the judiciary to the external environment (political, economic and social) within which it operates. Yet by focusing on the impact of political competition, this study extends on only one of the explanations of judicial independence. Controlling for other possible determinants, in this section I develop and test an empirical model that, albeit indirectly, aims to show whether the impact of political competition changes across advanced and developing democracies.

Suggesting that the effect of political competition on judicial independence is mediated by the quality of democratic performance; the current study uses the 2000-2008 data for 97 democratic countries to test its hypothesis. Following Robert Dahl's (1971) *Polyarchy*, I consider as democratic the countries in which regimes hold elections and the opposition has some chance of winning and taking office. Thus, adopting a minimalist definition of democracy[10] the sample is composed of regimes in which the executive and the legislature are both chosen in "contested elections". Using the Cheibub, Gandhi and Vreeland (2010) database, I apply this definition to the countries which the data indicates that have elected executive and legislative bodies and a legislature which is composed of multiple political parties.

A closer scrutiny of the literature shows that judicial independence is generally studied under two main categories: "de jure" and "de facto". De jure judicial independence refers to the institutional guarantees outlined in constitutions and contains issues such as the tenure of a judge, the nomination process, and salary protections. De facto judicial independence- that is the dependent variable of the empirical model - focuses on judicial behavior and tries to discern whether and how the formal rules are implemented in practice (see Rios-Figueroa and Staton, 2009).Yet, there is no direct way to measure objectively the level of de facto judicial independence. For 134 countries the Global Competitiveness Report provides standardized and relatively comprehensive subjective assessment of judicial independence. This indicator measures the expert opinion regarding the independence

[10]For other examples of minimalist definition of democracy, see Przeworski, Alvarez, Cheibub and Limongi (1996).

of the judiciary in their own countries through the following question: Is the judiciary in your country independent from political influences of members of government, citizens, or firms? Countries are coded in a scale ranging from 0 (no-heavily influenced) to 10 (yes-entirely independent). Calculating the average judicial independence index of each country for the period 2000-2008, judicial independence in our sample varies from 0.64 in Venezuela to 9.09 in Denmark. The mean value of judicial independence in the sample is 5.04 with a standard deviation of 2.04. Of the 97 countries 36 had judicial independence under 4, while 33 had values between 4 and 7; and only 28 had values above 7.

In order to test the hypothesis suggesting that the impact of political competition on judicial independence changes across advanced and developing democracies, I model political competition and the level of democracy as the key independent variables of the study.

Political competition: Although political competition could take different forms, the most common framework involves electoral competition, in which politicians or parties must compete for public support via elections. In order to measure political competition a variable that proxies for parties' subjective assessment of their probability of controlling the government is needed. The theoretical framework of this chapter – the insurance theory – suggests that political competition generates uncertainty which in turn provokes the incumbents to support the creation of an independent judiciary (Ginsburg, 2003; Finkel, 2008). Yet, challenging the insurance theory I argue that in the context of developing democracies while political competition is intense and the incumbent party has lower chance of winning the upcoming election, a subservient judicial system can help the incumbent government to maximize its chance of re-election. In this sense we suggest lower levels of judicial independence while competition is intense in the context of developing democracies. For that reason our measure of political competition should be able to capture the political uncertainty and demand for insurance in both multi-party and two-party systems. For instance one might argue that the "effective number of parties"[11] measure - which is frequently used

[11]The effective number of parties is measured by the following formula $N = 1/\sum_{i=1}^{n} p_i^2$ where p_i equals the percent share of seats in the legislature of the i^{th} party (Laakso and Taagepera, 1979).

to measure political competition - correlates with political uncertainty. A smaller number of parties in the parliament would indicate a higher chance of each party to capture seats in government and this would signify a lower political uncertainty. But what the proponents of the insurance theory imply by the notion of political uncertainty is the condition where an incumbent party has low chance of winning the upcoming election. Thus the "effective number of parties" measure would not capture the political uncertainty in a legislature dominated by two equally large parties.

For all these reasons I measure political competition in terms of the difference between the percentage of seats of the winning party or bloc of parties and the percentage of seats of the runner up in the legislature. Regardless of the number of parties in the legislature, a smaller difference between the seat shares of these two parties or blocs of parties would indicate a higher competition and a higher uncertainty about the upcoming election results. On the other hand, a higher differential between the seat shares, the more certain will be the leading party or bloc that will end up in power. This measure thus would also capture the extent to which there is a dominant party. But still the presence of electoral competition means that even the most dominant and popular party faces a relatively higher chance of losing power than it would under a one-party system.

The data for political competition is drawn from the IFES Election Guide for the period 2000-2008. For the reason that there is a direct inverse relationship between "the differential between the seat shares" and "political competition" (political competition increases as the difference between the seat-shares decreases) I create a variable of political competition that takes the inverse value of the difference between the seat shares. The measure of political competition is normalized between 0 and 1, "0" indicating minimum political competition and "1" referring to maximum political competition.[12] For each country the average political competition for the given time

[12] For instance, if we take the political competition in Moldova during the period 2000-2008 my calculation is as follows. The total number of seats in the Moldovan parliament is 101. In 2000, the leading party holds 40 of the seats and the runner up holds 26 of the seats. Thus the differential between the seat shares is: (40-26)/101= 0.139. With the general election held in 2001 the differential between the seat shares becomes (71-19)/101= 0.515. In the general election held in 2005 the differential between the seat shares becomes (56-34)/101=0.218. Hence, the average of the differential between the seat shares for the period 2000-2008 is (0.139*1+0.515*4 + 0.218*4)/9= 0.341. The lower differential between the seat shares refers to a higher level of political competition. For that reason I normalize the differential by subtracting

period (2000-2008) is calculated. The values of the political competition variable ranged from 0.036 to 0.989 with a mean of 0.777 and a standard deviation of 0.199. The data was heavily skewed towards the higher end of the scale. Only 13 countries had political competition lower than 0.5. For robustness check I also use the political competition indicator from the Polity dataset as an alternative measure (see Table 2.2).

Level of democracy: I take the level of democracy as an indicator that differentiates between advanced and developing democracies. In other words, "level of democracy" refers to a rough categorization of democratic regimes ranging from strong democratic regimes where democratic values are fully consolidated and political processes successfully institutionalized (advanced democracies) to democratic regimes that meet the procedural minima for democracy but lack consolidation of democratic values and institutionalization of political processes (developing democracies). The Freedom House (FH) measurement scale is used as a tool to operationalize this abstract classification of democratic regimes. The FH scale becomes an agreeable tool for categorizing democratic countries according to the institutionalization and protection of the political rights and civil liberties of citizens.

The use of the FH measure in the current analysis, however, necessitates careful thinking. First, one of the sub-scores of the FH index is the rule of law that in addition to other legal protections also measures judicial independence. In this regard, including judicial independence in both sides of the equation will create fundamental methodological problems and lead to biased and inconsistent estimates. Second, the FH index also includes the measure of the electoral process as well as political pluralism and participation. Using these measures in the analysis will also lead to multicollinearity problem since one of the key independent variables of the model is political competition. Thus, I recalculated the FH index to obtain a democratization level index that is exogenous to judicial independence and political competition. I excluded the rule of law, electoral process, political pluralism and participation and functioning of government sub-scores that are used in calculating the FH index. I recalculated the democracy index by summing up each country's points only on the subcategories of Freedom of Expression and Belief, Associational and Organizational

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it from 1. So the political competition measure for Moldova for the period 2000-2008 is (1-0.341)=0.659

Rights, and Personal Autonomy and Individual Rights. In total each country's democracy point ranges between 14 and 44. Thus having a continuous character the recalculated FH index is normalized between 0 and 1. The values for level of democracy variable ranged from 0 (Cameroon) to 1(7 countries) with a mean of 0.716 and standard deviation of 0.247.The data was heavily skewed towards the higher end of the scale. For robustness check I also use the World Bank Governance Indicator of Accountability and Voice as an alternative measure of democracy level (see Table 2.2).

Control variables: In the empirical model I also explore the robustness of our estimates to the inclusion of other potential judicial independence determinants which are related to the executive-legislative arrangement, type of the legal system, and the constitutional status of courts.

How might presidentialism and parliamentarism affect judicial independence? For instance, Ackerman (1997) suggests that presidentialism is good for courts by providing them with a role as an arbitrator among law-making powers. Because of the potential for institutional divergences between the executive and the legislative branches, it is stated that the presidential systems support judicial activism. Ginsburg (2003) argues that these divergent policy views can be ameliorated by the presence of a powerful and independent constitutional court. In addition, division of power between branches can allow the courts to exercise greater independence in their rulings because attacking the court may be more difficult in systems where passage of legislation requires the cooperation between two separate political bodies. On the other hand, some scholars argue that a strong president can control the actions of judges through acts of coercion. Hayo and Voigt (2007), for instance, observe that presidential systems enjoy lower levels of judicial independence compared to parliamentary systems. According to this line of thinking strong presidents are more easily able to retaliate against the courts for unfavorable decisions. Likewise some scholars show that concentrated executive power is a significant factor in explaining judicial subservience in the post-communist countries (Herron and Randazzo, 2003). According to this line of thinking, strong presidents impose substantial constraints on judicial independence.

Measuring the relationship between the executive and legislature as a form of government, I include *executive-legislative arrangement* in the empirical model as a control variable. Indicating whether a country has a parliamentary, presidential or semi-presidential regime, the data for executive-legislative arrangement variable is taken

from the World Bank Political Institutions database. Parliamentary systems are coded as 2, semi-presidential systems are coded as 1 and presidential systems are coded as 0.

Another system based explanation that is elaborated in the literature as a possible determinant of judicial independence is the *type of the legal system*. In their study, La Porta et al. (1998) find that the quality of law enforcement differs across legal families. They take "efficiency of the judicial system" provided by the Business International Corporation as a proxy for the quality of law enforcement and find that countries with common-law tradition have more efficient judicial systems. On the other hand, Djankov et al. (2003) empirically demonstrate that legal origin explains about 40 percent of the variation in legal formalism. In the data for legal system, civil-law legal tradition is coded as 0 and common-law legal tradition is coded as 1. In our sample 68 countries had common-law and 28 had civil-law legal system.

For an accurate inference about the independence of a judicial system, one should also take into consideration the institutional guarantees of the judiciary stated in legal texts. In the literature, these guarantees are designated as de jure judicial independence and generally comprise issues such as tenure of a judge, nomination process, and salary protections (Feld and Voigt, 2003).The degree of institutional protections in a given country is assessed by looking at its constitution. I formulate *de jure judicial independence* as an additive index by summing up three variables from the Comparative Constitutions Project by Elkins, Ginsburg and Melton in 2007 that provides information on the characteristics of written constitutions for 192 countries. These variables are judicial independence[13], judicial review[14] and protection of judicial salary[15]. The additive index is normalized between 0 and 1. Thus, the countries with maximum de jure judicial independence refer to higher levels of constitutional guarantees of the judiciary. Finally, to control for the arguments stating that judicial independence and political competition are merely the result of having more financial resources, I use the natural log of the average per capita gross domestic product for the period 2000-2008. I use the data from the World Bank's World Development

[13]It is a binary variable coded 1 if the constitution contains an explicit declaration regarding the independence of the central judicial organ(s) and 0 otherwise.

[14]It is a binary variable coded 1 if "any court can review the constitutionality of laws and 0 otherwise.

[15]It is a binary variable coded 1 if the constitution explicitly state that judicial salaries are protected from governmental intervention and 0 otherwise.

Indicators. The *ln GDP per capita* (corrected for purchasing power parity) has a minimum value of 6.48 (Niger) and maximum value of 11.24 (Luxemburg) and a standard deviation of 1.22.

To correct for potential omitted variable bias, all these control variables are included in the empirical model. Thus, if the relationship between de facto judicial independence and political competition is merely the result of being economically developed and having a presidential system with common-law legal tradition, and strong constitutional protections for the judiciary then controlling for these variables should eliminate the statistical significance of political competition on judicial independence.

2.4 Empirical Analysis and Results

Although the available data for judicial independence has longitudinal character, our key independent variables are time invariant (e.g. level of democracy) and rarely changing (e.g. political competition changes with national elections). The lack of variation in the level of democracy variable may not constitute a big problem since that variable is expected to condition the effect of political competitiveness. Yet the bigger problem is the lack of variation in the political competition variable. For this reason conducting panel data analysis is not appropriate. Using ordinary least squares (OLS) regression, as is appropriate for continuous dependent variable (Wooldridge, 2002), I aim to test whether the impact of political competition on judicial independence changes across countries with different democratization levels. Yet one should bear in mind that, since the empirical analysis does not directly take into consideration the changes to judicial independence that follow from changes in political competition, the analysis provides an indirect test of the mechanism that is proposed in the theoretical section.

I estimate two interaction models that would help to delineate whether and to what extent the impact of political competition on judicial independence changes across advanced and developing democracies. In these models the dependent variable is the *de facto judicial independence* score. In the first model, I include only the variables of interest (*political competition*; *democracy level* and *political competition interacted*

with democracy level). In the second model, I control for the *legal system, executive-legislative arrangement, de jure judicial independence* and *the GDP per capita* of the countries**.**

Table 2.1: OLS regression on judicial independence index

	Model 1	**Model 2**
Political Competition	-8.86***	-5.15**
	(2.37)	(1.89)
Democracy Level	-1.09	-2.74
	(2.56)	(2.14)
Political Competition*Democracy Level	10.92**	8.84**
	(3.42)	(2.90)
Legal System		1.89***
		(0.33)
Executive-legislative arrangement		0.43**
		(0.18)
De jure judicial independence		-0.86
		(0.60)
GDP per capita (ppp)		0.39**
		(0.19)
Constant	6.38***	1.85
	(1.60)	(2.02)
Observations	*97*	*97*
R squared	*0.48*	*0.68*
Prob>F	*0.000*	*0.000*

Note: ***<0.001, **<0.05, * <0.10

Both models presented in Table 2.1 show that the impact of political competition on de facto judicial independence reveals significant variation across advanced and developing democracies. The coefficient on the interaction term is

positive and statistically significant in both models, suggesting that the beneficial effect of political competition on judicial independence is greater for countries with very high levels of democratization compared to the countries with very low levels of democratization. The negative estimate of political competition shows that when the democratization level is '0" the net impact of political competition on judicial independence is significantly negative, whereas when the democratization level is "1" the impact of political competition is significantly positive.

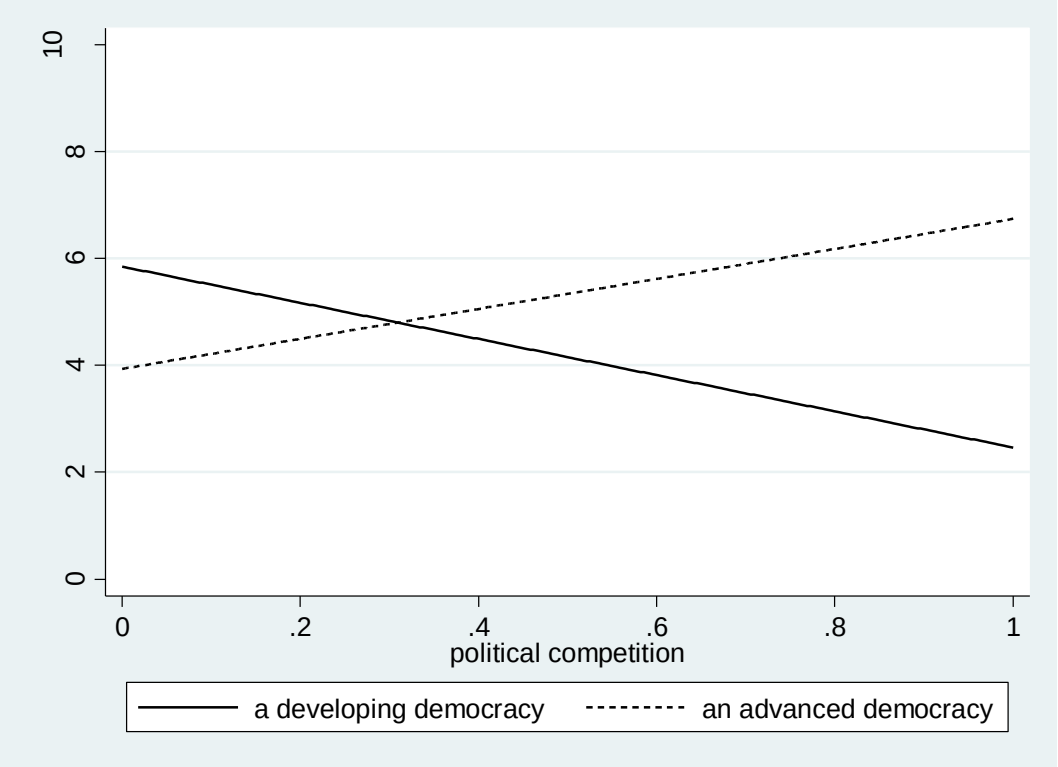
Nevertheless, it is impossible to evaluate the statistical significance of the political competition effect simply from reviewing the coefficients and their standard errors in Table 2.1 (Brambor, Clark and Golder, 2006). The marginal effect of political competition may not have a statistically significant impact on judicial independence over the entire range of democracy levels. In other words, the hypothesis tests summarized in Table 2.1 for the political competition effect are useful and interpretable only when the level of democracy is equal to ''0'' or "1". In order to evaluate better the statistical and substantive effects of political competition, we require additional analysis. Figure 2.1 shows the predicted level of judicial independence across the range of political competition for two hypothetical democratic countries. Estimates for the hypothetical developing democracy whose level of democratization is set to 0.2 (based on the recalculated FH index that ranges between 0 and 1) are represented on a solid line. On the other hand, the estimates for the hypothetical advanced democracy whose level of democratization is set to 0.9 are represented on a dashed line. Except their democratization levels, both countries share the same legal system and executive-legislative arrangement as well as the same level of de jure judicial independence and GDP per capita.[16]

Note that the solid line slopes downward and reflects the negative effect of political competition, whereas the dashed line slopes upward and reflects the positive of political competition. Accordingly, for our hypothetical developing democracy, the predicted level of judicial independence drops from approximately 6 points to 2 points across the range of political competition. On the other hand, for our hypothetical advanced democracy the predicted level of judicial independence increases from approximately 4 points to 7 points. The distance between the solid line and the dashed

[16] Both countries are presidential democracies with common-law legal systems. They have full constitutional protection over their judiciaries (de jure judicial independence is set to 1). Their GDP per capita is set to the mean value of the variable.

line is precisely the effect the political competition on judicial independence, conditional on a democratization level. These estimates are consistent with our argument suggesting that while in advanced democracies the political competition has positive impact on judicial independence, in developing democracies it hampers independence of the courts. Yet we do not know whether the differences are statistically distinguishable from zero.

Figure 2.1: Predicted level of judicial independence

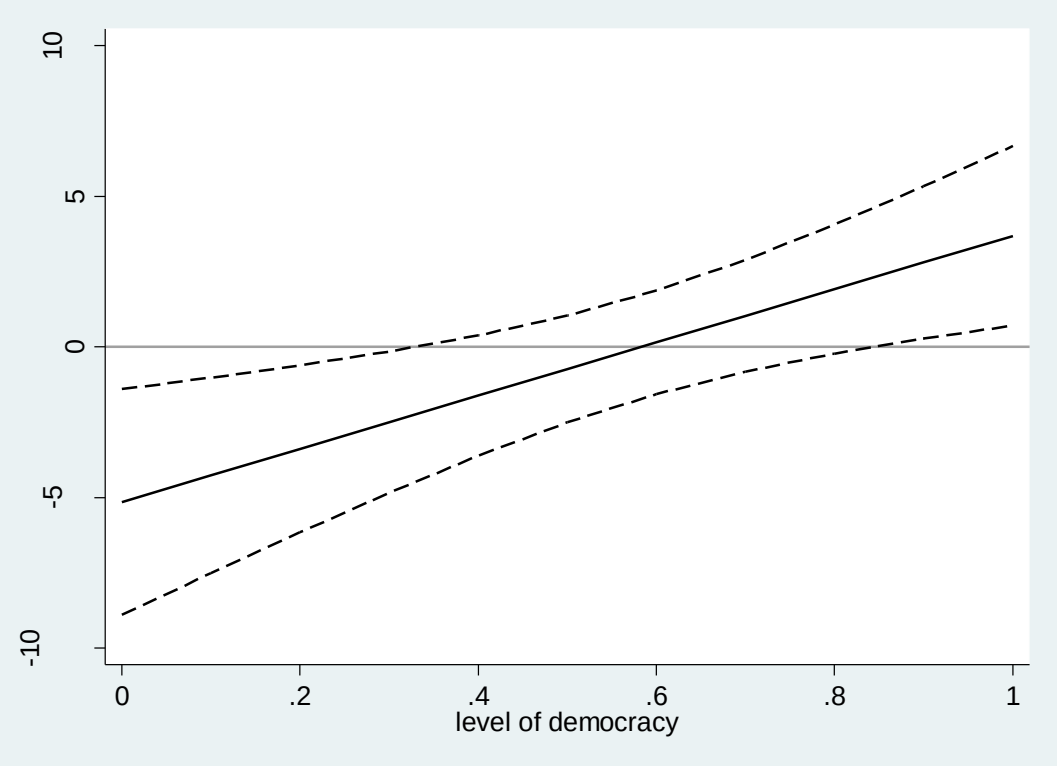


Note: Shows predicted level of judicial independence across the range of political competition

To better convey how the effect of political competition on judicial independence changes across countries with different democratization levels, Figure 2.2 shows the marginal effect of political competition, with confidence intervals around the estimated effect. The graph is run using the estimates from the interaction model and the full sample of democratic states. The black line in the figure represents the change in judicial independence associated with flipping the political competition variable from 0 to 1. The dashed lines surrounding the solid black line indicate the 95 percent confidence interval around that change. Figure 2.2 shows that the marginal

effect of political competition on judicial independence does considerably vary across advanced and developing democracies. Indeed the effect of political competition is positive and significant for countries with relatively high democratization levels. It becomes statistically insignificant as democratization level decreases and especially for countries with very low levels of democratization it become statistically significant and negative.

Figure 2.2: Marginal effect of political competition



Note: Displays changes in the predicted probability of judicial independence when the political competition changes across countries, for all values of democracy level measures. Dashed lines reflect the 95% confidence interval around the predicted change.

The marginal effect of political competition on judicial independence appears to be significantly positive in countries with high democratization levels (between 0.8 and 1), whereas in countries whose recalculated FH index ranges between 0 and 0.3, the effect of political competition on judicial independence is significantly negative. These empirical results show that in countries with very low levels of democratization, political competition has significantly negative impact on judicial independence.

Contrary to the insurance theory that envisions long-term benefits for the incumbents in creating independent courts, the intuition behind this empirical finding is that, in the context of developing democracies under intensified competitive political environment, power holders might have high short-term benefits and low costs in creating politically dependent and subservient courts. In line with these empirical results, comparing the Russian and Ukrainian courts during the 2002-2003 parliamentary campaigns, Popova (2010) observes that the Russian politicians had a weaker incentive to interfere in judicial decision compared to the Ukranian politicians. Indicating that the Ukranian elections were more competitive than the Russian elections[17], the author presents the varying levels of political competition across these two countries as the key determinant of the varying levels of judicial independence. As a result, Popova (2010) states that in developing democracies, political competition (a) increases the benefits to incumbents of dependent courts, (b) fails to increase the costs of exerting pressure on the courts, and (c) increases the number of court cases whose outcomes matter to incumbents. The incumbents who face stronger competition and a higher probability of losing the next election are claimed to be more likely to try to control and constrain the judiciary.

Regarding the explanatory power of control variables, Table 2.1 demonstrates that all else equal, the judicial independence in democratic countries with common-law legal system is substantially higher compared to the judicial independence levels of democracies with civil-law legal origin. This finding is in line with La Porta et al. (1998)'s study where they observe that judicial independence is empirically strongly associated with common-law legal origin.

In parliamentary democracies, the executive is an agent of parliament, accountable to the majority of the parliament and subject to being ousted at any time by vote of no confidence. Yet, in presidential democracies legislature and executive are agents of voters and so not accountable to one another (Shugart and Carey, 1992). In line with these characteristics of the parliamentary systems, the empirical results

[17] Russian politics seem to be less competitive today than in 2003. For that reason some may ask whether Russia can be defined as a democratic regime. One should be cautious that in 2005, Freedom House downgraded Russia from a "partially free" regime to the "not free" category (Freedom House, 2005). Thus in 2003, the period considered by Popova (2010), Russia could still be called a developing democracy. Yet, since this study focuses on the period 2000-2008, Russia is not included in our sample of democratic regimes.

suggest that parliamentary systems are inclined to have higher independent judiciaries compared to presidential systems. As regards the impact of political regime on judicial independence, the empirical results presented in Table 2.1 show that the independence of the judiciary tends to be significantly higher in parliamentary democracies compared to the independence levels of the courts in presidential regimes.

Moreover, Table 2.1 specifies that the constitutional protections of the judiciary do not significantly explain a country's actual judicial independence level. Thus, based on our empirical findings one can argue that if a country would include in its constitution some legal reservations regarding the independence of the judiciary, such institutional protections would not guarantee higher levels of judicial independence. This finding is in line with the arguments stated by the scholars who acknowledge that actual practices do not always follow the rules (e.g. Chavez, 2004). Thus, on paper judges may enjoy formal guarantees of tenure or salary but in practice may face removal by the incumbent politicians before the end of their terms (Feld and Voigt, 2003). Finally, Table 2.1 shows that, all other variables held constant, the countries with higher levels of GDP per capita have significantly higher levels of judicial independence.

2.4.1 Sensitivity Tests and Empirical Challenges

Conceptually and methodologically this study distinguishes the level of political competition in a country from that country's level of democracy. In other words, I do not undertake high levels of political competition as a characteristic that could be ascribed only to advanced democracies. Nonetheless, one may still intuitively argue that political competition is closely related to the level of democracy. Thus it is important to show to what extent the measures of these two concepts are correlated with each other. When I check for the correlation coefficient[18] between these two measures, I find that the sample correlation between political competition and the level of democracy is Corr (X, Y) = +0.46. This value of the correlation does not indicate a strong relationship between political competition and the level of democracy measures used in the current analysis. Recalling the theoretical framework of the empirical

[18] The value of $Corr(X,Y)$ is such that that $-1 \leq Corr(X,Y) \leq +1$. The + and – signs are used for positive linear correlations and negative linear correlations, respectively.

analysis, one should also remember that by the political competition measure my purpose is to infer the political uncertainty that refers to the chance of the incumbent party to capture seats in the incoming government. In this regard, I believe that it is far from obvious why we should expect a strong connection between political uncertainty and the level of democracy.

The fact that the key variables are measured by reputational indices means that sensitivity testing is particularly important to see whether the results are robust to different operationalizations of the main variables. As a sensitivity test, I conduct the same empirical analysis by using different measures of the key independent variables. For instance, as an alternative measure of political competition I use the political competition indicator used in the Polity dataset. The original values for this measure ranges between "0" and "10". This measure is recalculated so as to vary between "0" and "1" so that "1" refers to the highest and "0" refers to the lowest level of political competition. On the other hand, as an alternative measure of democracy level, I use the World Bank Governance Indicator of Accountability and Voice. This may also be a good proxy for democracy level because it aggregates the results of numerous expert reputational surveys and captures the perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media. In the original dataset the Accountability and Voice indicator ranges between -2.5 and +2.5. The measure is recalculated so as to change between "0" and "1" so that "1" refers to the highest level of democracy. Including the usual controls the empirical models are re-tested by using these alternative measures of political competition and democracy level. The empirical findings presented in Table 2.2 show that the coefficients of the key variables remain statistically significant and maintain the same sign. All these results strongly support the hypothesis that political competition has varying impact on judicial independence across advanced and developing democracies. But it is important to underline two important caveats. First, the dependent variable of this study– de facto judicial independence - is derived from subjective evaluations and if these evaluations are correlated with other aspects of a country, the results might be biased. Yet, to my knowledge there is no better data that provides a direct and objective measure of de facto judicial independence in a cross-country setting.

Table 2.2: OLS regression on judicial independence index: Robustness check with alternative measures for political competition and level of democracy

	Model 1	**Model 2**
Political Competition	-5.50***	-4.49***
	(1.12)	(1.02)
Democracy Level	4.67	1.99
	(3.01)	(2.59)
Political Competition*Democracy Level	5.22*	6.38**
	(2.99)	(2.63)
De jure judicial independence		-0.01
		(0.49)
Political Regime		0.09
		(0.15)
Legal System		1.57***
		(0.24)
ln GDP per capita (ppp)		0.65*
		(0.41)
Constant	4.07***	3.56***
	(0.85)	(0.76)
Observations	*94*	*94*
R squared	*0.72*	*0.82*
Prob>F	*0.000*	*0.000*

Note: ***<0.001, **<0.05, * <0.10

Second, the key independent variables of the empirical model - political competition and the level of democracy - might be endogenous to judicial independence. Because of the absence of reliable instrumental variables (which have to be correlated with political competition and the level of democracy respectively but not judicial independence) I cannot rule out the possibility of reverse causation. Nevertheless I believe that it is important to consider the theoretical basis for the concern of endogeneity.

For instance, one might argue that in the countries where the judiciary is insulated from any external interference, the level of democracy would be higher (e.g. higher protection of freedom of expression and individual rights).[19] But one should recall that I am not looking to estimate the impact of the level of democracy on judicial independence. Instead, my purpose is to measure the impact of political competition on judicial independence which is conditioned by the level of democracy. Thus the issue that could be problematic is the reverse causality effect of judicial independence on political competition. However it is far from obvious why the impact of judicial independence on political competition would be stronger in countries with high democratization levels. If judicial independence increases the level of political competition for whatever reason, one would expect that it would do so similarly in advanced and developing democracies. Yet I am aware of no theoretical model that explains how this could be so. Thus despite all these caveats of the study, the consistency of the empirical results with the predictions of the model increases our confidence that the model is accurate.

2.5 Concluding Remarks

Assuming that putting pressure on the judiciary is very costly, the proponents of the insurance theory present judicial independence as an efficient insurance mechanism. They argue that in democratic countries electoral competition functions as a sanctioning device through which the electorate is able to replace politicians who intervene in the judiciary. Thus, attributing high levels of judicial independence to intense political competition, the advocates of this theory appear to envision a positive relationship between these two aspects. This chapter, however, empirically shows that as democracy level across countries changes the impact of political competition on judicial independence changes as well. While in advanced democracies high levels of political competition enhance judicial independence, in democracies with very low democratization levels, political competition significantly hampers independence of the

[19]Some scholars argue that the judiciary is responsible for protecting minority rights and securing other procedures associated with liberal government (Larkins, 1996), for maintaining the rule of law and ensuring the establishment of consolidated democracy (Linz and Stepan, 1996).

courts. In line with these empirical findings, the positive relationship between judicial independence and political competition that is suggested by the insurance theorists appears not to grasp the situation in developing democracies. At this point assuming that political competition has similar impacts on judicial independence across all types of democracies would be quite misleading.

This chapter proposes that the cost-benefit analysis that the rational political elites have to undertake while choosing their judicial policies would reflect different trends across advanced and developing democracies. For that reason high levels of political competition would not inevitably lead to high levels of judicial independence across all democratic countries. In the context of advanced democracies, for instance, the cost of meddling with judicial decision-making practices would be quite costly for the incumbent politicians. In advanced democracies free and independent media provides considerable transparency so that the public becomes aware of the wrongdoings of the government. In these types of regimes people also have high levels of confidence in the judicial system. Moreover they are highly interested in politics, have higher education levels and tend to actively participate in political or civic activities. Because of all these aspects, in an advanced democracy if an incumbent government decides to put pressure on the judiciary and create subservient courts, it will probably face fierce public backlash. In other words, the cost of putting pressure on the judiciary or meddling with its decision-making practices would be quite costly for power holders in these types of regimes. Thus, the incumbent politicians who face the challenge of being ousted from power would prefer to secure their long-term interests under the insurance of an independent judiciary.

In developing democracies, however, this chapter suggests that the costs of pressuring the courts are lower but the benefits of pressure are higher. In these types of regimes as political competition increases, the incumbent governments tend to manipulate the judiciary and use it as a mechanism for re-election or protection of power. In other words political competition appears to hamper the independent performance of the courts. This situation reveals an important dilemma for the democratic consolidation efforts in the developing democracies. As long as the public does not start to act as a credible control and constrain mechanism in these countries, this dilemma would stay irreconcilable and we should not wonder why the majority of developing democracies struggle with the rule of law despite electoral competition.

CHAPTER 3

THE INFLUENCE OF CASE-LEVEL FACTORS ON STRATEGIC VOTING IN TURKEY'S CONSTITUTIONAL COURT

3.1 Introduction

By reviewing laws and decrees under the rubric of constitutionality, constitutional courts serve as a control and constrain mechanism against the other branches of government. Yet, only in the last two decades the scholars started to account for the factors that lead constitutional courts to declare a parliamentary act unconstitutional. Especially the European scholars still often perceive courts to be "above politics," and their decisions tend to be treated as purely legal texts that can be understood in isolation from their political context (Vanberg, 2001).Whether courts exercise judicial review power, however, depends not only on the constitutional rules specifying the court's jurisdiction and function. Accordingly, the approaches that account for judicial decision-making often show that judges tend to be guided more by policy concerns and less by legal concerns. In this regard one of the most central debates in judicial politics literature is about whether or not the political institutions constrain the court's decision-making.

The separation-of-powers approach, for example, suggests that the courts take into consideration the external political constraints because the other two branches, executive and legislature, have the power to affect the judiciary. Assuming that judges are strategic actors, the proponents of this approach argue that judges' decisions depend on a consideration of the preferences of other political actors, anticipation of reactions to their decisions and the institutional context in which they act (Harvey and Friedman, 2006; Epstein, Knight, and Martin, 2001; Maltzman, Spriggs and Walbeck, 2000; Epstein and Knight, 1998; Ferejohn and Shipan, 1990; Eskridge, 1991; Spiller and

Gely, 1992; Ferejohn and Weingast, 1992). As a result, all of these studies assume that the court has rational foresight and suggest that the court will anticipate the reaction of the elected politicians and act strategically[20]. According to the attitudinal approach, on the other hand, judges decide cases based solely on their own personal preferences (Segal and Spaeth, 2002; Lindquist and Solberg, 2007; Howard and Segal, 2004).

Although these two approaches appear to be situated in an absolute dichotomy, they should not be treated as binary opposites. For instance, as the leading figures of the attitudinal approach, Segal and Spaeth (2002:349) say: "One might readily imagine a spectrum along which the separation-of-powers model might be relatively true...or relatively false…" Similarly, in his previous study Segal (1997) argued that judges may or may not be able to vote their sincere preferences, depending on the political environment. On the other hand, some scholars who support the strategic account of judicial decision-making do not deny the importance of judges' preferences but additionally maintain that under certain conditions other political institutions may constrain the judges' ability to pursue their own preferences. In this regard, Spiller and Gely (1992) and Bergara et al. (2003) argue that there are ranges in which the U.S Supreme Court is constrained and ranges in which the Court acts independently so that the judges are able to impose their own preferences. But these studies seem only to account for the political contexts where judges will adopt strategic behavior instead of sincere behavior.[21] They do not mention whether and to what extent the explanatory

[20] Although the literature that treats courts as strategic political actors has focused mostly on the U.S. Supreme Court, many scholars have been able to show that the courts outside the United States behave strategically as well. Some of these studies include applications to executive–judicial relations in Russia (Epstein, Knight and Shvetsova, 2001), Argentina (Iaryczower, Spiller and Tomassi, 2002) and post-communist countries (Herron and Randozzo, 2003). Others focus on strategic behavior by Argentinean judges during periods of regime change (Helmke, 2002); account for the strategic use of media by the Mexican Supreme Court (Staton, 2010); and explain the impact of public monitoring and transparency of the political system on the final decision of the German Constitutional Court (Vanberg, 2005).

[21] Spiller and Gely (1992), for instance, argue that when the courts ideologically based preferences are far different from those of relevant members of congress then the court will adopt strategic behavior for its decision not to be overturned by the congress. But when courts preferences are middle of the road in comparison to those of the congress then the court will vote its own preferences. Bergara et al. (2003), on the other hand, apply Spiller and Gely's (1992) model to Segal's (1997) data and find that although judges' ideologies matter the Court is often, but not always, constrained by the Congress. Bergara et al. (2003) maintain that when the Court is constrained by politics,

power of political factors on the court's decisions changes across cases. In other words, strategic perspectives have examined a limited set of broad situations under which the judges may be constrained, but they did not focus on the situations that may vary from case to case.

The goal of this chapter is to explain the variation in the relationship between government structure and the court's invalidation of laws (hereinafter, "strategic voting") across cases and account for how certain case-level factors influence the magnitude of the court's strategic voting. Cases provide judges with different contexts and situations, which in turn interact with their perception of external political impacts and hence shape their decisions (Bartels, 2011). Certain case-related characteristics may intensify the Court's invalidation of laws, whereas other characteristics may constrain it. A focus on how situational factors can both constrain and enhance strategic voting extends strategic perspectives since certain case-level factors can motivate judges to act more in line with the external political factors.

In this study, I examine how a variety of case-level characteristics influence the relationship between the government structure and the judicial invalidation of laws with a special emphasis on parliamentary systems and the European model of constitutional review (Ferejohn and Pasquino, 2002). By means of a data set I constructed for the period 1984-2010, I analyze the Turkish Constitutional Court's decisions. Using this original dataset and taking the behavior of the court as a whole, I examine to what extent the impact of the government structure on the court's decisions is shaped by the varying situations that confront the court from case to case. My research seeks to fill a substantial gap in our understanding of the judicial review conducted by the Turkish Constitutional Court and integrate the workings of this Court into the excellent body of existing research in comparative political institutions and judicial politics. Furthermore this study shows to what extent the impact of political factors on judicial decision-making changes across cases in the context of parliamentary democracies.

This chapter proceeds in six stages. The first part reviews some expectations about how external political factors affect judicial review based on the existing literature. Establishing the theoretical foundation of the linkage between case-level factors and strategic voting, the second part presents the hypotheses of the study. The

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judges respond strategically and formulate their actions they consider will face potential reactions from the Congress or the President.

third part gives a short explanation of the organization and decision-making process of the Turkish Constitutional Court and introduces the data. The fourth part describes the empirical model that is used to test the hypotheses and discusses the operationalization of several key variables. The fifth part is the empirical section where the hypotheses are tested and results presented. The last part will conclude the study by discussing both theoretical and practical implications of the findings.

3.2 Political Factors and Judicial Decision-Making

Under the separation-of-powers system each political branch can impose certain limits on the functions of other political actors. For that reason policy does not emanate from separate actions of each political branch but from interactions among them (Epstein and Knight, 1998). While taking a decision judges, legislators or executives take into consideration the institutional constraints, the preferences of other relevant actors and their expected behaviors. The judiciary, for instance, may strike down a law for violating the constitution but the parliament can pass a new legislation or "punish" judges for their decisions. Although the executive and legislature rarely "punish" judges for their decisions, even in advanced democracies the elected branches may constrain judges since there are several institutional mechanisms that provide the judiciary with an incentive to take the preferences and expected actions of other political actors into account.

The Comparative Constitutions data compiled by Elkins, Ginsburg and Melton (2010) shows that the national constitutions of 129 countries do not explicitly protect judicial salaries from governmental intervention. Furthermore, in these countries the legislature has considerable discretion concerning the portion of national budget given to the judiciary. Altering the size of the constitutional court or the selection and removal processes of judges is another sanctioning tool that the elected branches possess. For instance, in the Turkish case, with the constitutional amendments adopted in 2010, the Turkish Parliament increased the number of judges sitting in the constitutional court from 11 to 17. Moreover, while before the 2010 amendments the judges of the constitutional court were appointed only by the President, with the new amendments three judges will be elected by the Parliament. Impeachment and

conviction of a constitutional court judge might be another tool used by the executive or legislature. For instance, despite clear constitutional provisions granting federal judges life tenure in Argentina, the Supreme Court judges have been removed or threatened with removal following every change in government since the 1940s (Helmke, 2002). In the case of the United States, on the other hand, although the threat of impeachment may seem to have limited credibility because of the legislature's costs associated with the process, the most direct congressional power over federal judges is impeachment (Cross and Nelson, 2001).

Finally, one should recall that for an efficient judicial review in democracies, the courts' decisions must be implemented. The implementation of their decisions, however, demands a variety of tools and resources that judiciary lacks (Cross and Nelson, 2001). For instance, the executive or legislature might simply refuse to implement or follow the court's decisions or provide insufficient funds for effective implementation. Thus, when a court hears a case involving the interests of those controlling the executive and the legislature, any decision against their interests may disrupt the implementation of the decision (Rosenberg, 1992). In this regard, the legislature may overrule the court's decision by drafting a new legislation, or the executive may impede or ignore that ruling.

While using all these "punishment" tools the executive and legislature must weigh a variety of factors, such as public reaction, in deciding whether to employ these tools. Similarly, the court's public legitimacy may erode if it constantly takes decisions that are in favor of the incumbent government. But anticipating a possible override of its decisions; alteration in the tenure and assignment of its judges; or decrease in its budget and resources, the court will still face incentives to sacrifice its most preferred choices and choose the next best option that it believes the other political branches will support (e.g., Ferejohn and Shipan, 1990; Ferejohn and Weingast, 1992; Spiller and Gely, 1992). In this regard, situations in which the judges recognize the constraints imposed by other political actors and suppress their own preferences because of these constraints provide evidence of strategic voting.

The anticipation of a possible reaction by elected branches is presented by the proponents of separation-of-powers approach as a central determinant of strategic voting. According to them, certain characteristics of the incumbent government influence the court's strategic calculations. The strength of government, for instance, will affect the judges' anticipation of political reactions to their decisions. Under

divided government, the legislature and executive will encounter certain difficulties to coordinate. This will constitute an obstacle to sanction the judiciary but enable the court to efficiently constrain and control the executive and legislature. On the other hand, unified government will create a threatening environment for judges, increasing the probability of their decisions being reversed. For that reason, under a unified government, the likelihood of judges deciding against the government will diminish.

Following the basic insight of the veto player theory (Tsebilis, 2002), Iarcyzower, Spiller and Tomassi (2002) argue that the absence of a unified government enables judges who were negatively predisposed to the administration to cast their true or "sincere" preferences. As they show, during periods of unified government in democratic Argentina, the court was much more likely to show deference to the government than in periods when power was divided between the executive and legislature because under unified government it is easier for political actors to coordinate a response to the judiciary's activism. Scribner (2003) observes the same trend in Chile. When the democratic government was divided, the Supreme Court of Chile was more willing to decide against government decrees. Rios-Figueroa's (2006) study in other Latin American countries also suggests that under unified government, the Supreme Court judges expect their potential rulings against executive abuses not to be welcomed by the majority in Congress so that the elected branches will easily coordinate and pass legislation breaching the interests of the judiciary. Most of these studies assume that the government structure exhibits a uniform impact on the court's decision-making across a wide variety of contexts. Nevertheless, I argue that there exists systematic variation in the impact of government structure on the court's decisions that can be explained theoretically and tested empirically.

3.3 Theoretical Framework

The theoretical framework of this article posits that certain case-level characteristics can attenuate the magnitude of strategic voting. In this regard, I provide a theoretical rationale for (a) why there is a systematic variation in the government structure–court behavior relationship across cases and (b) the types of case-level factors that will shape the government structure–court behavior relationship. Because

situational characteristics across cases can trigger different motivations and considerations, the importance that the court gives to a possible reaction from the political branches are expected to vary across cases.

As stated in the previous section, many scholars have argued that under unified government it is easier for political actors to coordinate a response to the judiciary's activism. This will increase the fear judges have regarding retaliation or retribution for unpopular decisions. For that reason, under unified government the court will have higher inclination to strategic voting and more likely to uphold laws. In specifying this relationship the focus of this chapter is not simply on whether government structure guides judicial review, but about when the government structure influences the judicial review to lesser extent.

The cases that come before the constitutional court for review vary along a number of dimensions. Certain factors associated with the case under review will attenuate the impact of government structure on the court's decisions. Accordingly, the case-level characteristics that are hypothesized to influence strategic voting are the following: origins of the law, identity of the litigant, and the constitutional ground on which the litigant brings the case.

The first case-level factor is *origins of the law* and it refers to the political alignment between the court and government that enacted the law under review. I argue that the political alignment between the majority of judges in the court and the political majority that enacted the law under review is likely to affect the court's decision. More importantly, I suggest that this alignment will influence the degree of strategic voting. For instance, a law that was passed under a Parliament dominated by Party A may come up for review when Party B is in power. Assuming that the political preferences of majority of judges are closer to Party A, the court would have higher tendency to uphold the laws supported by Party A. From the court's point of view these types of laws can be identified as 'friendly' laws. On the other hand, the probability of striking down laws would increase when Party B has enacted the laws under review. And from the court's viewpoint these laws can be identified as 'unfriendly' laws.

These expectations are not new since the attitudinal approach argues that the Court will strike down the acts of its partisan opponents and uphold the acts of its partisan allies (Segal and Spaeth, 2002; Lindquist and Solberg, 2006; Howard and Segal, 2004). Attitudinalists expect the Court to invalidate statutes enacted by ideologically distant elected branches, regardless of the elected branches sitting at the

time. Nevertheless, in line with the proponents of separation-of-powers approach I assume that under every situation the political context has a certain influence on the court's decision-making. For that reason, my goal is to account for to what extent the political alignment between the court and the enacting government would influence the impact of government structure on the court's likelihood of invalidating laws. In line with the literature, I expect that the constitutional court is more willing to uphold laws under the ruling of a unified government. But additionally I hypothesize that under unified government the court's likelihood of invalidating laws will increase when the court reviews an unfriendly law. Accordingly, the first hypothesis of this study is:

> *Hypothesis-1:* The magnitude of strategic voting will be lower in cases where there is weak political alignment between the enacting government and the court.

The second case-level factor is *identity of the litigant* who brings the case before the constitutional court. Judges know that at different times majorities of different political inclinations will dominate the political system and so they cannot simply serve the incumbent government at the expense of the other political actors' interests. The logic is somewhat similar to the one employed by Helmke (2005) who analyzes the behavior of the Argentinean Constitutional Court. One of her interesting findings is that when the judges have reasons to believe that the incumbent regime is close to losing power, they will shift their decisions to favor the incoming government. In this way, they signal their willingness to serve the interests of a new majority. Similarly, Stone-Sweet (2000) argues that when the president appears as a litigant before the court, judges will be more likely to invalidate legislative statutes (Stone-Sweet, 2000). Given all these arguments, I expect that regardless of the ideological inclinations of the political actors who bring the cases for reviews, the court has greater tendency to invalidate the laws that are brought by the political actors compared to the laws that are brought by other courts. For that reason, I might expect:

> *Hypothesis-2:* The magnitude of strategic voting will be lower in cases where the litigant is a political actor.

The third case-level factor is the *constitutional ground on which the litigant brings a case* before the constitutional court. The litigants demand the annulment of a law (or portion of it) for its violation of certain principles of the country's constitution. I suggest that the referral reasons would significantly influence the magnitude of strategic voting. For instance, it has long been argued that the court acts in counter-majoritarian fashion to protect the rights of minorities (Bickel, 1962). Supporting this traditional view of the court Thomas Keck (2007:321) has also identified the "general libertarian orientation toward free speech" as one of the most important institutional concerns that animated the Court's decisions over the last quarter century. In line with these arguments that identify the promotion of freedom and justice as the main duty of the judiciary, I hypothesize that when the litigant demands the annulment of a law for its violation of individual rights, the magnitude of strategic voting will decrease:

> *Hypothesis-3:* The magnitude of strategic voting will be lower in cases where the referral reasons for striking down a law include individual rights violations.

Evidence would be inconsistent with these hypotheses if the stated case-level factors do not affect the explanatory power of the government structure. Before the empirical evaluation of these hypotheses, in the next section I briefly explain the organization and decision-making process of the Turkish Constitutional Court and the empirical setting of the constitutional review in Turkey.

3.4 The Turkish Constitutional Court and the Constitutional Review Database

Before moving from hypothetical arguments to analyzing real world events, it is important to focus on the key assumptions underlying the given hypotheses. First and foremost, it is necessary to explain the actors' preferences, beliefs, and expectations. In this case, for example, how plausible is it to assume that Turkish judges believed that they are constrained by the political context in which they act? And, did they have sufficient reason to believe that the direction of their opinions could affect the sanctions

they faced? To begin to answer these questions, this part draws on the institutional design of the Turkish Constitutional Court.

Until the transition to multi-party system in 1945, the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) ruled Turkey without facing any political opposition. In the 1950s the CHP found itself in opposition and the Democrat Party (*Demokrat Parti*, DP) government passed a series of laws that severely restricted the rights of the opposition. Hence following the 1960 military coup that overthrew the DP government, the necessity of legal control over the legislative and executive organs appeared as an urgent issue. As Özbudun (2000:53) argues the absence of checks and balances in the 1924 constitution was 'the main reason for the collapse of the first Turkish experiment with democracy'. One of the central goals of the 1961 constitution, which was drafted jointly by the military and civilians, was to provide the separation of powers system and transform Turkey from a majoritarian to a pluralistic democracy (Özbudun, 1993). As a result, the Turkish Constitutional Court was established by the 1961 Constitution and began to carry out its activities in April 1962. With the 1982 constitution and the 2010 constitutional amendments the Turkish Constitutional Court underwent certain changes. Yet, since this study focuses on the 1984-2010 period, in this part of the chapter I will mainly focus on the institutional design of the court as it is framed in the 1982 constitution.

In the establishment of the Turkish Constitutional Court, the European (Kelsenian) model was adopted as the basic model for constitutional review[22]. The functions and organizational structure of the German, Italian and the Austrian Constitutional Courts were taken into account in giving the final shape to the court (official website of the Turkish Constitutional Court). Like its European counterparts the Turkish Constitutional Court decides only on constitutional issues and conducts

[22] The European model differs from the American one in several respects. First, unlike the American model where courts at all levels have the power to review the constitutionality of legislative and executive acts, the European model introduces a specialized constitutional court that alone holds the power of judicial review. Second, the European constitutional courts typically study not only concrete controversies involving actual alleged violations of citizens' constitutional rights, as in the U.S., but also abstract challenges to the constitutionality of legislations. And usually these challenges are exerted both after the legislative act has been enacted and implemented. Third, unlike in the American model the higher court judges are given limited tenure and reappointment is rarely permitted. Furthermore, the European court judges are not popular public figures as it is the case in the American context (Ferejohn, 2002; Epstein, Knight, and Shvetsova, 2001).

both abstract and concrete review of norms. Regarding the abstract review of norms, the constitutionality of laws, decrees and the rules of procedure of the Turkish Parliament are challenged directly before the Court through an annulment action. This procedure enables the court to examine the constitutionality of a law without reference to any specific case. Abstract review procedures in Turkey are *a posteriori*. This means that the legislation in question must first be implemented before its constitutionality can be challenged. The right to apply for annulment directly to the Constitutional Court lapses sixty days after publication in the *Official Gazette* of the contested law, decree or the rules of procedure of the Parliament (The Constitution of Republic of Turkey, Article 151). These cases can be brought before the Court for abstract review by the President of the Republic[23], the parliamentary group of the main party in government, the main opposition party, or a minimum of one-fifth of the total number of members of the parliament (The Constitution of Republic of Turkey, Article 150).

In addition to the abstract control of norms, the Turkish constitutional court also has the authority for concrete review of norms. The allegation of unconstitutionality can be initiated any time by the general, administrative and military courts. If a court finds that the law or the decree having the force of law or a provision thereof to be applied in a pending case is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality that may be submitted by one of the parties, it applies to the Constitutional Court to decide on constitutionality and it postpones the proceeding of the case until the Court decides on the issue (The Constitution of Republic of Turkey, Article 152). In the constitution it is indicated that no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the *Official Gazette* of the decision of the Court dismissing the application on its merits (The Constitution of Republic of Turkey, Article 152).

Other than the power of judicial review, the Court has some further political powers such as supervising political parties and trying high-ranking officials such as the President, the members of the Council of Ministers, the members of the Parliament and the members of the Constitutional Court itself and the other high courts and public prosecutors (The Constitution of Republic of Turkey, Articles 90 and 148). The Court

[23] The President of Turkish Republic has the authority to return any law to the Parliament for review before its promulgation. But this is not a very strong veto power because if the parliament enacts the same law without amendment, then the president must promulgate it.

does not serve as appellate court for ordinary disputes and litigations. Furthermore, until the 2010 constitutional amendments, there was no mechanism in Turkey for individual constitutional complaints so that the Court has not reviewed the concrete controversies involving actual alleged violations of citizens' constitutional rights.

Judges of the Turkish constitutional court do not serve for lifetime but for a specific time period. The Court's judges have to be at least 40 years old at the time of their appointment and hold office until they reach retirement at the age of 65. For that reason, the average tenure of a judge on the court is relatively short. The statistical figures show that since 1962 a judge in the Turkish Constitutional Court serves for an average of 6 years 8 months[24] (Anayasa Mahkemesi Üyeliği, official website). Apart from reasons of age, 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. The Constitutional Court itself decides with the absolute majority of the total number of its members on the termination of membership (The Constitution of Republic of Turkey, Article 147). And since 1962 there has been no evidence of removal of judges and no instance of court-packing. However the vagueness of the non-eligibility condition still appears to threaten the independence of judges.

An important organizational difference between the Turkish Constitutional Court and some of its European counterparts is related to the appointment process of the judges. In most democracies parliamentarians appoint the members of the constitutional courts. In the European model, for instance, the parliament and popularly elected presidents appoint judges of the constitutional courts. In the Turkish case, however, the 1982 constitution attributes no role to the Parliament in appointing the constitutional court judges. The President of the Turkish Republic, an official elected by the parliament, is the only person who appoints all the judges. Hence the Constitutional Court is composed of eleven regular and four substitute members[25] whom are appointed by the president from among candidates nominated by other high courts and the Higher Education Council (The Constitution of Republic of Turkey, Article 146). Although the President is required by the constitution to remain politically independent, one can easily infer that having the authority for judicial appointment, the

[24] With the 2010 constitutional amendments the tenure of judges is fixed to 12 years.

[25] With the 2010 constitutional amendments the number of judges is increased to 17.

President will appoint likeminded judges or at least try to prevent the appointment of judges whose preferences s/he doesn't like.

Taking into consideration the institutional design of the Turkish Constitutional Court one might argue that the constitutional structures leave the Court immune from political constraint. Yet, this argument can be easily challenged. First, compared to the U.S constitution, for instance, the Turkish constitution is more flexible and it is relatively easier to amend it. A political party that holds majority in the parliament can easily change the constitutional articles which protect the judiciary from political intervention. In 2010, for instance, the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) that have held majority of the seats in the Parliament adopted certain constitutional amendments. In line with these amendments, in addition to the President the parliament is also given authority to appoint some of the judges[26]. 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. Finally, although the institutional guarantees outlined in constitutions are important determinants for the independence of a judiciary, high levels of constitutional protections do not automatically lead to high levels of judicial independence in practice.

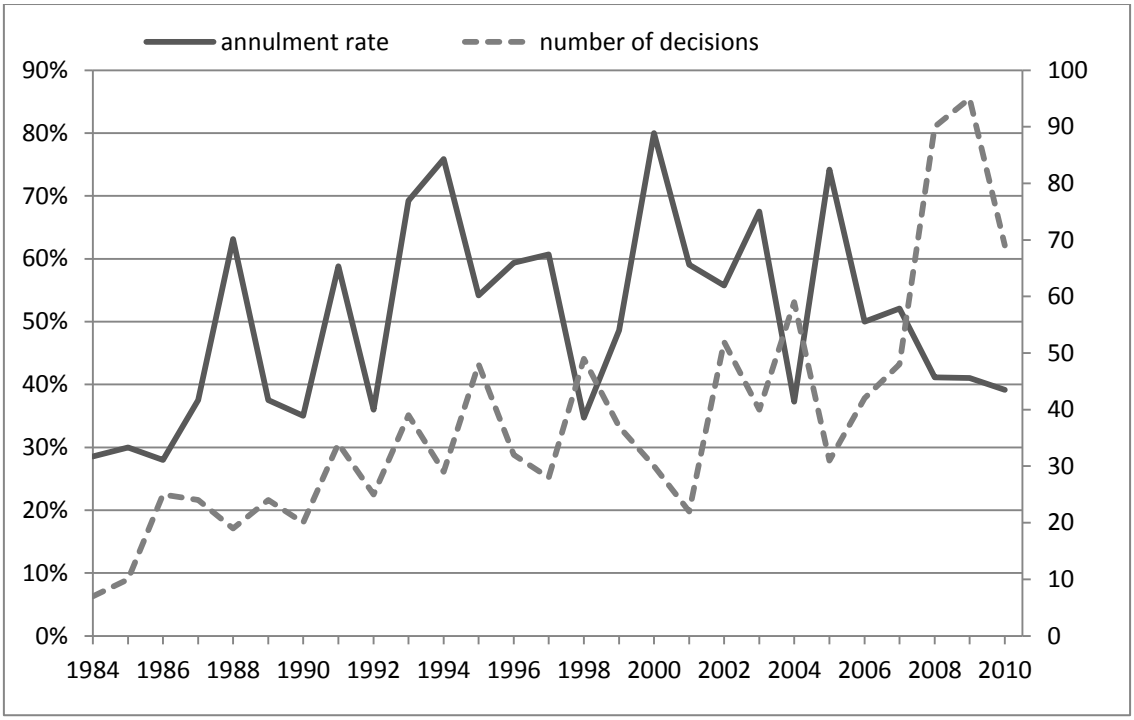
3.4.1 Decisions Data

The goal of this chapter is to account for how case-related factors influence strategic voting of the constitutional court. With this goal in mind, I seek to explain the Turkish Constitutional Court's choices to strike down laws. I use an original data set on all constitutional decisions where the Court reviews the constitutionality of laws, decrees and procedures of the Parliament. The data set includes decisions that were

[26] With the 2010 amendments three of the constitutional court members are appointed by the Parliament among the three candidates nominated by the Court of Accounts and presidents of the Bar Associations for each vacant seat. In the first ballot two thirds majority of the total number of members of the Parliament is required in order to elect a judge and absolute majority is needed in the second ballot. Other fourteen members of the Court are appointed by the President of the Republic.

resolved by the constitutional court between January 1, 1984[27] and December 31, 2010. The constitutional court decided on 1028 analytically distinct constitutional cases during this period and 54% of the challenged norms were found unconstitutional. As previously stated, the judicial politics literature suggests that under unified government the Court is more likely to uphold laws. Yet, showing trends in the percentages of cases where a law (or portion of it) is annulled by the Court, Figure 3.1 clearly illustrates the existence of other factors that would attenuate or escalate the impact of government structure on the court's decisions. The percentages of laws that were strike down by the Court show considerable variation even within the same governmental period.

Figure 3.1: Number of decisions and percentage of annulments, 1984-2010



Source: Data were 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: 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 total number of valid decisions excluding party closures, other types of cases and procedural rejections.

[27] Turkey's last military rule runs between 1980 and 1983. The first national election after the military coup was held on November 6th, 1983 and the Motherland Party (*Anavatan Partisi*, ANAP) came to power on December 1983. For that reason I start the analysis of the Court's decisions by 1 January 1984.

The 1962–1982 period of constitutional review was not included in the dataset because the institutional design of the Turkish Constitutional Court differs between these two periods. For instance, the 1961 constitution shared the appointment powers between the Parliament and the President, whereas the 1982 constitution gave this power only to the President. Additionally, while the 1961 constitution had granted the referral power to larger number of political actors[28], the 1982 constitution restricted these referrals. Since these kinds of institutional differences would affect the Court's perception of political constraints, I focused on the 1984-2010 period which does not show variation in the institutional design of the court.

For the 1984–2010 terms, the data was obtained from the Court's decisions published in the official website of the Turkish Constitutional Court[29]. Referral and review numbers, referral and review dates, type of constitutional review (*iptal* or *itiraz*), referring authorities, name of law, publication date of law, type of law (law, decree or procedure for the parliament), articles of the constitution cited as referral reason, and the Court's decisions constitute the dataset. Cases related to the dissolution and financial audit of political parties, trial of statesmen before the Grand Tribunal (*Yüce Divan*) and procedural rejections were excluded from the dataset.

Finally, I should point out that taking as data the final decisions of the court is not a problem in the Turkish case because the court cannot select its cases as in the US case. In the US case, the Supreme Court enjoys discretionary docket so that the cases are chosen by the judges themselves. For that reason, the problem with analyzing only the outcomes in these decisions is that the criteria by which those cases were selected for inclusion on the Court's docket may have included a consideration of the political actors' policy preferences. The Court may refrain from granting certiorari because it can anticipate its own deferential response (Cross and Nelson, 2001: 1476; Epstein and Knight, 1998: 84). Nevertheless, the Turkish constitutional court does not have a

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[28] According to Article 149 of the 1961 constitution the following actors are granted referral authority: the President, parliamentary groups in either house, political parties that had parliamentary groups in the lower house, political parties that had obtained 10 percent of the valid votes in the most recent general election, one-sixth of the members of either house, and, when it concerned their existence or duties, the Supreme Council of Judges and Public Prosecutors, the Supreme Court, the Council of State, the Supreme Military Court and universities.

[29] http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=search&id=24

discretionary docket privilege. This aspect insures that the court decisions which are analyzed in this study do not suffer a selection bias from the preferences of the Court. 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.

3.5 Measurement and Empirical Model

The central goal of this study is to explain whether and to what extent certain case-level characteristics influence the magnitude of strategic voting. As I noted earlier, strategic voting refers to the impact of government structure on the court's likelihood of striking down laws. Looking at the Court as a whole, the dependent variable of this study, *strike*, is a binary variable that measures whether the constitutional court invalidated a law/decree (or portion of it) through constitutional review actions. *Strike* is coded 1 if the court declares a law/decree (or 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. While the dependent variable of this study is a court's decision for or against the constitutionality of the challenged norm, the independent variables are indicators of the government structure, identity of the litigant, origin of the law and referral reason. To analyze to what extent case-level factors affect the explanatory power of the government structure I use the following structural model:

$$ln\ (S/1\text{-}S) = \alpha + \beta_1(ug) + \beta_2(ul) + \beta_3(pl) + \beta_4(ir) + \beta_5(ug * ul) + \beta_6(ug * pl) + \beta_7(ug * ir) + (\alpha_1 X_1) + \varepsilon$$

S refers to the probability of the Court's binary decision on each case to *strike* down a law (or portion of it). In this model *ug* refers to *unified government* which measures the government structure; *ul* to *unfriendly law* which is a measure of political alignment between the court and the enacting government; *pl* to *political litigant* which measures identity of the litigant; *ir* to *individual right* which measures the inclusion of individual rights violations as a referral reason. While 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.

Unified Government: In agreement with the existing studies, the theoretical framework of this chapter suggests that the 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's degree of control over the Parliament. An incumbent government that holds 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 taken, is a unified or divided government.[30]

Unified government refers to the situation where a single political party controls the executive, has a majority in the parliament and the capacity to enact laws. In this regard, unified government is coded 1 when the sitting government is a single majority party at the time the Court takes the decision. On the other hand, divided government refers to the situation where a single political party does not have the capacity to enact laws by itself. Hence, unified government is coded 0 when the incumbent government is a coalition government at the time the Court takes the decision. In our data 62% of the decisions were taken under unified governments, but the Court found only 45% of these claims unconstitutional. On the other hand, although 38% of the decisions were taken under the rule of coalition governments, the Court found 57% of these claims unconstitutional.

Unfriendly Law: The theoretical framework of this study posits that the political alignment between the constitutional court and the enacting government affects the court's strategic voting. To capture the political alignment between the court and the enacting government I create a binary variable, unfriendly law, and code it 1 if the law

[30] See Appendix A for detailed information about the unified and divided governments in Turkey.

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 measure the political alignment between the court and the enacting government, we need a proxy for the partisan affiliation of the individual judges. In the US context, for instance, judges are appointed by the president who is politically affiliated either to the Republican or Democratic Party. For that reason, one can easily show the political party with which the majority of the judges are affiliated. In the Turkish context, however, this task is quite challenging for two reasons. First, the President of the Turkish Republic is elected by the members of the Parliament. The candidates for presidency can be chosen 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 (The Constitution of Republic of Turkey, Article 101). More importantly, the constitution clearly states that the president should be politically independent from any political party. This creates an obstacle to measuring the political alignment between the constitutional court and the enacting government.

To deal with this problem I use the classification presented by Hazama (2011) who categorizes the Turkish Presidents into two main groups: state-elite presidents and non-state-elite presidents. He argues that the past affiliation or membership to a non-elected state institution distinguishes the state-elite presidents from the non-state-elite presidents. In line with this definition, Kenan Evren (1982–1989, former chief of the general staff and leader of the military junta that seized power in 1980) and Ahmet Necdet Sezer (2000–2007, former president of the Constitutional Court) 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 to ANAP, DYP and AKP respectively.

The second challenging factor to measure the political alignment between the court and the enacting government in the Turkish context is the conceived invariability of judges' preferences. In the Turkish politics literature it has always been argued that judicial bureaucrats are state-elites and the Turkish Constitutional Court defends the values and interests of the state-elites (Belge, 2006; Shambayati and Kirdiş, 2009). Yet,

one should not forget that the President will appoint likeminded judges or at least try to prevent the appointment of judges whose preferences s/he doesn't like[31].

Taking all these aspects into consideration the law under review is considered unfriendly and coded 1 whenever a) it was passed under the ruling of a state-elite political party[32] and majority of the judges in the Court was appointed by a non-state-elite president; and b) it was passed under the ruling of a non-state-elite political party and majority of the judges in the Court was appointed by a state-elite president, and 0 otherwise. The data shows that unfriendly laws constituted 43.7 percent of the cases that were decided by the Court between the 1984-2010 periods. And 53.3 percent of these unfriendly laws were found unconstitutional.

Political Litigant: This study argues that identity of the litigant does not only affect the court's probability of invalidating laws but also affect the magnitude of strategic voting. I suggest that the Court will be more likely to invalidate legislative statutes when asked directly by the political actors through litigation. To measure the identity of the litigant I have created a dummy variable, political litigant, which is coded 1 when the litigant is a political actor (the President; the main opposition party; or a minimum of one-fifth of the total number of members of the parliament), and coded 0 when the litigant is another type of court (the general, administrative and military courts). The data shows that 32.5 percent of the cases decided by the Court are brought by political parties. But more interestingly, in 71.8 percent of these cases the court found unconstitutional grounds.

Violation of Individual Rights: When they bring a case before the court for judicial review, the litigants demand the annulment of a law (or portion of it) arguing that it

[31] Since the tenure of a judge in the Turkish Constitutional Court is approximately 6.5 years on average, the makeup of the Courts tends to track the presidency returns very closely.

[32] Hazama (2011) uses the state-elite and non-state elite categorization for the Turkish political parties as well. The Republican People's Party (*Cumhuriyet Halk Partisi*, CHP), for instance, played a central role in the establishment of the Turkish Republic and is considered a state-elite party (Özbudun, 1993). As the descendants of this party, the Social Democratic Populist Party (*Sosyal Demokratik Halkçı Parti*, SHP) and the Democratic Left Party (*Demokratik Sol Parti*, DSP) are also considered as state-elite parties. All other political parties in the parliament are considered as non-state-elite parties.

violates certain principles of the constitution. In this regard, the theoretical framework of this study suggests that when the litigant brings the violation of individual rights as referral reason, the magnitude of strategic voting will decrease in these types of cases. In these types of cases the impact of government structure on the court's decisions is hypothesized to attenuate.

In this study I measure the issue of violation of individual rights by looking at the constitutional articles that a litigant indicates as a referral reason. I create a dummy variable, individual rights, code it 1 when the litigant mentions the violation of the constitutional articles that deal with the individual rights and 0 otherwise. The articles in the 1982 Turkish constitution which deal with individual rights include all articles in Part Two: Fundamental Rights and Duties (Articles 12 to 74). These articles pertain to the fundamental rights and duties of the individual, the social and economic rights and duties, and the political rights and duties. In 57 percent of the cases decided by the court, the litigants include the violation of individual rights among their referral reasons. And 45 percent of these challenges are found unconstitutional.

Control variables: In the empirical model of this study I control for three potential influences on judicial decision-making. First, I control for the type of legislative acts that are being reviewed. Laws passed by the legislature are the most common type of acts reviewed by the Turkish Constitutional Court. Additionally, the court may review government decrees which the government is authorized to issue, and rules of procedures of the Parliament. To capture the type of legislative act that is reviewed by the court I create a dummy variable, *type of law,* coded 1 when the court reviews a law passed by the legislature and 0 when it reviews a governmental decree or a Parliamentary decision. Our data shows that 88.5 percent of the legislative acts that are reviewed by the Turkish Constitutional Court are laws passed by the parliament. The data also shows that while governmental decrees or parliamentary decisions constitute only 11.5 of the cases, almost 91 percent of these governmental decrees and procedures of the parliament are found unconstitutional.

In order to address the possibility that the court usually tries to uphold the laws passed by the incumbent government, I also include a dummy variable, *enacting/incumbent same party,* taking on the value 1 if the enacting and incumbent governments were under the control of the same political party (ies), and 0 otherwise. Defying the traditional view of the Court as a counter-majoritarian institution, in his

seminal study Dahl (1957) found that in American Politics the Supreme Court rarely invalidated policies favored by the party coalition then in control of the presidency and Congress. He argued that the Court is supportive of the policies of political institutions at the time the judicial decision is taken but annuls older laws that had been passed by the political actors who are no longer in power (Dahl, 1957). Following the Dahlian paradigm, many scholars asserted that judges generally share the policy preferences of the dominant governing coalition (Clayton and Pickerill, 2006; Peretti, 1999) and "almost never engage in policy-making that challenges those power-holders who are in a position to assault their nominal independence" (Gillman 2003, 251). It has also been argued that "rather than a check on majority power, the courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition" (Clayton and Pickerill, 2006: 1391). If the Court tends to avoid challenging the policies of the contemporary government, as suggested by these scholars, this variable should be negatively associated with judicial review. In about 55% of the cases decided by the Turkish Constitutional Court the enacting and incumbent governments are identical.

An additional control variable that is of interest here is whether the behavior of the court changes across time. In other words, 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 came 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 change will increase. To account for this possibility, I have included a continuous variable, *months in power*, which measures number of months an incumbent government is in power. The data shows that in Turkey between 1984-2010 periods the average time that an incumbent government stays in power is 53 months.

3.6 An Analysis of Decision Making on the Turkish Constitutional Court

Table 3.1 displays results from two binary logistic estimations. In these models the dependent variable is *strike* and it measures whether the court invalidates a law or not. In the first model, I include only the key variables of interest (*unified government*; *unfriendly law; political litigant; violation of individual rights)* and three control variables *(type of law; enacting/incumbent same party; months in power).* In the second model, on the other hand, to test the hypotheses of this study, interactions between the case-level factors (*unfriendly law*, *political litigant*, and *violation of individual rights*) and government structure (*unified government*) are included. These interactions test whether and to what extent the impact of government structure on the court's invalidation of laws changes across certain case-level characteristics. In other words, these interactions show whether the indicated case-level variables show significant effects on the magnitude of strategic voting that is represented by the coefficient of unified government. The coefficients for these case-level factors that are presented in Model-2 represent their conditional effects on the probability of striking down a law when unified government variable is equal to zero. And the effect of unified government is conditional on all variables with which it is interacted.

In Model 1 the coefficient of unified government shows that in line with the existing theories and our expectation its impact on the court's strategic voting is negative and statistically significant. This means that under a unified government when the constitutional court reviews a case where the court reviews a friendly law, the litigant is not a political actor and the referral reason does not include any statement of violations of individual rights the court is more likely to uphold laws. Yet as shown in Table 3.1, the significance of the interaction terms confirms that the impact of unified government (government structure) significantly changes across certain case-level factors.

Table 3.1: Effects of case-level factors on strategic voting, 1984-2010: Estimates of binary logistic model

	Model 1	**Model 2**
Unified government	-0.42*	-1.35***
	(0.19)	(0.29)
Unfriendly law	0.32*	0.69*
	(0.15)	(0.29)
Political litigant	1.35***	1.27***
	(0.18)	(0.20)
Individual rights	-0.61*	-0.75**
	(0.17)	(0.24)
Unified government*Unfriendly law		1.06**
		(0.35)
Unified government*Political litigant		0.71*
		(0.31)
Unified government*Individual rights		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)
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>chi2	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 portion of it) or 0 when the court upholds the law. Cell entries are logistic regression coefficients. Standard errors are in parentheses. ***<0.001, **<0.01, * <0.05

I discuss the results in Table 3.1 in conjunction with Table 3.2 and Figure 3.2, which present a clear substantive view of the results, showing the probability of striking down laws for each case-level factor. In Figure 3.2, I present the baseline probability for striking down laws under the rule of a unified government. This allows one to see how the predicted probability of striking down laws is compared to the

baseline probability. The baseline probability is calculated by holding months in power to its mean, unified government and other control variables constant to 1, and all case-level variables to 0.[33] Thus, it represents the prediction that the court will strike down a law under unified government which is 53 months in office and when the litigant is not a political actor, the law under review is friendly law, the litigant does not bring the violation of individual rights as a referral reason, and when the enacting and incumbent governments are same. Table 3.2 and Figure 3.2 show that under these conditions the probability of observing that the court will strike down such a law is not very high: 22%.

The results from the interactions presented in Table 3.1 indicate that all of the hypothesized variables exhibit statistically significant effects on strategic voting. In support of the first hypothesis, the empirical results show that the review of an unfriendly law significantly decreases the impact of strategic voting. The coefficient on the *unified government*unfriendly law* interaction term is positive and statistically significant suggesting that the effect of unified government on the annulment of laws decreases for cases where the court reviews unfriendly laws. In other words, when the court reviews unfriendly laws under unified government the probability of invalidating laws tremendously increases. When unfriendly law is "1", the coefficient for unified government is (-1.35+1.06*1) = -0.29 suggesting that the importance of unified government as a predictor decreases for cases where the court reviews unfriendly laws. Table 3.2 and Figure 3.2 also show that when the court reviews an unfriendly law instead of friendly law the probability of striking down laws increases from 22% (baseline probability) up to 37%. The high levels of annulment suggest that when the court reviews unfriendly laws, it tends not to take into consideration the political constraints that are at their highest levels under unified governments. In this regard the strategic calculations of judges appear to diminish when they review unfriendly laws.

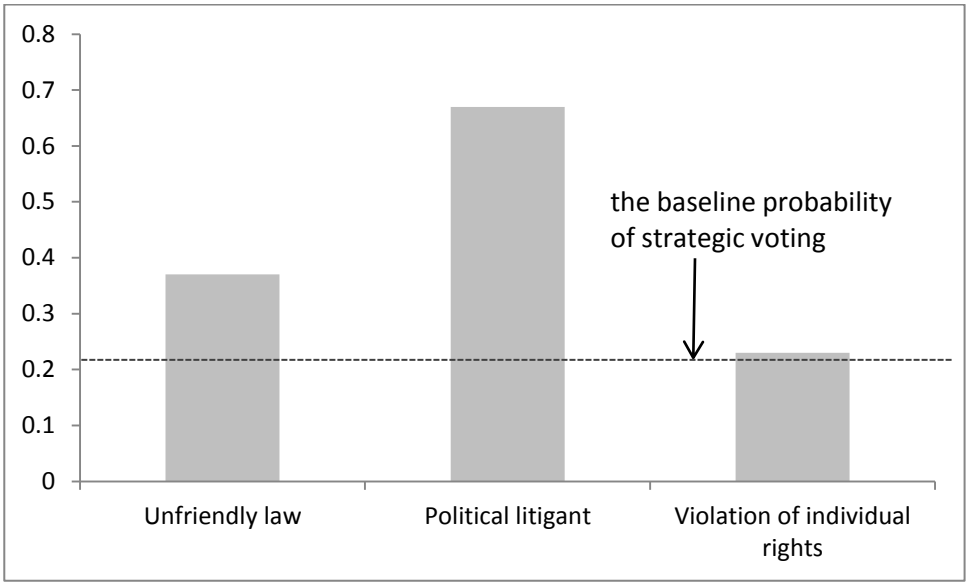
[33] In Appendix B you can find the table and figure of predicted probabilities that are calculated by taking the mean of all variables. For instance, to compute the predicted probabilities of strategic voting for cases where the court reviews unfriendly laws, I set unfriendly law to 0 and all variables to their mean values. The dotted line in the Figure is the "average" probability of striking down laws under the rule unified government. The value is 63 % and it represents the effect of unified government when all other variables are held at their mean values. This allows one to see how the predicted probability of striking down laws is compared to the baseline probability.

Table 3.2: Predicted probabilities: Decisions of the Turkish Constitutional Court

	Prob. Strike
	Under unified government
Baseline	0.22
Unfriendly law	0.37
Political litigant	0.67
Violation of individual rights	0.23

Whether the litigant is a political actor or not exhibits statistical significance on strategic voting as well. As expected the impact of political litigant on strategic voting is in negative direction. Model 2 in Table 3.1 shows that the coefficient for *unified government*political litigant* interaction term is positive and statistically significant. This suggests that the effect of unified government on the annulment of laws decreases for cases where the litigant is a political actor. In other words under unified government when the court reviews cases which are brought before the court by political actors, the court's inclination of invalidating laws tremendously increases. To put it in more specific terms, when the litigant is political actor "1", the coefficient for unified government is (-1.35+0.71*1)= -0.64 suggesting that the importance of unified government as a predictor decreases for cases when the litigant is a political actor. Table 3.2 and Figure 3.2 also show that when the litigant is a political actor the probability of striking down laws almost triples: 67%. This remarkable increase in the probability of striking down laws under the ruling of a unified government suggests that while the litigant is a political actor, the Court does not pay too much attention to the possible retaliatory actions of the powerful incumbent government. From this empirical result one can easily argue that identity of the litigant significantly influences the magnitude of strategic voting and this influence is in negative direction.

Figure 3.2: Predicted probability of strategic voting as a function of case-level factors



Similarly, Table 3.1 shows that whether a case has violations of individual rights among its referral reasons has significant impact on strategic voting. And its impact is in the expected direction. When the referral reason includes violation of individual rights, the coefficient for unified government is (-1.35+0.82*1) = -0.53 suggesting that the importance of unified government as a predictor decreases for cases when the violation of individual rights is included among the referral reasons. Yet Table 3.2 and Figure 3.2 show that under the ruling of a unified government when the court reviews a case where violations of individual rights are presented as referral reasons the probability of striking down laws increases only by 1 percent. For that reason, we can say that the influence of this factor on the magnitude of strategic voting is trivial.

Regarding the impact of control variables, both models presented in Table 3.1 show that the Turkish Constitutional Court is more likely to strike down governmental decrees rather than the laws passed by the legislature. Similarly, Model 2 indicates that the probability of invalidating laws decreases when the Court decides cases where the enacting and contemporary governments are controlled by the same political party. This finding suggests that the Turkish Constitutional Court does not tend to actively challenge policies favored by the incumbent government. Finally, the number of

months an incumbent government stays in office does not show a significant influence on the strategic voting of the Court.

3.7 Discussion and Conclusion

The probability of observing a constitutional court deciding to strike down a law (or portion of it) is related to whether the court *can* challenge the elected branches and whether it *wants* to challenge the elected branches. A court can challenge the incumbent government and the legislature when it does not face strong political constraints. To a larger extent this depends on the political strength of the executive at the time decision was taken. The literature suggests that under the ruling of a unified government the executive is more powerful since a single political party has the capacity to enact laws by itself and constrain the courts in this regard. For that reason, many studies argue that under a unified government, the likelihood of judges deciding against the government will diminish. In this regard, the court's inclination to uphold laws under the ruling of unified government refers to high levels of strategic voting.

While the existing literature has assumed that the political context exhibits uniform effects across cases, I have highlighted the importance of case-level context and argued that the impact of government structure on the court's decisions changes across cases in a systematic way. Case-level stimuli activate cost-benefit calculations to varying degrees, leading to variation in the magnitude of strategic voting. From the analysis of the Turkish Constitutional Court decisions taken between 1984-2010 periods, the empirical evidence supported all hypotheses. Unfriendly laws, for instance, appear to elicit a lower magnitude of strategic voting than friendly laws. Similarly when the litigant is a political actor the magnitude of strategic voting appears to decrease compared to when the litigant is another court. Finally, although the influence of violation of individual rights on the relationship between government structure and annulment of laws is significant, its impact appears to be minor.

In general, this study has sought to increase the knowledge of constitutional court decisions in parliamentary systems by systematically examining the conditions that weaken the impact of government structure on the choices that the judges make. Despite the prominence of the existing models on judicial decision-making, my

research demonstrates that they are still open to certain refinements. And future research can continue this trend. Hopefully scholars will continue to probe these types of extensions to understand further conditions under which political factors or judges' preferences influence the court's final decisions to lesser or greater extents. Such inquiries can further contribute to the theoretical perspectives central to the study of judicial decision-making. More importantly, such work can expand our knowledge and understanding of how judges make decisions on the important questions that face them.

CHAPTER 4

JUDICIALIZATION OF POLITICS THROUGH STRATEGIC LITIGATION: THEORY AND EVIDENCE FROM TURKEY

4.1 Introduction

The formation of higher courts with extensive jurisdiction led to the expansion of judicial power in many countries[34] and triggered the interference of the judiciary into the activities of the legislature and executive. As a result of this trend, it is argued that judges "have developed into powerful institutional actors or policymakers" (Shapiro and Stone-Sweet, 1994: 401), who "direct the making of public policies" (Tate, 1995: 28) and "intervene in the legislative process" (Stone-Sweet, 1992: 235). As Shapiro (1981: 155) notes, these courts "are not expected to be 'neutral' but instead to be active instruments for the promotion of the newly established democratic regimes and guardians against any backsliding into earlier antidemocratic political ways." This process of "global expansion of judicial power" is often referred to as the "judicialization of politics" (Tate and Vallinder, 1995) and defined as a "transfer of decision-making rights" from the legislative and executive bodies to the courts (Vallinder, 1995:13).

Even though the courts play a crucial role in shaping the governmental policies, we do not really know much about what triggers the judicialization of politics in the first place. The cases do not come to the courts at random but rather litigants bring them to the courts. Thus it is crucial to understand why, when and under which

[34] The expansion of judicial power has been causally related to the demand to prevent the human rights violations of the Second World War period (Shapiro, 2002) and to consolidate the global diffusion of democracy (Tate and Vallinder, 1995).

conditions the political issues are judicialized instead of addressed and resolved through traditional political forums. Do political opposition parties care only about a proper judicial review, or are they willing to refer a bill to the court to increase their public vote share or secure more seats in parliament? Or perhaps they act mainly to further public awareness, foster public discussion, and create pressure for social and legislative change? Or, perhaps by referring bills for abstract review the political elites in the opposition simply want to place obstacles in the way of an incumbent government's ability to function. Given that an opposition party might be motivated by a number of different goals, it is worth exploring under which conditions the political opposition parties most frequently turn to the constitutional court.

The existing studies usually focus on the American cases and they mostly study the incentives of interest groups or individuals who act as litigants (e.g. Epp, 1998; McCann, 1994). In the American model of judicial review, litigation starts in lower courts and can make its way to the higher court only after a complicated process of appeals. For that reason the process is very long and less appealing as an effective means of political action (Stone-Sweet, 2000). In the European model of judicial review, however, because of the abstract review power of the constitutional courts, the political opposition parties are essentially the only external actors who can initiate a constitutional litigation (Stone-Sweet, 2000). This condition suggests that litigation might be used as a useful weapon by the parliamentary oppositions in order to veto the policies with which they disagree. But in developing democracies where judicial independence is not fully consolidated the opposition parties' frequent referral to the higher court reveals an important puzzle: Why do the opposition political parties frequently bring cases in front of the constitutional court and choose to judicialize politics although the judiciary is not fully independent? In this regard, exploring the conditions under which the political actors in the opposition have higher incentives to turn to the judiciary instead of using political channels appears as an imperative area of academic investigation.

In this chapter I suggest that political opposition parties are rational actors who tend to use litigation as a tool to differentiate their policy preferences from the policies enacted by the incumbent government. Accordingly, I argue that the approaching general election affects the willingness of an opposition party to go to the constitutional court although the judiciary is not fully independent. This effect is hypothesized to be conditioned on the opposition party's prediction of the upcoming general election

results. Specifically, once the opposition party believes that it will lose the upcoming election, it will begin facing incentives to increase its referrals to the constitutional court to highlight the policy differences on constitutional dimension that in turn may increase public awareness and its vote share. Yet once the opposition party foresees itself winning the upcoming election, it will not tend to frequently use litigation since the costs of pursuing litigation will overweigh the marginal benefits. As a result, this study predicts a legal-political cycle in which the number of cases referred to the constitutional court by weak political opposition parties increases with the approaching election date. I refer to this phenomenon as "strategic litigation theory".

Turkey presents a proper case for testing the theory of strategic litigation in a context where the judiciary is not fully independent. Similar to the continental European model, the Turkish judicial system enables the political opposition parties to challenge the constitutionality of the legislation and public policies before the constitutional court. Although the phenomenon of legislators' petitions may be more common in Turkey than in many other countries, the Turkish case is by no means unique or exceptional. Over the last two decades Turkish elected representatives have resorted to litigation as a routine means of their political activity. Nevertheless, within legislative periods there is some interesting variation in the litigation practices of the opposition parties that needs to be explained. To test the strategic litigation theory, I constructed an original data set including all the acts promulgated by the parliament between the years 1984-2011, and analyzed all the cases that are brought to the Turkish Constitutional Court by the main opposition parties[35] in the same time period. Building on an original data set, this study not only speaks to broader debates surrounding the judicialization of politics but also seeks to integrate the Turkish Constitutional Court – which is understudied at this point - into the large body of existing research in comparative political institutions and judicial politics. Moreover, analyzing the conditions that lead to the expansion of judicialization of politics in the Turkish case is of crucial importance for understanding similar developments in developing parliamentary democracies where the constitutional courts exercise abstract review.

The article proceeds as follows: the first part of the study gives the theoretical framework about the use of strategic litigation by the political opposition parties. The second part gives information about the Turkish judicial and political system as well as

[35] The main opposition party refers to the opposition party with the largest number of seats in the parliament.

the institutional design of judicial review in Turkey. The third part introduces the data, empirical model and key variables. The fourth part is the empirical section where the main hypotheses are tested and results presented. The last part will conclude the study by discussing both theoretical and practical implications of the findings.

4.2 Strategic Litigation as a Triggering Aspect of Judicialization: The Theoretical Framework

The judicialization of politics refers to the processes by which "courts and judges come to make or increasingly dominate the making of public policies that had previously been made by other governmental agencies" (Vallinder, 1995: 13). In this sense, the pursuit of politics through the "medium of legal discourse" appears as the central aspect of a judicialization process (Shapiro and Stone-Sweet, 2002). Since courts are invited regulators in this process, the political elites' decision to channel political conflicts through constitutional litigation triggers the judicialization of politics.

There are two main reasons for why judicialization inevitably follows from the establishment of courts with constitutional review powers. First, by awarding parliamentary minorities the right to refer legislation for judicial review, a significant opportunity emerges for the use of litigation for counter-majoritarian purposes. In parliamentary politics strong and disciplined parties control the legislative process, whereas the opposition parties use the few remaining opportunities to constrain the policies adopted by the governments supported by the majorities in parliament. All this might be countered if majorities enjoyed the ability to reverse judicial rulings and force courts to abide by their wishes (Magalhaes, 2003). However, at this point a second factor gains importance: constitutional courts are independent and insulated from the interests of majorities and executives. For that reason litigation by opposition parties turns the judiciary into a third higher chamber in law production replacing the traditional forms of legislative organization, unicameralism or bicameralism, by "tricameralism" (Lane and Ersson, 1999: 166).

In this regard, Stone-Sweet (2000) argues that the interaction between the courts and legislators is conditioned by two underlying structural factors. First, the mode of judicial review (abstract or concrete review) exercised by the constitutional court.

Second, the extent to which the parliamentary majorities seek to enact radical reform legislation. Accordingly, Stone-Sweet (2000:50) suggests that the political systems which contain abstract review, experience more judicialization than the systems that do not. He also suggests that the more radical the legislation adopted by the majority in the parliament, the more likely that the law will be referred to the constitutional court (2000:52). On the other hand, Ryan (2010) presents a favorable legal framework, a relatively autonomous judiciary and organizational support for policy litigation as the main sets of enabling conditions for the judicialization of politics. However, it is important to stress that these enabling conditions, by themselves, cannot explain what triggers the judicialization in the first place. In other words, they provide an opportunity for taking policy claims to the courts, but they cannot account for the factors which lead to the judicialization of policy issues. In order to designate these factors one should first elucidate the reasons of why the political elites in the opposition would choose to go to the court instead of addressing the problematic legislations through traditional political forums even though the judiciary is not fully independent.

When a political opposition party decides to refer a bill to the court for its annulment, is it because the opposition party truly disagrees with the legal standing of the bill? Or is it for some other reason? The conventional response for the litigation processes initiated by the opposition parties asserts that the "losers" of a policymaking process decide to turn to the courts, because they cannot achieve their policy goals through political means (Stone-Sweet, 2000). According to this kind of explanation, the opposition parties should be willing to bring courts into the legislative process whenever government policies deviate from their preferences. At first sight, the loser argument seems a very reasonable because it fits very well with the traditional view of the courts as defenders of minorities against the potential abuses of the incumbent government (Ryan, 2010). However, identifying a litigation process merely in terms of winners and losers does not provide a thorough vision into the phenomenon of judicialization of politics. First, having the constitutional power to send each and every bill - which has been enacted by the incumbent government- to the constitutional court, the main opposition party can hardly be defined as a "looser" in a strict sense. Second, the "looser" argument appears to envision that the only concern of the main opposition party who brings a bill in front of the constitutional court for judicial review is to win the case.

By recasting the connection between the choices opposition parties make and the constraints they face, in the following part of the chapter I explore a new set of answers to the question that asks why and when the opposition political parties frequently bring cases in front of the constitutional court and choose to judicialize politics although the judiciary is not fully independent. At the core of the argument is the idea that opposition parties go to the court not because they truly disagree with the legal standing of the bill but because they want to use litigation as a strategic tool to achieve their policy and political objectives.

4.2.1 The Logic and Theory of Strategic Litigation

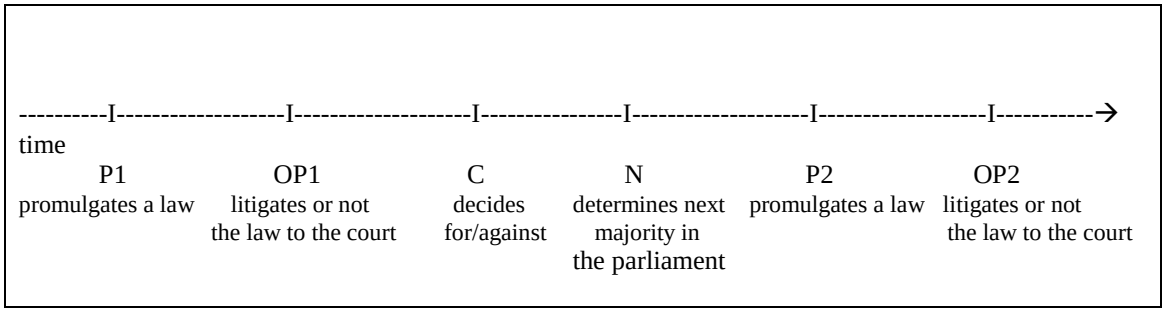
So far we laid the groundwork for identifying litigation as a distinct form of behavior that a political opposition party adopts when faced with a problematic bill in the parliament. The central argument of this chapter suggests that as election time approaches the opposition parties become more willing to go to the court. Yet the effect of the approaching election is hypothesized to be conditioned on the opposition party's prediction of its post-election placing. I refer to this phenomenon as "strategic litigation". Because a strategic litigation makes sense only if the opposition parties believe that litigation will improve their fate, the next step is, therefore, to develop a unified theoretical framework.

An implicit assumption underpinning the strategic litigation argument is that the political elites in the opposition are rational actors who place a higher value on achieving their political objectives than on the resolution of the case in line with a legal standing. Another assumption sustaining the strategic litigation theory is that the opposition parties might not care much about the final decision of the judges when deciding whether to refer a statute to the court. By contesting a policy in the court it may be possible to secure a political victory without achieving a legal victory. The final simplifying assumption of the strategic litigation theory is that an opposition party has complete and perfect information about the election results. Based on these assumptions, I derived strategic litigation as a logical response used by the political opposition parties to achieve their political objectives.

Figure 4.1 provides a basic setting that illustrates the logic of strategic litigation. The figure depicts a sequence of decisions with the majority in the parliament (P1)

moving first, the main political opposition party (OP1) second, the court (C) third, nature (N) fourth, the future majority in the parliament (P2) fifth and the future main opposition (OP2) party sixth.

Figure 4.1: Strategic litigation game



In the first stage, the majority in the parliament acts by promulgating a law. In the second stage, the main opposition party in the parliament decides whether to refer that law to the constitutional court or not. In the third stage, the constitutional court decides to annul the law or not. In the fourth stage Nature selects the next government. With a probability *p* the main opposition party will be part of the incoming government. It will either hold a majority of the seats in parliament and act as a single party government or form a coalition government with another political party. With a probability *1-p* it will be acting as the main opposition party or as a small opposition party or it will be totally ousted from the parliament. In the final stages, the future majority in the parliament tries to promulgate another set of laws and the main opposition party decides whether to refer that law to the constitutional court or not.

Through litigation the opposition parties are able to challenge the unconstitutionality of legislative bills before the constitutional court. For that reason, judicializing a bill makes it easier to highlight the policy differences between the opposition party and incumbent government. For instance, an opposition party can convert a problematic legislation into a public debate in which there is only a "good" side to be advocated. Freedom and human rights, democracy, political corruption, economic growth or social justice are the issues that can be used in this sense (Stokes, 1963). Thus by accusing the majorities of violating constitutional rules and referring legislation for abstract review, the opposition parties can attempt to place themselves

on the "right" side (and the majorities on the "wrong" one) of a debate regarding these issues (Magalhaes, 2003). As a result, the use of litigation by an opposition party to differentiate its policy preferences from the policies of the incumbent government, may increase public awareness, foster public discussion, bring pressure for social and legislative change, cast doubt on governmental policies or discredit them.

The main argument of this chapter posits that the effect of the approaching election on the opposition party's use of litigation is conditioned on its prediction about the general election results. This is because the cost-benefit calculations of an opposition party who predicts to be part of the incoming government will be quite different from the opposition party who expects to lose the general election and continue to act as an opposition party. If the opposition party expects to lose the forthcoming election it will have nothing to lose from frequently going to the court prior to the election. Under this situation the opposition party foresees that in the post-election period it will be acting as the main opposition party or as a small opposition party or even worse it will be totally ousted from parliament. For that reason the opposition party will try to use all available means to highlight the distinction between its policy preferences and the policies enacted by the incumbent government. Presented as a testable hypothesis the first prediction is as follows.

> *Hypothesis-1:* The main opposition party would increase its use of litigation as election time approaches once the prospect emerges that it will lose the general election and act as the main or a small opposition party in the parliament.

On the other hand, if the main opposition party foresees itself winning the upcoming election and holding a majority of seats in parliament or becoming part of a coalition government, it will not tend to use litigation as a policy differentiating mechanism because when the opposition party is likely to win power the costs of pursuing litigation will overweigh the marginal benefits. Although the immediate costs of referring a problematic legislation to the court might be zero, the long-term electoral and political costs of frequently turning to the court might be great (Stone-Sweet, 2000:198). For instance, if the opposition party has some chance of becoming part of the incoming government, a policy based on obstructionism would constrain its future legislative freedom making it vulnerable to destructive criticisms once it tries to pass similar laws from parliament. Hence, the main opposition party - who envisions

winning the upcoming general election - may decide to change the problematic bills by itself instead of losing time in the litigation process and wait for the decisions of the court. And the second prediction can be stated as follows.

> *Hypothesis -2:* The main opposition party would not increase its use of litigation as election time approaches once the prospect emerges that it will have an electoral victory and either hold the majority of seats in parliament or become part of a coalition government.

In line with these hypotheses, the theory of strategic litigation suggests that the changes in the opposition party judicial behavior depend on changes in the opposition party's beliefs and expectations about the results of the upcoming general election. For that reason, evidence would be inconsistent with these hypotheses if the opposition parties which were expecting to lose the upcoming general election did not significantly increase their use of litigation as election time approached or if the opposition parties which were expecting to win the future general election did significantly increase their use of litigation as election time approached.

4.3 The Constitutional Court, Governments and Opposition Parties in Turkey

Controlling the executive and legislative actions through a higher judicial organ has been one of the most significant developments in the history of democratic regimes. In Germany and Italy, for example, constitutional courts were created after the Second World War as a reaction to the abuses of political regimes. In Turkey, the establishment of the constitutional court, however, dates back to the Constitution of 1961, which was drafted following the 1960 military coup[36]. The court's creation was a response to a prevalent perception among the military elite that the Democrat Party (*Demokrat Parti*, DP), which controlled a parliamentary majority between 1950 and 1960, had abused executive power in an effort to eliminate political opposition and destroy the basic principles of the republic (Arslan, 2002). The shortcomings of the 1961 system led to a

[36] Turkey's experience with parliamentary democracy dates back to 1945, but its recent history is characterized by three military coups in 1960, 1971 and 1980.

revision in the role of the constitutional court after the 1980 military coup. With the adoption of the new constitution in 1982, the Turkish Constitutional Court was transformed into an administrative agent whose function was stated to depend on assisting the Kemalist elite, enhancing the power of the state, promoting the ideology of the regime, regulating the political arena and facilitating the transformation of the society to the level of contemporary civilization (Shambayati, 2004; Shambayati and Kirdis, 2009).

According to the regulations laid down in the 1982 Constitution, the Turkish Constitutional Court was given considerable powers and authority to deal with 1) annulment cases which are filed on the grounds that laws, decree-laws, regulations of the Turkish Grand National Assembly or certain articles or provisions thereof are against the constitution as to its form and merits and 2) annulment of the amendments to the constitution which contradict with the constitution in terms of the form (The Constitution of Turkish Republic, Article 148)[37].

Since the action for annulment is abstracted from any particular case, matters falling under these items can be brought before the Turkish Constitutional Court for abstract review[38]. Abstract review procedures in Turkey are *a posteriori*. This means that the legislation in question must first be promulgated before its constitutionality can be challenged. Actions of annulment on the grounds of unconstitutionality must be initiated within 60 days of publication in the *Official Gazette* (The Constitution of

[37] Article 148 also indicates that the Turkish Constitutional Court has authority to consider 1) decisions concerning procedures referred by other courts; 2) in the capacity of Supreme Court, to try the President of the Republic, members of the Council of Ministers, the presidents and members of the Constitutional Court, the Court of Cassation, the Council of State, the Military Court of Cassation, the High Military Administrative Court, the chief prosecutors, the deputy Chief Public Prosecutor, the presidents and members of the Council of Judges and Prosecutors, and of the Court of Accounts, on offences relating to the exercise of their functions; 3) to try cases relating to the dissolution of political parties; 4) to control the constitutionality of the finances of political parties in addition to their revenues and expenses; 5) to render annulment decisions in cases where the Grand National Assembly of Turkey decides to waive the parliamentary immunity of a member or disqualify him/her from membership, or to waive the parliamentary immunity of ministers who are not deputies; and 6) to perform the other functions assigned to it by the Constitution.

[38] With the constitutional amendments of 2010 concrete review is included among the duties of the Turkish Constitutional Court. In contrast to the annulment actions, incidental proceedings can also be initiated by any individual and are not subject to any time limitation. However our data does not include these cases.

Turkish Republic, Article 151). Furthermore, no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the court dismissing the application on its merits (The Constitution of Turkish Republic, Article 152).

The constitutional validity of laws may be challenged directly before the Turkish Constitutional Court through an annulment action by persons and organs empowered by the constitution. Accordingly, the President of the Republic; the parliamentary group of the main party in government[39]; the main opposition party; or a minimum of one-fifth of the total number of members of the unicameral parliament have the right to apply for annulment action to the constitutional court. In the situation of a coalition government, only the party in power with the largest number of parliamentary members can apply for an annulment before the court (The Constitution of Turkish Republic, Article 150).

The President of Turkish Republic has the authority to return any law to the Parliament for review before its promulgation. But this is not a very strong veto power because if the parliament enacts the same law without amendment, then the president must promulgate it. Since the unicameral parliamentary system allows the incumbent political party to dominate the executive and legislature in the Turkish legislative processes, constitutional review provides the only veto point available to the opposition parties and members of parliament. For that reason, the opposition parties' effort to block the policies of the incumbent government focuses on this single veto point.

As in other countries with abstract review, most cases are brought before the Turkish Constitutional Court by the parliamentary opposition, a practice that increases the potential for the judicialization of the political process. Although smaller parties have been excluded from referring bills and decrees for abstract review, the largest parties in the opposition have always enjoyed the ability to litigate against laws passed by the parliamentary majorities. The frequency with which the Turkish political parties have used litigation has led the former President of the Turkish Constitutional Court - Mustafa Bumin- to complain that the constitutional court has become "like a senate" (*Hürriyet Newspaper*, 15 May 2003).

[39] Giving the right of referral to the main party in power seems meaningless. It is unlikely that a party that controls the government will challenge the constitutionality of a law that it itself has passed. This power, however, can be useful if there is a change in the government within the 60 days period for referrals.

The theoretical framework of this chapter suggests that only under certain political conditions will the main opposition parties go to the court more frequently. In order to better understand when the main opposition parties prefer to use judicial mechanism we should first look at the political context within which the opposition parties have operated. Table 4.1 shows that as a unicameral parliamentary democracy, Turkey had sixteen legislative terms between the years 1983-2011 and in seven of these terms the incumbent has enjoyed a majority government, in the other two the incumbent formed minority government and in the remaining seven the incumbent formed coalition governments. Despite these sixteen legislative terms, only seven national elections were held during the period 1983-2011. This reveals that the cabinet turnovers in Turkey were not necessarily followed by a general election and that Turkey bears the characteristics of a developing democracy where governments may suddenly collapse or leave office early.

In the general election which was held in November 1983, the Motherland Party (*Anavatan Partisi*, ANAP) had a landslide victory capturing nearly 45 percent of the votes. On the other hand, by winning 30 percent of the votes the Social Democratic People's Party (*Sosyaldemokrat Halkçı Parti*, SHP)[40] was the main opposition party in the parliament. Under the first ANAP government important economic reforms and austerity measures were implemented that in turn created economic recovery and progress. As a result, having won 36.3 percent of the votes in the general election that was held in November 1987, the ANAP once again formed a single party government, whereas the SHP won 24.7 percent of the votes and was once again the main opposition party in parliament.

[40] Prior to 1985, the SHP was called the People's Party (*Halkçı Parti*, HP). In 1985, merging with the Social Democratic Party (*Sosyal Demokrasi Partisi*, SODEP), the HP formed the SHP.

Table 4.1: Governments and opposition parties in Turkey, 1983-2011

Period	*Governing Party(ies)*	*Type of government*	*Main Opposition Party*
December 1983-December 1987	ANAP	Single party/ majority	SHP
November 1987 (general election)			
December 1987-November 1989	ANAP	Single party/majority	SHP
November 1989-June 1991	ANAP	Single party/majority	SHP
June 1991-November 1991	ANAP	Single party/majority	SHP
October 1991 (general election)			
November 1991 - May 1993	DYP SHP	Coalition/majority	ANAP
June 1993 - October 1995	DYP SHP	Coalition/majority	ANAP
October 1995	DYP	Single party/minority	ANAP
October 1995 - March 1996	DYP CHP[41]	Coalition/majority	ANAP
December 1995 (general election)			
March 1996 - June 1996	ANAP DYP	Coalition/majority	RP
June 1996 - June 1997	RP DYP	Coalition/majority	ANAP
June 1997 - January 1999	ANAP DSP DTP	Coalition/minority	RP[42], FP
January 1999 - May 1999	DSP	Single party/minority	FP
April 1999 (general election)			
May 1999 - November 2002	DSP MHP ANAP	Coalition/majority	FP [43]
November 2002 (general election)			
November 2002 - July 2007	AKP	Single party/ majority	CHP
July 2007 (general election)			
July 2007 - June 2011	AKP	Single party/ majority	CHP
June 2011 (general election)			
June 2011 -	AKP	Single party/ majority	CHP

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)

[41] With the military coup in 1980, the CHP was banned from elections. In 1992, the CHP was reopened and in 1995 the SHP merged with the CHP.

[42] The RP was closed down by the Turkish Constitutional Court in January 1998, on the grounds that it sought to undermine Turkey's secular institutions.

[43] In 2001 the FP was closed down by the Turkish Constitutional Court, which had decided that the FP was a continuation of the banned RP. Until the general election in 2002, the DYP was the main opposition party in the parliament.

After the general election held in October 1991, the SHP[44] formed a coalition government together with the True Path Party (*Doğru Yol Partisi*, DYP). Although in the general election of 1991 the vote shares of the SHP (20.6 %), the DYP (27.2%) and the ANAP (24 %) were very close to one another, from 1991 until the general election held in 1995, the ANAP was the main opposition party in the parliament. The 1991 election marked important developments in the re-democratization process in Turkey. It ended the period of one-party dominance in Turkey, marked the return of coalition governments and underscored the growing fragmentation of the Turkish party system (Sayarı, 1996).

Because of a devastating economic crisis in 1994, in the general election held in 1995 the pro-Islamist Welfare Party (*Refah Partisi*, RP) increased its vote share surprisingly winning 21.38 percent. The victory of the RP opened up a series of discussions on the democratic regime in Turkey. The state elites, in particular the military, were alarmed by the RP's electoral victory due to its pro-Islamist roots and anti-systemic tendencies. This skepticism was aggravated further during the RP-DYP coalition government. The polarization between the pro-secular and pro-Islamist forces eventually led to a major crisis in 1997, which resulted in the ouster of the coalition government from power under mounting pressure from the military (Sayarı, 2007). In January 1998, the main opposition party (the RP) was legally banned from politics and closed down by the Turkish Constitutional Court on the grounds that it sought to undermine Turkey's secular institutions.

In the early general election held in 1999, the Democratic Left Party (*Demokratik Sol Parti*, DSP), the Nationalist Movement Party (*Milliyetçi Hareket Partisi*, MHP) and the ANAP formed a coalition government winning 22.2, 18 and 13.2 percent of the votes, respectively. Winning 15.4 percent of the votes, the Virtue Party (*Fazilet Partisi*, FP) acted as the main opposition party until it was closed down by the Turkish Constitutional Court in 2001 on the grounds that it was acting against the secularist principles of the Republic and was formed as a continuation of the banned RP.

[44] In 1995, the SHP merged with the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP).

Following the financial crisis in 2001, the political credibility of the DSP-MHP-ANAP coalition government was seriously undermined. And in the general election held in November 2002, the Justice and Development Party (*Adalet ve Kalkınma Partisi,* AKP)[45] had a landslide victory. After winning 34.2 percent of the votes, the AKP controlled an absolute parliamentary majority by capturing 66 percent of the seats (363 out of 550)[46]. This represented the largest parliamentary majority enjoyed by any party in Turkey since the 1987 elections. Controlling the remaining third of the parliamentary seats was the CHP which became the main opposition party and the principal rival of the governing AKP. Faced with the AKP's huge majority, the CHP had little effective influence over shaping public policies. Moreover, the CHP's failure to devise new electoral strategies and policies to broaden its popular appeal seriously undermined its chances to present itself as an alternative to the AKP (Sayarı, 2007). Given these reasons and the successful economic performance of the AKP government during its tenure, the AKP won two more victories in the 2007 and 2011 general elections, whereas the CHP continued to be the main opposition party.

The strategic litigation theory should be tested in a political framework where the lives of the political opposition parties show continuity. Nevertheless, the 1995-1999 and 1999-2002 periods in Turkish politics mark important drawbacks for testing the strategic litigation theory. One year prior to the general elections held in 1999 and 2002, the main opposition parties, at the time (the RP and FP), were legally banned from politics and closed down by the Turkish Constitutional Court. For this reason, during the 1995-1999 and 1999-2002 periods Turkey did not have a single main opposition party which could formulate a strategic policy for the upcoming elections.

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[45] "The Justice and Development Party (AKP) was founded by Tayyip Erdogan, only one year before the election. The AKP was perceived as the continuation of the previous pro-Islamist parties (RP and FP). The perceived ideological moderation of the AKP, along with the decisions of several former ANAP and DYP officials to join Erdogan's new party, helped it to attract many voters who had previously supported the established centrist parties" (Sayarı, 2007:201).

[46] "The Turkish electoral system is a proportional representation system with multimember districts under the d'Hondt formula and a 10 percent national threshold that parties must pass to qualify for seats. For that reason the AKP won nearly two-thirds of the seats with about one-third of the vote; the CHP controlled the remaining one-third of the parliamentary seats with only one-fifth of the popular vote, and close to 45 percent of the votes were effectively wasted since they went to parties that failed to clear the 10 percent barrier" (Sayarı, 2007:200).

4.4 Data, Measurement and Model

The aim of this study is to analyze whether the willingness of the political opposition parties to go to the constitutional court changes in accordance with their expectations about the upcoming general election results. In other words, does an opposition party who expects to win or lose the general election decrease or increase its referrals to the court respectively? In this study, I use an original data set that is based on all laws and decree-laws passed by the Turkish Grand National Assembly between the years 1984 and 2011. In order to test the strategic litigation theory, we need a political framework where the life of an opposition party shows continuity. Yet as previously stated, the periods of 1995-1999 and 1999-2002 do not provide an appropriate political framework to test the strategic litigation theory since one year prior to the general elections held in 1999 and 2002 the main opposition parties (the RP and the FP) were legally banned from politics and closed down by the Turkish Constitutional Court.

In this regard, the data set is based on laws and decree-laws passed by the Parliament during the following five governmental periods: the first ANAP government (January 1984- November 1987); the second ANAP government (November 1987-October 1991); the DYP-SHP government (October 1991- December 1995); the first AKP government (November 2002-July 2007); the second AKP government (July 2007-June 2011). The starting and ending dates of each governmental period refers to a general election. The total number of laws and decree-laws passed by the Parliament during these five governmental periods is 2933[47]. Each law and decree-law is coded dichotomously according to whether the main opposition party sent the regarding law to the Turkish Constitutional Court or not. For that reason, all cases filed by the main

[47] 521 of the laws were passed under the first ANAP government (January 1984-November 1987); 492 laws were passed under the second ANAP government (November1987- October 1991); 446 laws were passed under the DYP-SHP government (October 1991-December 1995); 914 laws were passed under the first AKP government (November 2002-July 2007); and 560 laws were passed under the second AKP government (July 2007-June 2011).

opposition parties to the Turkish Constitutional Court during the given periods are analyzed. This corresponds to 281 cases[48].

All this data is used to assess whether the patterns of the main opposition parties' behavior adhere to the approaching election, as predicted by the theory of strategic litigation. I compare the behavior of the main opposition parties who expect to win and those who expect to lose the upcoming general election. Hence, inferences about strategic litigation are based on whether the willingness of the main opposition party to go to the court changes relative to changes in its expectations about the election results.

The dependent variable of this study, *litigation*, is a binary variable that measures whether the main opposition party brings a law/decree before the constitutional court for abstract review. Litigation is coded 1 if the main opposition party brings a law/decree before the constitutional court and 0 otherwise. Given that the dependent variable is dichotomous, binary logistic regression is the appropriate estimation technique.

Since the main argument of this study posits that the impact of the approaching election on the litigation frequency is conditioned by the main opposition party's prediction of upcoming general election results, we need a measure of the political opposition parties' expectations about these election results. Because it is impossible to measure directly the opposition parties' beliefs about their own and the incumbent government's future, I generate proxy measures for the opposition parties' expectations by drawing on the local election results. I suggest that local elections provide important information to the opposition parties about their future electoral success and serve as the earliest source of information about the results of the upcoming general elections.

In their influential study, Anderson and Ward (1996) argue that local elections are "barometer elections" which are used by the citizens to send signals to key political actors regarding the incumbent government. For that reason local elections are stated to

[48] 281 laws and decree-laws are sent to the Turkish Constitutional Court by the political opposition parties during the January 1984-December 1995 and November 2002- June 2011 periods. 23 laws are sent to the court under the first ANAP government (January 1984-November 1987); 35 laws are sent under the second ANAP government (November 1987- October 1991); 48 laws are sent under the DYP-SHP government (October 1991-December 1995); 100 laws are sent under the first AKP government (November 2002-July 2007); 75 laws are sent under the second AKP government (July 2007-June 2011).

reflect changes in public attitudes toward the incumbent government as a response to political and economic conditions. Similar to the British by-elections and German land elections that have been defined by Although Anderson and Ward (1996) as barometer elections, Turkish local elections also provide some clues as to future voting trends in general elections (Çarkoğlu, 2009).

In the Turkish case when we compare the results of each local election and the subsequent general election we see that local elections successfully predict the following general election results. For instance, under the second ANAP government the changing mood of the electorate became evident in the local elections of March 1989 when the ANAP suffered its first major loss. On the other hand, winning 28 percent of the votes, the main opposition party, the SHP, came out as the winner of this local election. This event served as an early sign of the SHP's success in the general election to be held in October 1991. Similarly, the local election conducted under the DYP-SHP government in March 1994, was an early indication that the ANAP - the main opposition party at the time - would be able to become part of the incoming government[49]. Finally, the local elections conducted under the first and second AKP governments, in March 2004 and March 2009 respectively, served as the earliest source of information about the results of the general elections to be held in 2007 and 2011[50].

Suggesting that local elections signal certain information to the main opposition party about the general election results, I created a series of dichotomous timing variables that allow me to model the changes in the opposition parties' perceptions about the upcoming general election results[51]. Since on average the local elections have

[49] Winning 21 percent of the votes each, both the ANAP and DYP were the winners of the local elections held in March 1994. The devastating economic crisis of the year 1994 resulted in very high annual inflation rates, domestic debt crisis and high rates of unemployment. This financial crisis was the most important aspect that decreased the incumbent parties' vote shares and increased the ANAP's vote share.

[50] In the 2004 local election, the AKP won 41 percent of the votes, whereas the CHP won 16 percent of the votes. As a result, the AKP finished first in 57 of the 81 mayoral contests. The AKP's electoral success at local level has greatly enhanced its political power. Similarly, in the 2009 local election, the AKP, with about 39 percent of the vote, was about 16 percent ahead of its main competitor, the CHP (Çarkoğlu, 2009). Both of these local elections signaled that the AKP would have a landslide victory in the general elections held in 2007 and 2011.

[51] The major assumption underlying the strategic litigation is that the opposition party's perception - that the government will lose power or that the opposition party will be part of the incoming government- increases the probability of a law to be sent to the

been conducted two years prior to general elections, I take the final 18 months before the general election as the earliest point of information about the upcoming election results. In this regard, I adjust the cutoff points at eighteen, twelve and six months to examine the effects of changes on the main opposition party's behavior under different relative amounts of certainty and information. These cutoff points yield a series of independent variables- *final 18 months*, *final 12 months* and *final 6 months*- which allow me to assess patterns in the main opposition party's decision making over time. This helps me to compare the behavior of the main opposition party under periods of relative certainty to their behavior under periods of relative uncertainty. For each dummy variable I assign a value of 1 to all laws falling within the mentioned period of approaching election. All other laws take a value of 0.

4.5 An Analysis of Strategic Litigation to the Turkish Constitutional Court

The key hypothesis of this study predicts that when the opposition party thinks that it will lose power in the upcoming general election and not be part of the incoming government it will send the laws passed by the parliament more frequently to the constitutional court as the election time approaches. The second hypothesis, on the other hand, envisages that once the main opposition party expects to be part of the incoming government, it may decrease (or at least it would not significantly increase) the number of litigations to the court as the election approaches.

Given the evidence that the main opposition parties under the first ANAP government, as well as the first and second AKP governments lost the general elections and continued to act as the main opposition parties, the specific prediction is that each of these main opposition parties should increase their willingness to go to the court in the final years of each governmental period. By contrast, since the main opposition parties under the second ANAP government and the DYP-SHP government won the upcoming general elections and succeeded in becoming part of the incoming governments, I suggest that these main opposition parties lacked similar incentives to

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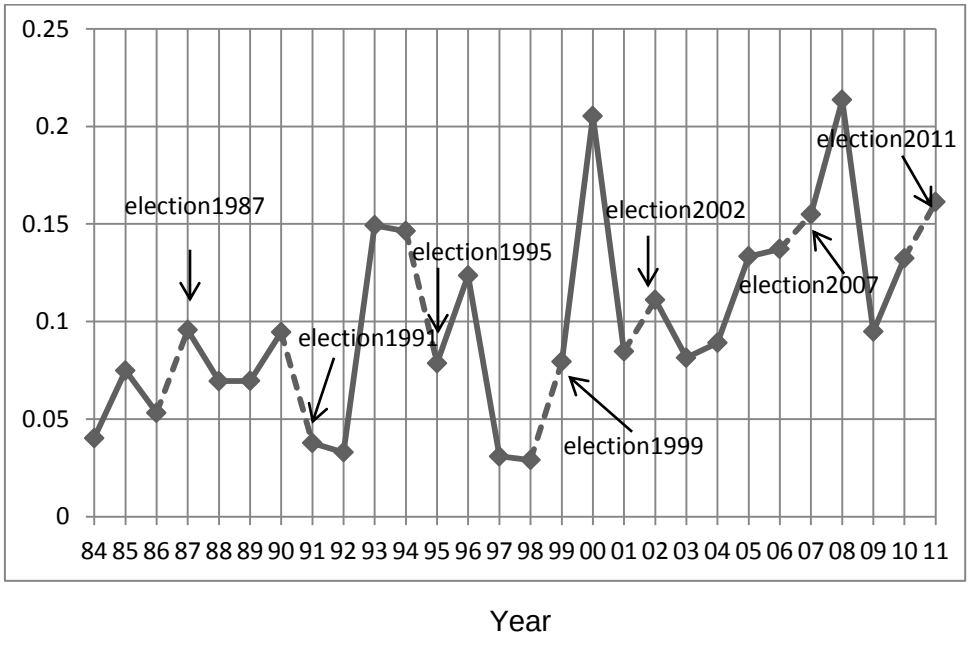
Court. For that reason I treat timing variables as dichotomous but not as a continuous variable that measures the elapsing time per se.

use litigation as a strategic tool at the end of these two governmental periods. Thus, evidence would be consistent with both strategic litigation hypotheses if the main opposition parties' referrals to the constitutional court increased at the end of the first ANAP government, the first and second AKP governments but decreased or did not change at the end of the second ANAP government and the DYP-SHP government.

Showing trends in the laws sent by the main opposition parties to the Turkish Constitutional Court by year, Figure 4.2 clearly fits with the patterns predicted by the hypotheses of the current study. Under the first ANAP government, between the years 1984 and 1987, the main opposition party, the SHP, sent on average 6 percent of the laws to the constitutional court. Yet one year prior to the election, the opposition party increased the number of laws referred to the court to 10 percent. Similarly while under the first and the second AKP governments the main opposition party sent on average 12 and 15 percent of laws to the constitutional court, one year prior to the election the percentages of laws sent to the court by the main opposition party, the CHP, peak at 15 and 16 percent respectively. This trend underscores the intuition that once the main opposition party becomes certain that it will lose the upcoming election it goes more frequently to the court as the election approaches.

Figure 4.2: The percentage of laws referred by the opposition parties to the Turkish Constitutional Court, January 1984 - June 2011



By contrast under the second ANAP government (1987-1991) and the DYP-SHP government (1991-1995) there was no increase in the number of laws sent to the constitutional court by the main opposition parties at the time. Instead, consistent with the second hypothesis, the trend in the laws sent to the court shows that as it became more likely that the main opposition party would be part of the incoming government the percentage of the laws sent to the court declined or did not change as the election approached. For instance, under the second ANAP government the main opposition party, the SHP, sent 6 percent of the laws to the constitutional court on average. Yet one year prior to the election, in 1991, it sent only 3 percent of the laws to the court. On the other hand, under the DYP-SHP coalition government the main opposition party sent 10 percent of the laws to the court on average, whereas during the final year of the outgoing government it sent only 6 percent of the laws to the court. This trend underscores the intuition that once the main opposition party becomes certain that it will win the upcoming election it decreases its number of referrals to the court as the election approaches.

Figure 4.2 also shows that there is a considerable variation in the use of litigation across different legislative periods. The fractionalization in government (single party government or coalition government); the durability of the incumbent party in office; and the ideological difference between the main opposition party, the incumbent party(ies) and the constitutional court might be some of the crucial factors affecting this variation.

First, under a coalition government the decision-making process in the parliament will involve larger number of political parties and will be comprised of give and take among the coalition members. Thus minority parties in the parliament will find a way to directly involve themselves in the decision-making process. An incumbent party with a majority in parliament, however, would have fewer incentives to seek consensus with the main opposition party (Hagan, 1993). Additionally, under single party government the incumbent party would be able to take more radical reforms and decisions. For these reasons, under single party government the opposition parties might more frequently turn to the court. Second, the durability of the incumbent government might be another important aspect that may affect the frequency of litigation. The longer a political party has been in the majority, the more that party is likely to seek radical legislative reforms and this may direct the opposition party to obstruct these policies through all other means. Third, when the opposition parties use

litigation as a tool to achieve their policy objectives they will also take into consideration the likely outcomes of judicial decision-making and refrain from bringing into the policy-making process the courts which would probably be sympathetic to majority preferences. For that reason, the ideological differences between the incumbent party, the main opposition party and the court do also affect the opposition parties' use of litigation. For instance, high levels of ideological difference between the incumbent party and the opposition party might increase the opposition party's frequency to go to the court as long as the court has similar preferences to those of the opposition party.

Although in this chapter I argue that the frequency of the use of litigation by the main opposition party depends on the approaching time of the election and that this impact is conditioned by the opposition party's predictions about the election results, these three political factors might also affect the use of litigation. For that reason, while testing the core hypotheses of the study, I suggest controlling for the impact of the above stated political factors. In this regard, I employed separate binary logistic regressions for each governmental period.

4.5.1 Empirical Results

The results for each governmental period are presented in Table 4.2. In this table we see three sets of models. In the first group of models (Models 1, 4, 7, 10, 13) time-to-election variable is calculated by assigning a value of 1 to all laws passed by the Parliament within 18 months prior to the general elections and 0 otherwise. In the second (Models 2, 5, 8, 11, 14) and third groups of models (Models 3, 6, 9, 12, 15) time-to-election variable is calculated by focusing on 12 and 6 months prior to the general elections respectively.

I discuss the results presented in Table 4.2 in conjunction with Table 4.3, which present a clear substantive view of the results, showing the probability of litigation by the main opposition party for three specific time periods: 18, 12 and 6 months prior to the general election. Table 4.3 also presents the baseline probability of litigation for each governmental period. This allows one to see how the predicted probability of litigation is compared to the baseline probability. The baseline probability is calculated by holding time-to-election variables constant to 0.

Table 4.2: The main opposition party's litigation to the constitutional court by time to election

	Time to election= 18 months prior to election	Time to election = 12 months prior to election	Time to election = 6 months prior to election
	First ANAP government,1984-1987		
	Model 1	Model 2	Model 3
Constant	-3.45***	--3.48***	-3.31***
	(0.31)	(0.29)	(0.25)
Time to election	0.90**	1.19**	1.18**
	(0.43)	(0.43)	(0.47)
Number of observations	522	522	522
Prob>Chi-square	0.03	0.007	0.02
	Second ANAP government, 1987-1991		
	Model 4	Model 5	Model 6
Constant	-2.47***	-2.55***	-2.54***
	(0.21)	(0.19)	(0.18)
Time to election	-0.32	-0.07	-0.46
	(0.39)	(0.42)	(0.74)
Number of observations	492	492	492
Prob>Chi-square	0.40	0.87	0.51
	DYP-SHP coalition government, 1991-1995		
	Model 7	Model 8	Model 9
Constant	-2.11***	-2.09***	-2.08***
	(0.19)	(0.17)	(0.15)
Time to election	-0.02	-0.12	-0.37
	(0.31)	(0.37)	(0.62)
Number of observations	446	446	446
Prob>Chi-square	0.96	0.74	0.53
	First AKP Government, 2002-2007		
	Model 10	Model 11	Model 12
Constant	-2.28***	-2.26***	-2.22***
	(0.13)	(0.12)	(0.12)
Time to election	0.59**	0.79***	0.77**
	(0.22)	(0.24)	(0.26)
Number of observations	914	914	914
Prob>Chi-square	0.008	0.001	0.005
	Second AKP Government, 2007-2011		
	Model 13	Model 14	Model 15
Constant	-1.95***	-1.94***	-2.04***
	(0.18)	(0.17)	(0.15)
Time to election	0.14	0.137	0.529**
	(0.25)	(0.24)	(0.26)
Number of observations	564	564	564
Prob>Chi-square	0.56	0.58	0.04

Note: The unit of analysis is a law promulgated by the parliament, coded 1 = if the regarding law is sent to the Constitutional Court by the main opposition party, 0 = if the law is not sent to the Constitutional Court by the main opposition party. Cell entries are logistic regression coefficients. Standard errors are in parentheses.

$* p \leq 0.1$ $** p \leq 0.05$ $*** p \leq 0.001$, two-tailed test

Starting with the first ANAP government, the results for Models 1–3 presented in Table 4.2 overwhelmingly support the first strategic litigation which suggests that when the main opposition party expects to lose the upcoming election it will increasingly go to the court as the election approaches. Consistent with this prediction, every time-to-election coefficient for the first ANAP government contained in Models 1, 2, and 3 is positive and statistically significant. Table 4.3 shows that eighteen, twelve and six months prior to the election, the probability of the main opposition party going to the court increased by 4,6 and 7 percentage points, respectively.

Repeating the analysis for the first AKP government, we also get equally impressive results. For instance the coefficient contained in Models 10, 11, and 12 is positive and statistically significant. Table 4.3, on the other hand, shows that eighteen, twelve and six months prior to the election, the probability of the main opposition party going to the court increased by 6, 10 and 10 percentage points, respectively.

Somewhat less convincing are the results for the second AKP government. Although the coefficients in Models 13 and 14, which examine the main opposition party's referrals to the constitutional court, are positive during the last eighteen and twelve-months prior to election, they fall short of statistical significance. But Model 15 shows that six months prior to the election the main opposition party significantly increases its referrals to the constitutional court. According to the predicted probabilities presented in Table 4.3, compared to the first four years of the second AKP government, in the final six months prior to the general election the main opposition party was more likely to go to the constitutional court by 6 percentage points.

Table 4.3: Predicted probabilities-litigation by the main opposition parties

		Prob. of Litigation		
	Baseline	**18 months**	**12 months**	**6 months**
First ANAP government	0.03	0.07	0.09	0.1
First AKP government	0.09	0.15	0.19	0.19
Second AKP government	0.12	0.14	0.14	0.18

On the other hand, repeating the same analysis for the second ANAP government and the DYP-SHP government I find that the results strongly support the second hypothesis. Models 4-9 show that when the main opposition party expects to win the upcoming general election it would not significantly increase its referrals to the court as the election approaches. Every election coefficient for the second ANAP government and the DYP-SHP government contained in Models 4- 9 is negative. For that reason, one might even argue that when the opposition party expects to be part of the incoming government, as election time approaches the main opposition party would less frequently go the court. But since the coefficients are not statistically significant, Models 4-9 at least confirm the expectation that going to the court would not increase as election time approaches when the main opposition party expects to win the upcoming election.

As election approaches the incumbent government may tend to pass laws dealing with certain issues to increase its vote share or secure its interests/policies after it leaves office. Hence, if the subject of laws passed by the legislature changed with the approaching election time, how can one know whether the increase in the number of cases referred by the opposition party to the court was driven by strategic litigation or simply by the change in the mix of laws passed by the parliament? In this regard, not the main opposition party's electoral expectations but the mix of laws passed by the legislature might account for the increase in the probability of sending laws to the court for abstract review. For that reason, I now consider an alternative explanation for the increase in the main opposition party's referrals to the court.

To examine this alternative explanation, I ran binary logistic regressions for the first ANAP government, as well as the first and second AKP governments with the issue variables included in the database (see Appendix C). The results presented in Table 4.4 suggest that a change in the mix of laws does not erase the timing effect predicted by the theory of strategic litigation. Consistent with the strategic litigation argument, Models 16, 17 and 18 show that even after controlling for the issue categories the coefficients for the final 12 months to the general election remain positive and significant. Table 4.4 also displays that the laws involving issues related to government operations, legislature, economy, and welfare and human services were significantly more likely to be sent to the court by the main opposition parties.

Table 4.4: The laws sent to the Turkish Constitutional Court by the main opposition parties, controlling for the issues of the laws passed by the Turkish Parliament

Independent variables	**Model 16**	**Model 17**	**Model 18**
Constant	-4.66***	-2.71***	-2.52***
	(0.6)	(0.17)	(0.23)
12 months to election(First ANAP government)	0.78*		
	(0.46)		
12 months to election (First AKP government)		0.59**	
		(0.25)	
12 months to election (Second AKP government)			0.48*
			(0.27)
Judiciary & Justice	1.38	-0.21	1.57***
	(0.92)	(0.48)	(0.44)
Government Operations	1.63**	1.77***	2.33***
	(0.78)	(0.33)	(0.73)
Legislature	3.40***	0.68	1.94**
	(0.78)	(0.65)	(0.76)
Economy	1.70**	1.35***	1.45***
	(0.77)	(0.29)	(0.40)
Welfare and Human Service	1.68**	1.01**	0.85*
	(0.77)	(0.33)	(0.49)
Number of Observations	522	914	564
Significance of Chi square	0.000	0.000	0.000

Note: The unit of analysis is a law promulgated by the parliament, coded 1= if the regarding law is sent to the Constitutional Court by the main opposition party and coded 0= if not sent to the Court. Cell entries are logistic regression coefficients. Standard errors are in parentheses.
* p<0.1 ** p< 0.05 ***p<0.001

Although the patterns identified in Tables 4.2-4.4 empirically support the existence of strategic litigation in the Turkish context, showing how this strategy works in practice is important as well. The main opposition parties' talks during their election campaigns reveal the practical implications of our theory. In this chapter I have suggested that a main opposition party uses litigation as a tool to differentiate its policy preferences from the incumbent government's policies. And when the main opposition party expects to lose the upcoming general election it will more frequently go to the court to underline these political differences. In line with this argument, we see that one month before the 2011 general election, the main opposition party, the CHP, made

some referrals to one of the cases that it brought before the constitutional court. Regarding the land registry law that has been challenged by the CHP, in his talk to the people, the leader of the CHP differentiated the incumbent government's policy and their future policy on this issue. And finally he said: "This is the difference between us and the AKP. We are on the side of all citizens, whereas they are on the side of their supporters" (*Habertürk Newspaper*, 17 May 2011). This statement clearly reveals how the strategic litigation works in practice.

4.5.2 Robustness Check

In this part of the chapter I conduct a robustness check to see whether the results are robust to an alternative operationalization of the dependent variable. The number of laws sent to the constitutional court by the main opposition party per month is a good proxy to measure the opposition party's willingness to go to the court. For this reason, I constructed a monthly data set which includes the number of laws sent to the Turkish Constitutional Court by the main opposition parties during the first ANAP government (January 1984 - December 1987), the first AKP government (November 2002- July 2007) and the second AKP government (July 2007-June 2011). This corresponds to 147 months during which 218 cases were sent to the constitutional court by the main opposition parties. As the election time approaches the incumbent government may tend to pass a higher number of laws in the parliament. This in turn may lead to a higher number of referrals to the court. For that reason I also control for the number of laws passed by the parliament[52].

Since the values of the dependent variable are discrete, an ordinary least squares regression would not generate efficient parameters. Although the data of the dependent variable are strongly skewed to the right, the variance (2.75) is almost two times that of the mean (1.48). Furthermore, the dependent variable - number of laws sent to the court by the main opposition party per month- may not be independent across months. Each

[52] The Turkish Constitution (Article 151) envisions that the right to apply for annulment directly to the Constitutional Court lapses 60 days after the contested law's publication in the *Official Gazette*. For that reason I calculated the number of laws that can be sent to the court as follows. For instance, in May 2007 the number of laws that can be sent to the constitutional court is 91. This is calculated by taking the sum of the laws passed in May (41 laws), April (18 laws) and March (32 laws).

year the Turkish Parliament goes into recess on July 1 and restarts its workings on September 30. During these three months the parliament usually does not pass new laws and the main opposition party does not go to the Court. So that the number of laws sent to the court by the main opposition party during these three months is usually zero. For all these reasons the Poisson distribution does not seem to be a good fit[53]. Thus I use a negative binomial regression model to test the influence of the approaching election time on the number of cases sent to the constitutional court by the main opposition parties.

Table 4.5: Negative binomial regression analysis of the laws sent to the Turkish Constitutional Court under the first ANAP government, the first and second AKP governments

	Model 1	**Model 2**	**Model 3**
Independent Variables	**18 months prior to election**	**12 months prior to election**	**6 months prior to election**
Constant	-0.12	-0.12	-0.04
	(0.18)	(0.17)	(0.16)
Time to election	0.21	0.35*	0.58**
	(0.17)	(0.18)	(0.21)
Number of laws passed	0.009**	0.009**	0.007**
	(0.003)	(0.003)	(0.003)
Number of Observations	*147*	*147*	*147*
Significance of Chi square	*0.005*	*0.001*	*0.000*

Note: The unit of analysis is month. The dependent variable is the number of cases sent to the Constitutional Court by the main opposition party. Cell entries are negative binomial regression coefficients. Standard errors are in parentheses.* p<0.1 ** p< 0.05 *** p<0.001

[53] The large value of chi square in the goodness of fit that is obtained after running Poisson regression also indicates that Poisson distribution is not a good choice.

Table 4.6: Negative binomial regression analysis of the laws sent to the Turkish Constitutional Court

	18 months prior to election	12 months prior to election	6 months prior to election
	First ANAP government,1984-1987		
Constant	-1.97**	--2.11***	-1.90***
	(0.57)	(0.53)	(0.48)
Time to election	0.63	1.09**	1.41***
	(0.46)	(0.44)	(0.44)
# laws	0.02**	0.02**	0.01**
	(0.009)	(0.008)	(0.008)
Number of observations	47	47	47
Prob>Chi-square	0.037	0.005	0.001
	Second ANAP government, 1987-1991		
Constant	-1.20**	-1.25**	-1.14**
	(0.46)	(0.48)	(0.44)
Time to election	0.04	0.15	-0.27
	(0.34)	(0.39)	(0.53)
#laws	0.02**	0.02**	0.02**
	(0.01)	(0.01)	(0.01)
Number of observations	47	47	47
Prob>Chi-square	0.06	0.06	0.05
	DYP-SHP coalition government, 1991-1995		
Constant	-1.34**	-1.03**	-1.33***
	(0.45)	(0.46)	(0.46)
Time to election	0.06	-0.01	0.06
	(0.32)	(0.40)	(0.55)
# laws	0.03**	0.03**	0.03**
	(0.01)	(0.01)	(0.01)
Number of observations	50	50	50
Prob>Chi-square	0.01	0.01	0.01
	First AKP Government, 2002-2007		
Constant	0.06	0.10	0.20
	(0.25)	(0.23)	(0.22)
Time to election	0.34*	0.43**	0.60**
	(0.20)	(0.21)	(0.23)
# laws	0.009**	0.008**	0.007*
	(0.003)	(0.003)	(0.003)
Number of observations	56	56	56
Prob>Chi-square	0.03	0.01	0.007
	Second AKP Government, 2007-2011		
Constant	0.21	0.26	0.46**
	(0.19)	(0.18)	(0.17)
Time to election	0.43	0.70**	1.24***
	(0.25)	(0.26)	(0.34)
#laws	0.001	-0.001	-0.007
	(0.003)	(0.003)	(0.004)
Number of observations	47	47	47
Prob>Chi-square	0.12	0.02	0.002

Note: The unit of analysis is month. The dependent variable is the number of cases sent to the Constitutional Court by the main opposition party. Cell entries are negative binomial regression coefficients. Standard errors are in parentheses.* $p<0.1$ ** $p< 0.05$ *** $p<0.001$

Analyzing the combined data set for the first ANAP government, as well as the first and second AKP governments, Table 4.5 shows that when the main opposition party thinks it will lose the upcoming general election it increases its referrals to court as the election time approaches. Conducting a separate negative binomial regression analysis for each governmental period Table 4.6 shows that the previous findings are still supported. The empirical findings show that as the main opposition party perceives that it will lose the upcoming election it will more frequently go the court as the election approaches, whereas when it thinks that it will win the upcoming election the number of referrals does not show a significant change as the election approaches.

4.6 Concluding Remarks

The European model of judicial review entails the establishment of special constitutional courts which are able to veto bills and declare laws passed by the parliament unconstitutional usually following referrals by the political opposition parties. Parliamentary minorities have strong incentives to use their access to courts as a tool with which to place veto pints especially when they are prevented from influencing the context of policy. By this model of judicial review legislative policy-making is placed under the shadow of constitutional law and politics becomes judicialized. While studying judicial review and the judicialization of politics, scholars have long focused on the judicial behavior and political context within which the judges operate while ignoring the role and motivations of the actors who invite the judicial intervention in the first place. Since cases do not come to the courts at random, it is crucial to understand why and when the political issues are judicialized instead of addressed and resolved through traditional political forums.

This study has explored the proposition that the opposition party's perception about the election results affect its willingness to go to the court. At the core of the argument is the idea that opposition parties go to the court not because they truly disagree with the legal standing of the bill but because they want to use litigation as a strategic tool to achieve their policy and political objectives. Once the main opposition party is weak and starts to believe that it will lose the upcoming election, as election

time approaches it faces the incentive to turn to the constitutional court to differentiate its policy preferences from the policies enacted by the incumbent government. By using litigation as a policy differentiating mechanism, the main opposition party believes that it will increase its vote share. On the other hand, if the main opposition party foresees itself winning the upcoming election and holding a majority of seats in parliament or becoming part of a coalition government, it does not tend to use litigation as a policy differentiating mechanism because when the opposition party is likely to win power the costs of pursuing litigation will overweigh the marginal benefits. Hence, the main opposition party - who envisions winning the upcoming general election - prefers to change the problematic bills by itself instead of losing time in the litigation process and wait for the decisions of the court. These two arguments are defined as the central components of strategic litigation theory and the empirical results from the Turkish case strongly support this theory.

Several broader implications emerge from examining the opposition parties' use of the judiciary. The empirical analysis presented here not only reveals the starting point of the judicialization of politics but also suggests that the nature of judicialization of politics may differ depending on whether the political opposition actors expect to be part of the incoming government. With respect to a broader question about democratic consolidation, strategic litigation presents the use of litigation by the parliamentary minorities as an instrument to challenge the policies of the incumbent government especially when these minorities are prevented from influencing the content of policy in any other way. With respect to the rule of law, however, litigation appears as the main determinant of judicial empowerment that is crucial to control and constrain the actions of the government.

CHAPTER 5

CONCLUSION

Judicial independence is believed to provide a lot of benefits ranging from economic development (North and Weingast, 1989), the maintenance of democratic order (North, Summerhill, and Weingast, 2000), the protection of civil and political rights (Powell and Staton, 2009; Howard and Carey, 2004) to overcoming political "ungovernability" (Hirschl, 2004). Yet, it remains hard to underline the conditions that determine judicial independence. At the intersection of law and politics a significant number of scholars tried to account for the determinants of judicial independence and most of these scholars have linked the creation and maintenance of judicial independence to democratic processes and the rule of law. For instance, the insurance theory presents the existence of electoral competition as the source of political uncertainty that makes the political actors perceive independent courts as a mechanism that would protect them from the opposition's attack after future electoral change (Ginsburg 2003; Finkel 2008). Similarly, the separation-of-powers approaches - which identify the courts as strategic actors who can anticipate the reaction of the elected politicians and act accordingly- operate on democratic logic. According to their explanations fragmentation in electoral politics creates a space for independent judicial review. For these reasons, the recent increase in the number of democratic countries around the world raised the demand for scholarly inquiries about the strategic relationship between the political actors and the constitutional courts.

My dissertation project starts by constructing a general model that accounts for the political incentives in maintaining judicial independence. Testing the insurance logic of judicial independence across 97 democratic countries I show that under similar political conditions the incumbent governments in advanced and developing democracies adopt different incentives in maintaining the judicial independence. The

empirical findings reveal that while in advanced democracies high levels of political competition enhance judicial independence, in developing democracies political competition significantly hampers the independence of the courts.

To better determine the influence of political factors on the independence of the judiciary in the context of developing democracies, I continue my analysis by focusing on a single developing democracy, Turkey. Testing the logic of separation of powers approaches and their proposed link between the political fragmentation and judicial behavior I try to account for whether the government structure influences the Turkish Constitutional Courts' invalidation of laws and whether this impact changes across certain case level characteristics. While the existing literature has assumed that the political context exhibits uniform effects across cases, I show that the impact of government structure on the court's decisions changes across cases in a systematic way. For instance, when the court reviews an unfriendly law and when the litigant is an opposition party, the constitutional court appears to be less concerned about the external political constrains and judges act more in line with their own preferences.

Following these two analyses that have tried to account for the political factors that affect the judicial behavior in the context of developing democracies, the final question of this dissertation project asks "Why do the opposition parties frequently bring cases in front of the constitutional court and choose to judicialize politics although the judiciary is not fully independent?" I argue that the approaching time of the general election affects the frequency of the main opposition party's referrals to the constitutional court and this effect is conditioned on the opposition party's prediction of its post-election office. I refer to this phenomenon as strategic litigation theory and empirical evidence is derived from Turkey.

5.1 Limitations of the Study

The first limitation of this dissertation is the question of generalizability. In Chapter 3 and 4, I tested my hypotheses using Turkey as a case study. It is certainly possible that the same empirical analyses could yield very different results when other democratic countries are used as case studies. Regarding Chapter 4, for instance, I should note that this study is the first to formulate the strategic litigation theory and test

it; therefore, the findings from this chapter should be viewed cautiously until other researchers verify these results in the context of other countries.

Another potential limitation of this dissertation might include the possibility that the empirical results presented in Chapter 2 are time bound. Due to data limitations I have selected the time period of 2000 to 2008 for each country studied. Since the political competition variable changes only with the national election and in 8 years' period a country can have two general elections in average, time- series cross-section analysis was not appropriate. And by aggregating the data to include average scores within an 8-year period I was not able to show the direct effect of short-term changes in political competition on the changes in judicial independence. For that reason my empirical analysis provides an indirect test of the mechanism that is proposed. So when other researchers get data for longer time periods, the replication of this study would be a very promising area for future research.

In addition to these limitations, one can also make some objections against what has been argued in this dissertation and I would like to focus on these possible objections. Regarding Chapter 3, one objection might be that, I wrongly assume that judges do not care about following the law as such but only about political outcomes of their decisions. Nevertheless, I am not arguing that while taking decisions judges do not care about the law and established norms of adjudication at all. It is difficult to imagine a judge who is taking a decision without taking into consideration the legal rules, norms and principles. Following the attitudinalist and separation-of-powers approaches I argue that legal rules governing decision making in the cases that come to the court do not limit the discretion of judges so that judges may freely implement their personal policy preferences (Segal and Spaeth, 2002).

Another objection regarding Chapter 4 might be against the logic of strategic litigation. One might argue that when a political opposition party decides to refer a bill to the court for its annulment, it is just because the opposition party truly disagrees with the legal standing of the bill. Although I do not ignore this possibility, I argue that while an opposition political party brings a case in front of the constitutional court it cares more about its political and policy objectives rather than the legal standing of the bill. One can easily observe this condition in real life cases. For instance, in Turkey before the general election which was held in June 2011, the main opposition party- the CHP- made some promises on land registry issue. Yet, these promises were highly criticized by the media and the incumbent government since in 2009, the CHP had sent

a law – which was very similar to the one it promised to promulgate - to the constitutional court and the court strike it down (*Star Newspaper*, 18 April 2011). This example explicitly reveals that the main opposition parties prioritize their political objectives rather than the legal standing of the bills.

5.2 Future Research

The theoretical frameworks developed in Chapter 3 and 4 open up several areas for future research. While it is hoped that the arguments and theories proposed in these two chapters are generalizable to other high courts and countries, even if it is not, the findings herein still hopefully shed some light on strategic behavior of the Turkish Constitutional Court and main opposition parties in the Turkish context. I hope, in a future research, to replicate these two studies in developing as well as established democracies. This type of research will not only help me to assess the generalizability and robustness of the proposed theories and arguments but also to delineate whether the applicability of these theories show considerable difference in the context of advanced and developing democracies.

The strategic litigation logic developed in Chapter 4, for instance, can be applied to other developing democracies but the scholars should take into consideration a few points. First, evaluating the theory in other contexts will only be successful if the political and judicial context of the country is suitable for testing this theory. There should be an opposition party that has a secure place in the parliament during two consecutive general elections. Moreover, this theory should be evaluated in democracies where the constitutional court exercises abstract review. Second, I must admit that testing the findings of Chapter 3 and 4 in a large-N analysis will solve the generalizability problem of this dissertation to a greater extent. Yet it is difficult to collect data and identify systematically the beliefs and preferences of the actors and judges. Without such information on the independent variables we cannot fully test the hypotheses presented in this study.

On the theoretical side, some issues also merit future attention. First, regarding the strategic litigation theory I present highlighting policy differences as the mechanism that lies behind the judicialization of a bill. Yet another avenue for further research

might try to account for whether these same conclusions hold true if we alter our assumptions about what opposition political parties want from litigation. For example, an opposition party might care solely about blocking the policies of the incumbent government or decrease its legitimacy. In this alternative scenario, it is not immediately obvious whether strategic litigation has the same intuitive appeal.

5.3 Relevance and Implications of this Project

The results of this dissertation are relevant for both policymakers and scholars of comparative politics and law. Chapter 3, for instance, has showed that case-level factors such as identity of the litigant and origin of the law significantly affects the influence of political factors on the judicial decision-making. Chapter 4, on the other hand, has indicated that once the main opposition party expects to lose the upcoming election, it tends to go to the court more frequently as the election date approaches. These two findings provide essential insights to the policy makers since they would now better know when their policies would be more frequently sent to the constitutional court for judicial review and under what conditions the court will be more likely to strike them down.

For scholars in the field of judicial politics, on the other hand, Chapter 2 has served to further understand the insurance logic of judicial independence in a cross-national perspective. Until now the insurance logic of judicial independence has been tested across a few numbers of countries whose democratic consolidation levels were not taken into consideration. Testing the insurance theory across 97 countries, I showed that the positive relationship between judicial independence and political competition that is suggested by the insurance theorists appears to exhibit a negative relationship in developing democracies. Thus, the findings of this chapter reveal that the scholars in the field of judicial politics should be more careful about the generalizability of certain theories.

Having noted the relevance of this study, it is appropriate to consider some of the implications of the findings herein. Chapter 3, for instance, has demonstrated that the constitutional court in Turkey is motivated, to a greater or lesser degree, by the government structure, political alignment between the court and the enacting

government, as well as the identity of the litigant. Thus, the belief that judges only take into consideration legal factors when deciding cases is discarded in the Turkish case.

The strategic litigation theory proposed in Chapter 4, on the other hand, provides a starting point to answer the question that has not been addressed by the judicial politics scholars: why do the main opposition parties tend to frequently bring laws in front of the high court although the judiciary is not fully independent? In this chapter, I have empirically showed that the main opposition party tends to go to the constitutional court more frequently once it expects to lose the upcoming general election. This finding also discards the belief that the main opposition parties use abstract review power of the judiciary only when they disagree with the legal standing of the bill and that the opposition parties go to the court only to win cases.

The findings of Chapter 3 carry also additional implications for the legal strategies employed by other social and political actors. A major debate in the U.S. judicial politics literature is whether courts can become effective agents of social change (see Epp, 1998). A primary concern is that judges often do successfully defend the status quo, rather than pushing forward a rights revolution. Similarly, the findings of Chapter 3 show that when a law passed by the Parliament is stated to violate the individual rights, the judges do not tend to vote sincerely but continue to take into consideration the possible reactions from the incumbent government. In other words, legal activism does not appear as a productive avenue for those seeking profound social change (but see McCann, 1994).

In addition, Chapter 3 and 4 have hopefully served to improve our knowledge about the relationship between the judiciary and political actors in Turkey. Thus, this project has provided an important step towards generating an extensive database of the Turkish Constitutional Court decisions and integrating this Court – which is understudied at this point - into the large body of existing research in comparative political institutions and judicial politics. Finally, as has been noted previously by various scholars in the field of judicial politics, the empirical findings of this dissertation show that it is impossible to think of judiciary as an institution isolated from and independent of any external political factors and institutions

Appendix A

Governments and Opposition Parties in Turkey, 1983-2011

Period	*Governing Party(ies)*	*Type of government*
December 1983-December 1987	ANAP	Single party/ majority
December 1987-November 1989	ANAP	Single party/majority
November 1989-June 1991	ANAP	Single party/majority
June 1991-November 1991	ANAP	Single party/majority
November 1991 - May 1993	DYP SHP	Coalition/majority
June 1993 - October 1995	DYP SHP	Coalition/majority
October 1995	DYP	Single party/minority
October 1995 - March 1996	DYP CHP[54]	Coalition/majority
March 1996 - June 1996	ANAP DYP	Coalition/majority
June 1996 - June 1997	RP DYP	Coalition/majority
June 1997 - January 1999	ANAP DSP DTP	Coalition/minority
January 1999 - May 1999	DSP	Single party/minority
May 1999 - November 2002	DSP MHP ANAP	Coalition/majority
November 2002 - July 2007	AKP	Single party/ majority
July 2007 - June 2011	AKP	Single party/ majority

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)

[54] With the military coup in 1980, the CHP was banned from elections. In 1992, the CHP was reopened and in 1995 the SHP merged with the CHP.

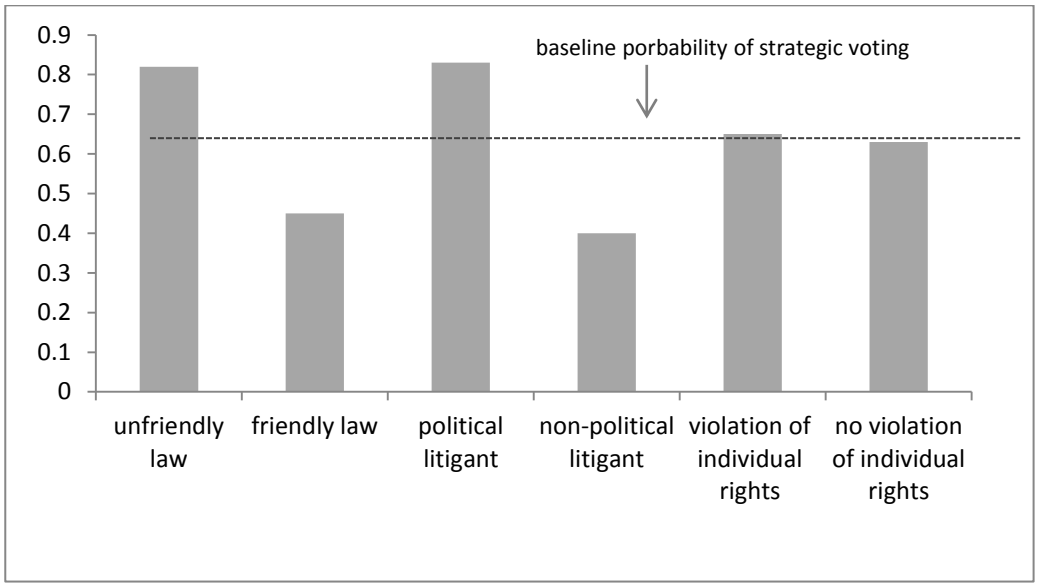
Appendix B

To better compare the impact of each case-level factor to the scenario where this factor is absent but where other factors exist, I present a table and figure of predicted probabilities that are calculated by taking the mean of all variables. In this regard, the table stated below exhibits that under the rule of a unified government when the court reviews unfriendly laws instead of friendly laws the probability of striking down laws increases by 37 percent. Similarly, under unified government when the court reviews cases that are brought by political actors instead of other courts the probability of striking down laws increases by 43 percent. Yet, under unified government when the court reviews cases whose referral reasons include violation of individual rights corresponds only to 2 percent of positive change in the probability of striking down laws.

Predicted Probabilities-Decisions of the Turkish Constitutional Court

	Prob. Strike
	Under unified government
Baseline	0.63
Friendly law	0.45
Unfriendly law	0.82
Political litigant	0.83
Non-political litigant	0.40
Violation of individual rights	0.65
No violation of Individual rights	0.63

Predicted Probability of strategic voting as a function of case-level factors



Appendix C

The issue variables are coded as follows: *Judiciary and Justice*= 1 when the law involved issues related to the judiciary, justice or civil rights. *Government Operations*=1 when the law involved issues related to local governance or government employees. *Legislature*=1 when the law involved issues related to political parties, general elections and the parliament. *Economy*= 1 when the law involved issues related to taxes, budget, trade, financial regulation, debt and general economy. *Welfare and human services*=1 when the law involved issues related to social security, social welfare, poverty, education, health care, assistance, housing and urban development.

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