Progress, Unity, and Democracy: Dissolving Political Parties in Turkey

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In this article, I analyze two cases where the Turkish Constitutional Court dissolved political parties during the 1990s. Specifically, I examine the cases against the Islamist Refah (Welfare/Well-Being) Party and the pro-Kurdish Halkin Emek Partisi (People's Labor Party). While the former was charged with threatening the secular basis of the national social order, the charges against the latter were around its allegedly separatist character. I engage in an in-depth analysis of the lines of argument in the indictments, arguments of defense deployed by the parties, and their ultimate contestations as they appeared in the final decisions by the Court. I see the Court as engaging with a medley of themes and tendencies, [trying to resolve them for the case at hand]. I argue that despite the differences in the construction of the alleged threats, in both cases the Court deployed a similar image of the ways in which social, political, and judicial terrains interact. A rather arbitrary boundary between the political and cultural domains informs these decisions. The Court operates with the understanding that once this boundary is transgressed, what may be harmless when an issue is cultural—such as the use of the headscarf or of the Kurdish language—may turn into a political symbol threatening the basis of the united, democratic, and progressive nation-state. In this vision, the concepts of democracy, progress, and unity are intimately tied together such that the threat to one of these concepts almost simultaneously constitutes a threat to the other two. The Court imagines itself as protecting the boundary between the political and cultural domains in an effort to uphold the right of a democracy to protect itself. This line of thought also enables the court's rather routine involvement in the political domain—which has brought about eighteen decisions for political party dissolution since 1980.

Introduction

In recent years, constitutionalism as a mode of political action undertaken by courts and other political entities has become key to efforts toward political reconstruction. In both South Africa and Eastern Europe, for example, constitutionalism has become the

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modus operandi of setting the framework of new political orders, for coming to terms with a troublesome past, and for gaining political legitimacy vis-à-vis relevant global or regional transnational institutions (Klug 2000; Scheppele 1999; Arjomand 1992). At the same time, constitutions today, as in the past, remain a crucial arena for contesting and negotiating the boundaries of the legitimate order and work as a juridico-political site for affirming and performing deeply rooted imaginations of a nation's past, present, and future.[1] Constitutional courts, accordingly, emerge as major players in these contestations (Scheppele 2003b; Stone Sweet 1992).

Studies of constitutional courts focus on judicial review and on the impact of constitutional decisions on the legislative process (Stone Sweet 1992; Arjomand 1992; Scheppele 2003b). The Turkish Constitutional Court has been studied along these lines as well (Shambayati 2002; Hazama 1996). However, relatively little attention has been given to the role of constitutional courts in actively structuring the boundaries of the legitimate political domain through their power to dissolve political parties on constitutional grounds (Dobson 2003; Genckaya 1998; Peled 1992; Shambayati 2002). While dissolutions in general are thought to be exceptional in "consolidated democracies," especially in Western Europe, recent developments such as the ban on Batasuna, the Basque Party in Spain,[2] and the German Constitutional Court's rejection of banning the neo-Nazi National Democratic Party point to the pertinence of studies on this capacity of constitutional courts. In this article, I engage in such a study by analyzing two instances in which Turkey's Constitutional Court dissolved political parties that were represented in the parliament during the 1990s. The two parties were positioned at the two ends of the political spectrum: Halkin Emek Partisi (the People's Labor Party, hereinafter HEP), which gave a voice to Kurdish sentiments, and the Refah Party (Welfare/Well-Being Party), which spoke in the name of politically engaged Islam.

Following Scheppele (2003b, 2003c), I argue that examining constitutional struggles while situating them in the context of relevant political dynamics may allow for new insights concerning the interaction between the constitutional and political domains. The case of Turkey suggests that decisions to ban a political party on constitutional grounds constitute a defining moment of demarcating and affirming concrete boundaries of legitimate political action.

[1] For an insightful if somewhat cursory discussion of the Ottoman and Turkish constitutions of 1876, 1921, and 1924, see Spivak (1995).

[2] For a discussion on constitution-making and constitutional courts in Spain in relation to minority issues, see Ehrlich (2000).

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Studying this process can help unlock and reveal political dynamics and their relation to juridical processes.

This article is an examination of the meanings the Court deploys to engage in this demarcation in Turkey. I demonstrate that while there are many differences between the two dissolution cases I discuss, the opinions expressed in these two cases share particular understandings of the political domain and its relation to the social and cultural spheres. In both cases, the Court considers "progress," "unity," and "democracy" as forming a singular and coherent conceptual package to which the nation is to adhere. Once a line of action—whether Islamic or Kurdish—is seen as a threat to one of the elements in this package, it is seen as a threat to all three. When a party is cast as a threat to these constructs, then the judicial decision is based on the ensuing right of a democracy to defend itself.

While the Court hardly deals with the tensions between the concepts of progress, unity, and democracy (Weber 1968; Preuss 1995; Laclau 1990), it does invest considerable effort trying to differentiate between the political domain and the cultural.[3] Practices that are considered harmless when they are conceptually located as "cultural" and/or "traditional" are considered a threat when they are "unduly politicized." In a sense, what the Court tries to achieve in both cases is to establish criteria as to how much of culture is culture proper that needs to be protected from "contamination" by politics. The political domain in turn emerges as that domain where only those aspirations, agendas, and identities that are deemed "appropriate" for politics, those elements that do not politicize what the Court deems "cultural," can be represented.

In Turkey, the Constitutional Court has activated its power to dissolve a party eighteen times since 1980,[4] when the Turkish army directly intervened in the political process and forced sweeping changes in the political order. In what follows, I will discuss the ways in which relatively routine interventions of this type affect relations between the judicial and political domains. I demonstrate that the dissolution of political parties on constitutional grounds is a moment for the Constitutional Court to assert itself, to activate its own authority, to expand or narrow its own jurisdiction, and to

[3] It is not my intention in this article to consider all the sociolegal and constitutional aspects relevant to these cases. Both cases raise interesting constitutional questions concerning methods of judicial interpretation (e.g., formalist versus substantive considerations). Both cases were also interesting in terms of the state-centered mode in which the relationship of Turkish constitutional law to international treaties was interpreted. Some of these issues are discussed in Kogacioglu (2003).

[4] Clearly, the Court's incessant drive to intervene in the political domain makes it an activist court. Yet it diverges from the prevalent image of the activist court as a forerunner of democratic reforms, as its decisions tend to support the status quo.

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position itself vis-à-vis other state institutions. The vision of politics and culture as domains that threaten to contaminate each other provides the Court with ample authority and legitimacy, as it emerges as the agency to prevent this. Positioned as an institution above and outside politics,[5] its acts of dissolution, with their far-reaching political implications, are constructed as constitutional means of securing democracy. While this vision enables the court to delegitimize the political appearances of social movements perceived to threaten the basis of the secular, statist, and nationalist order, it simultaneously leaves the political terrain vulnerable to challenge by movements that establish connections between the cultural and the political. The Court responds to this by intervening yet again and dissolving the next party, realizing its perceived task of precluding the imminent spillover of the cultural into the political in its efforts to prevent ever new threats against the triplets of "unity, progress, and democracy."

General Background

Turkey saw its first military intervention in 1960, which brought about the introduction of a new constitution in 1961. In the same year the Constitutional Court was founded.[6] The four decades of the Court's operation is characterized by a gradual extension of its authority and reach (Shambayati 2003). Another important institution founded at that time (1962) was the National Security Council (hereinafter NSC). Established with the purpose of serving in an advisory capacity, the role of the NSC had been transformed after a second military intervention in 1971 into one that included recommendations to the cabinet about national security requirements.[7] Following another major military intervention, in 1980,[8] the role of the NSC further expanded through the newly introduced constitution[9] of 1982.[10] The NSC at the time of

[5] See also Shapiro and Stone Sweet (2002) and Stone Sweet (1992) on examples of this process in the United States and France.

[6] For a discussion on the dynamics of the founding of the court and subsequent developments, see Shambayati (2002).

[7] See amended article 111 of the 1961 constitution (amendment date September 20, 1971, Law no. 1488).

[8] The 1980 military intervention brought about the 1982 constitution, which brings more serious limitations on fundamental rights and liberties than any Turkey has seen since 1960.

[9] This constitution is highly problematic in terms of both its contents and the way in which it was ratified. See Shambayati 2003; Parla 1991; Soysal and Saglam 1983; Zurcher 1998.

[10] Article 118 of the 1982 constitution (amended October 7, 2001).

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the HEP and Refah decisions[11] was composed of both civilians and members of the armed forces. On the civilian side, it included the President, the Prime Minister, the Minister of Defense, the Minister of Interior Affairs, and the Minister of Foreign Affairs. Members of the armed forces have comprised the commanders of the Navy, the Air Force, and the Ground Forces; the Chief of the Gendarmerie; and the Army Chief of Staff. Since 1980, the NSC has become a rather powerful institution, tacitly and sometimes not so tacitly overseeing the actions of the government and parliament, an institutional arrangement that has normalized the presence of the military as an integral aspect of political processes in Turkey (Sakallioglu 1997).

The Constitutional Court and the NSC have been two highly significant institutions in the post-1980 era. The NSC, an established venue for military input into politics, should be understood in light of the way the army conceives of its broader national role, namely, as an ardent guardian of the secular and nationalist social order that was instituted by a series of reforms in the 1920s and 1930s[12] and, more generally, as a guardian of Turkish democracy (Hale 1994; Karpat 1988; Celik 2000). Secularism was a central feature of the change brought on by these reforms. In the national order, Islamic identities and practices—while de facto continuing to be important—were to be locked in the private sphere, in the relation "between man and God." However, what was to happen in this private sphere could not be left alone; the parameters of "private and personal" religious practices were to be supervised by state organs specializing in religious affairs. Taken to imply more than the separation of state and religion commonly associated with secularism, the "laicism" principle brought about the supremacy and control of the state over religion in the political sphere. This amounted to the exclusion of most independent religious

[11] In 2001, in response to pressure from the European Union, a constitutional amendment was passed that enlarged the NSC to include the Minister of Justice and Deputy Prime Minister(s) (Article 118 of the constitution; amendment date October 13, 2001; Law no. 4709/32). However, this change is rather far from challenging the operation or the impact of the NSC on "normal politics."

[12] The reforms of the era were undertaken by the young Republic founded in 1923 that replaced the Ottoman Empire. These reforms were unprecedented in their extent and comprised the restructuring of the economic, administrative, juridical, political, religious, and familial domains. Mustafa Kemal Ataturk was the much celebrated leader in all these endeavors. Originally a soldier and a successful military commander in World War I, he took on leadership in almost all domains of republican social life, from agriculture to art, from education to industry. Kemalism, his ideological legacy—the set of principles he outlined together with his life's achievements and teachings—is the central axis of multiple contentions in modern-day Turkey. It appears in the constitution as well as in a variety of public and juridical documents. The question of what Kemalism is or was is also a constant theme in public discourse. And the question of who or which acts can be deemed safely Kemalist is a constant topic of attention and contention, and a source of personal and social anxiety.

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organizations[13] from public life, together with the founding of new state-run religious organizations.[14] The creation of a new national identity thus aimed not only at a departure from the legacy of the Ottoman Empire in general but also at transcending the multiplicity of Islamic identities and practices prevalent under the old social order (Zurcher 1998; Ahmad 1993). The underlying premise and goal was for the nation to remain united and strong while going through these changes. There remained little space for the recognition or accommodation of ethnic or other registers of differences within this much emphasized unity.

Turkey's overarching aim to attain "the modernity and civilization of the West" was part of the broader goal of establishing the new national order of laicism. "The West" was perceived in a singular way, and joining it could only be done by a unilinear path. The reforms of this era were geared not only toward a change in the political and legal regime but also toward recasting all forms of collective identity and daily practice. Abolishment of the Sultanate[15] and Caliphate,[16] total replacement of Shari'a law with laws drawn from various European legal traditions, replacement of the Arab script with a Latin one, closure of all religious sects and schools, and attempts to legislate the proper attire for the people by a special law were all steps undertaken during this era. The inherent presumption was that such interventions undertaken by the ruling military and bureaucratic classes were to be gradually adopted by the whole population and were to produce the desired

[13] This definition of laicism was historically appropriated from the French. It includes the exclusion of religious symbols from public life. In this vein, it is not surprising that the recent ban on religious symbols—and especially the headscarf in French public schools, that accommodates a similar definition of laicism—has already been in place for years in Turkey. What is significant here is that while the ban currently targets mainly Muslim minorities in France, in Turkey it affects religiously sensitive elements of the entire population.

[14] Such an intense consolidation of the divide between politics and religion and the extent of state control on religion present a contrast to many other national contexts of the twentieth century. For an exploration of a similar theme in the Spanish context, see Paz (2001).

[15] The ruler in the Ottoman Empire was called the Sultan, and his position, the Sultanate. The Sultanate was abolished in 1922 by the Grand National Assembly. This first step, undertaken in order to change the source of power from dynasty to polity, was soon followed by the founding of the Republic in 1923.

[16] The Caliphate is the leadership of Muslims, ideally combining spiritual, military, political, and religious qualities that are accepted by the community. After the first four caliphs that led the Islamic community in the immediate aftermath of Mohammad's death, the post became subject to political and military struggles. In the nineteenth century, Ottoman sultans began to use the title of Caliph, claiming it had been passed from the last Abbasid ruler/Caliph to Sultan Selim I in the sixteenth century. This was part of their effort to imagine and realize an imperial Islamic community to compete with the imagined communities of emerging nationalisms in the Empire. After the abolition of the Sultanate in 1922, the Caliphate continued for two more years before finally being abolished by the Grand National Assembly in 1924.

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"Western modernity" to which the Republic aspired (Zurcher 1998; Ahmad 1993).

Concurrently, a wide range of social movements on both the left and the right of the political spectrum were perceived as threats to Turkish democracy in the republican decades. In the post-1980 era, politically engaged Islam and Kurdish[17] nationalism became Turkey's two foremost national and international challenges. Kurdish political movements were seen as organically related to and/or increasing the support base for the armed struggle in southeastern Turkey between the Turkish army and the Kurdish separatist guerilla forces. To a lesser extent and in a much more sporadic fashion, acts of Islamic fundamentalist terror further tainted the already suspected attempts of Islamic political groups to challenge the prevalent distinction between public and private life and the corresponding relegation of religion to the latter sphere alone (Cakir 1990). These various political groups questioned a wide range of issues from existing bans on women wearing headscarves in public occupations to restrictions on public prayer (Gole 1996). Kurdish social movements brought to the fore tensions within Turkish nationalism regarding its multiple definitions of Turkishness and advocated minority rights such as the right to education in their own language, thereby destabilizing the taken-for-granted conceptions of a monolithic nation governed by the Turkish state.

In this context, the Turkish Constitutional Court dealt with the constitutional implications of these political challenges: perceived threats to the territorial integrity and political unity of the nation-state via accommodating Kurdish nationalist sentiments and perceived threats to the laicism principle of the state through efforts to bring about what the Court called a "Shari'a order."[18] Both threats[19] emerged as the two primary reasons for party dissolution. Of the eighteen parties dissolved during this era, nine had to do with accommodating concerns of the Kurdish people.[20] Laicism

[17] Kurds are an ethnically and linguistically distinct but still Islamic group. Roughly half of the Kurds reside in southeastern Turkey, where they constitute the majority of the population.

[18] In this usage, the term *Shari'a* refers to a social order that is different from the Shari'a law discussed in sociolegal scholarship. *Shari'a* is primarily a Turkish secular nationalist construct referring to a social order in which all realms of life are brought under the control of religious institution in a totally undemocratic and otherworldly manner. The obvious Orientalist nature of this construct, which essentializes Islam as an inherently repressive and backward regime, generally goes unrecognized.

[19] These threats themselves emerge in dialogical relation to the impact of the army and other state institutions. Sakallioglu (1994), for instance, notes the emphasis the military placed on Islam as a potentially unifying force in the immediate aftermath of the 1980 military intervention.

[20] Among these groups, different factions and ideas of Kurdish nationalism have been represented. And in the case of some parties, such as the Socialist Party, dissolved in July 1992 (Case No.: 1991-02 (Political Party Dissolution), Decision No.: 1992-01, Decision date:

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was the second reason political parties were dissolved. While fewer in number, the Islamic parties that were dissolved had scored greater and quite significant victories in local and governmental elections.

In the post-1980 era, parties that speak for politically engaged Islamic or Kurdish sentiments operate under the somewhat normalized threat of dissolution (Shambayati 2003). In fact, the prospect of a Constitutional Court case against a party with Kurdish or Islamic tendencies is so normal that in recent years an interesting strategy of founding what is called "a spare party" has emerged. For example, in March 2003, HADEP (Halkin Demokrasi Partisi—the People's Democracy Party) was dissolved. HADEP was the fourth[21] in a line of like-minded pro-Kurdish political parties, each founded in the aftermath of the dissolution of the previously existing one, itself to be dissolved later. A few days before the dissolution, members of HADEP revoked their association with the party and joined DEHAP (Demokratik Halk Partisi—the Democratic People's Party). This latter party was specifically founded as a "spare party" that members could join to resume political activity in case the main party was dissolved. However, this strategy of reemergence on the part of the banned political parties has not gone unrecognized by the Constitutional Court. The day HADEP was dissolved, the prosecutor initiated a Constitutional Court case against DEHAP as well, again seeking dissolution.

As mentioned above, the army does not shy away from voicing its critiques publicly when it perceives parties as diverging from the national and secular path of "modernization." The case of the Refah Party is especially significant, as it started three months after the army declared that Refah's actions seriously threatened the laicism principle of the Turkish state. Indeed, unlike the rare yet symbolic landmark decisions that the Israeli Supreme Court occasionally renders in dissent with entrenched state positions (Shamir 1990), the record of the Turkish Constitutional Court in the matter of party dissolutions is consistent with the hegemonic positions reproduced under the influence of the NSC.

July 10, 1992. Date of publication in the Official Gazette: October 25, 1992, Gazette No.: 21208), Kurdish nationalist concerns have been placed within a broader umbrella of socialism or leftist politics. While socialist agendas have also been extremely suspect in the eyes of the Court, accommodating the concerns of the Kurdish minority has occupied a central place in these acts of dissolution.

[21] After the HEP (Halkin Emek Partisi/People's Labor Party) was dissolved, DEP (Demokrasi Partisi/Democracy Party), and OZDEP (Ozgurluk ve Demokrasi Partisi/Freedom and Democracy Party) were founded and dissolved. Unlike other political parties with agendas for Kurdish minority rights, this is a specific line of political action around concerns of the Kurdish minority that suggests temporal continuity in both its composition and the transformation of its political outlook. For an elaboration of these dynamics, see Watts (1999).

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Still, reading these decisions as outcomes of pressures exerted on the Court by army or other external sources would be an oversimplification. The military establishment in general and the NSC in particular are no doubt some of the main elements at work in the reproduction of this discursive framework. Yet their influence on the Court is not by way of forcing decisions. The Court is one of the strongest judicial bodies in the country. Unlike most legal bodies, including the Turkish High Court of Appeals and Council of State, it does not face difficulties in terms of executing its decisions, which range from the dissolution of political parties to annulments of legal codes. By virtue of its power and its relatively independent character in terms of its composition,[22] the Court is not in the position of applying directives from the army.

These court decisions should be read not as results of direct influence from the military but rather in light of the fact that members of the Constitutional Court share the discursive framework of secular statist nationalism with the NSC. For instance, Vural Savas, the public prosecutor[23] who initiated the case against the Refah Party, has been one of the most vocal critics of Islamist lines of politics. The shortness of the time he took to prepare the indictment, coupled with his public remarks on the Refah Party, became issues of public debate. He also wrote a book in which he elaborated the necessity to defend the Turkish democracy through the adoption of harsh measures against Islamism and Kurdish nationalism (Savas 2000). Other judges,[24] such as Yalcin Acargun, did

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[22] All 11 members of the court are appointed by the president, who is supposed to be independent and "above politics." Presidential authority is limited by a number of conditions to ensure a body of various backgrounds. Seven of the regular members and all four of the substitute members must be chosen from among candidates nominated by the high courts (including the military high courts), and one member must come from among the candidates nominated by the Council of Higher Learning. In terms of the remaining three members, the president uses discretion among bureaucrats and legal professionals (see also Hazama 1996). Clearly, the independence of the Court depends highly upon presidential independence. There is no limitation on the time judges spend on the bench, except the age limitation of 65. So there is a constraint as to how much any single president can affect the composition of the Court. Shambayati argues that the composition of the Constitutional Court without any influence from the parliament or elected officials reduces the Court's democratic legitimacy (2003). However, in a context such as that of Turkey, where the political sphere is generally perceived as excessively corrupt, it can also be argued that the Court gains its legitimacy precisely from its image of being above and beyond the reach of parliamentary politics. For a discussion of constitutional courts and the democratic functions they can fulfill, see Scheppele (2003a).

[23] Chief public prosecutors of the Court of Cassation act as the chief public prosecutor of the state (also known as state counsel) in initiating cases of political party dissolution.

[24] Ahmet Necdet Sezer, currently Turkey's president and former member and president of the Constitutional Court is another example. His signature is on both the HEP and Refah decisions. His distaste for Islamist sentiments, for instance, is well known and reflected in some of the actions he has undertaken. Most recently, Ahmet Necdet Sezer did not invite the wives of Justice and Development Party parliamentarians—who wear headscarves in their daily lives—to the annual presidential ball celebrating the anniversary of

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not find the dissolution sufficient and pushed for an even harder line against the party.[25] However, these decisions can hardly be seen as the products of a monolithic nationalist, statist, and secular framework. While two judges critiqued the procedural handling of the case,[26] two others, Hasim Kilic and Sacit Adali, criticized the decision in their separate minority opinions as a failure to fulfill the interpretative role that is bestowed upon the court by the Turkish constitution. They noted that the Court is supposed to take into consideration human rights norms and international treaties that Turkey has ratified in its application of the constitution in line with the needs of the country in changing times.[27] Various positions taken by judges show that while the court does work within the general secular nationalist and statist framework, there is a significant range of variation in terms of the ways in which individual members articulate elements of this framework with notions of democracy, international treaties, minority rights, and so on. Thus, instead of seeing these cases as already-made decisions under the whisper of generals, I see the Court engaging with a medley of themes and tendencies that it tries to resolve case by case.

In order to understand the dynamics of the Court, we need to take a broader view of the way ideas about Turkish nationality, secularism, and the state permeate the juridico-political sphere. These decisions can be seen as unstable attempts on the part of the court to resolve tensions between the collectivist premises of the Turkish statist nationalist ideology and different notions of the rule of law, minority rights, international treaties, and so on. As such, every declaration of the "illegitimate" is at the same time a production of concrete images of the normatively "legitimate" and "desirable." Therefore, such judicial decisions are crucial moments when rather abstract principles of collectivist nationalist statism and those of its contenders are activated and applied.

I therefore read the cases of HEP and Refah with an eye to such constitutive affirmations and exclusions in the light of the tensions that have characterized Turkish politics in the last two decades. These two parties are particularly interesting because

the founding of the Republic. He argued that the presidency was a public role. This characterized the presidential party as a public event. As such, he claimed the ban against wearing of headscarves in public locations applies.

[25] He wrote a minority opinion criticizing the fact that the majority decision did not sufficiently consider the Refah Party parliamentarians' actions against the memory of Mustafa Kemal Ataturk—the Turkish national leader who had an immense impact both in constituting the Republican institutional structure and the parameters of its nationalist imagination.

[26] The procedural aspects of these dissolution cases were highly problematic. For a discussion of these aspects see Kogacioglu (2003).

[27] In the case against HEP, Yilmaz Aliefendioglu and Hasim Kilic, the two judges of minority opinion, made arguments parallel to these.

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unlike previous parties, they were dissolved after sending elected representatives to the parliament. In both cases, it was quite evident that the parties did not represent extreme margins of the polity. In the 1991 elections, HEP joined forces with the center-left Sosyal Demokrat Halkci Parti[28] (SHP) and secured parliamentary seats. The case against it started in July 1993 and culminated in its dissolution on the grounds of "separatism"; that is, threatening the unity of the nation-state.[29] In 1994, the Refah Party scored its first successes in local governmental elections. In 1995, it gained sufficient power to build the ruling national coalition with the center-right True Path Party. This parliamentary success was followed by its enhanced performance in local government elections in 1996. Its increasing success was halted in February 1997, the date of the so-called postmodern, or civilian, coup, when a declaration issued by the NSC emphasized the need to protect the laicism principle of the Republic. After this declaration, the Refah Party resisted pressure until June 1997, when the prime minister resigned. In May of the same year, the Constitutional Court case against the Refah Party had already begun. It ended in January 1998 with the dissolution of the party on the grounds of its alleged unconstitutional "work against the laicism principle of the nation-state."[30]

Below I present an in-depth examination of the meanings deployed in the indictments of the prosecution, the defense of the parties, and the final decisions of the Court. I analyze the ways in which some of the arguments of the indictment and the defense fall out in the final decision while some are taken up in an interesting amalgam of various arguments and reference points. I then examine the underlying set of ideas constitutive of both decisions, followed by a discussion of the role the court deems appropriate for itself within this set of dynamics.

HEP and Separatism

The indictment against the HEP had two counts. The first allegation was that the HEP cultivated social differences with the aim of destroying the "inseparable unity" existing between the Turkish state and the Turkish people. The prosecution also claimed that the HEP had become a center for illegal activities, mainly of the PKK (Partiya Karkaren Kurdistan, the Kurdistan Workers' Party), the

[28] Social Democrat People's Party.

[29] Case No. 1992/1 (Political Party Dissolution), Decision No.: 1993/1, Decision date: July 14, 1993, Date of publication in the Official Gazette: August 18, 1993, Gazette No.: 21672.

[30] Case No.: 1997/1 (Political Party Dissolution), Decision No.: 1998/1, Decision date: January 16, 1998, Date of publication in the Official Gazette: February 22, 1998, Gazette No.: 23266.

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illegal guerilla organization that led armed conflict against the Turkish security forces in southeastern Turkey for more than a decade.

The indictment was based on speeches made by party members and on allegations brought against individual members of the party in separate trials. The prosecution cited at length speeches by party representatives and other members, underlining parts that were considered problematic. One allegedly problematic statement was as follows:

> They give many names to us. They say this party is the party of the Kurds. Here I call to Kurds, Arabs, Circassians, Albanians, Pomaks. I call to everybody who is oppressed, repressed, and exploited. This party is the party of those who are exploited, oppressed, and repressed. This party is the party of those who are exploited, oppressed, and repressed the most. Now from here I ask the state, I ask the parties of the order (system) who is the most exploited? who is the most oppressed? If they say it is the Kurds that are oppressed and exploited the most, then they are confessing their crimes and we are proud to be the party of the Kurds. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 29)

Other examples of statements considered problematic were as follows:

> We claim that Kurdish people exist in unbearable condition. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 74)

> We demand a democratic context where Kurdish national problem and its resolution can be discussed freely with all its dimensions. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 38)

> The Kurdish problem has existed since the foundation of the Turkish Republic. Turkish and Kurdish people established the Republic together. But since the founding of the new state The Kurdish people have been excluded absolutely. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 108)

> "[i]t is clear that the unitary state has not been able to solve Turkey's problems so far. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 55)

The prosecution argued that the 1923 Lausanne Treaty had settled the question of minorities in Turkey once and for all.[31] According

[31] The treaty was signed between the members of the entente and Turkey on July 24, 1923, after very long and arduous negotiations. Turkey was recognized via this treaty as a sovereign nation. In terms of Turkish history it is also seen as a reversal of the Treaty of Sèvres. The latter was signed at the end of the first World War in 1920 by the Sultan but was refused by the rival nationalist government of Mustafa Kemal Ataturk in Ankara. The

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to that treaty, only non-Muslim groups (i.e., Greeks and Armenians) were recognized as minorities, and Kurds, therefore, could not make claims to a minority status. In trying to suggest otherwise, HEP promoted an entity that does not actually exist with the aim of establishing a separate nation for the Kurds, which was seen to undermine the unity of the nation.

The prosecution also raised more general arguments concerning the Kurdish question. It argued that Kurds were full citizens who took part in the nation-building struggle that led to the establishment of the Turkish Republic. As such, they were not a minority but part of the Turkish nation's flesh and blood. The prosecution also noted that Kurds could freely speak Kurdish, but that attempts to institutionalize the use of Kurdish would amount to attempts to replace the Turkish language as the language of the nation, thereby also amounting to separatism.

The defense responded to the allegation that the HEP was a center of illegal activities by systematically questioning the factuality of information and the procedural nature of the evidence used in the indictment. In terms of the second allegation of separatism, the HEP tried a number of strategies. First, it challenged the idea that assertions of cultural and linguistic distinctions represent an attempt to "create" a minority with separatist tendencies. The HEP defense noted that the party "was attempting to voice the reality of Kurdish people. Being a nation or a minority are sociological facts. It is impossible to create or destroy these facts by laws" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 165).

This line of defense carried its own risks because of the construction of "separatism" in the indictment. According to the prosecution, the claim of representation on national or ethnic grounds could amount to separatism as well. Thus, the HEP had to claim representation of that "reality" without claiming to represent a separate specific category of the "people" or a "minority." The HEP thus argued that it supported and advocated the cause of oppressed people in general, the Kurdish population—economically, politically, and culturally deprived—among them. From this point of view, the HEP argued that it was legitimate for a political party to openly discuss the country's most pressing issues.

Normalization was the second defensive strategy the HEP used against the allegation of separatism. The party tried to convince the Court that times had changed, that Turkey had become sufficiently democratic to openly discuss those issues that the HEP brought to

Sèvres treaty had sealed the fate of the dying Empire and virtually abolished Ottoman sovereignty. In that sense, the Lausanne Treaty is important not only in terms of its substantive but also in its symbolic effects in Turkey. For more on the subject, see Ahmad (1993) and Zurcher (1998).

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the fore. The HEP cited speeches by Suleyman Demirel, a former prime minister, and leaders of other political parties who stated that the Kurdish population was a social reality and that the Kurdish problem had to be solved through democratic means. The HEP argued that speeches such as the ones delivered by Demirel and others were already an established part of the Turkish political landscape and were essentially similar in content and spirit to the ideas expressed by members of the HEP.

Another defensive strategy centered on what might be termed an appropriation of the prosecution's terminology. The HEP argued that the rights of Kurds had to be acknowledged precisely because they fought shoulder to shoulder with and worked with Turks for securing the Turkish Republic. Thus, the defense insisted, the demands of the Kurds should not be interpreted as separatist tendencies but, on the contrary, as a desire to run local affairs as equal partners in Turkish society.

Finally, the HEP tried to counterattack by arguing that the indivisible unity of the Turkish state with its homeland and nation had become a slogan that denied social reality and thereby the rights of minorities to enjoy basic rights. It accused the prosecution of employing bygone methods and of invoking the constitution as an ideological-political device. The defense further argued that it was not HEP that displayed "racism" by its political acts but that it was the prosecution that displayed racism by emphasizing the idea of a single Turkish race.

In its decision, the Court found the allegation that the HEP was a center of illegal activities related to the PKK unfounded substantively and procedurally. In terms of the second count of the indictment, however, the Court found that HEP expressed a "desire to establish a new social order based on race" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 197). It singled out elements of the speeches that served as evidence against the HEP and found them to incite separatism.

In the course of this discussion, the Court developed a clear distinction between culture and politics. It found that there were many groups in Turkey that freely followed their distinct traditions. Yet different traditions, according to the Court, could not become a basis for claiming minority status and an amalgam of derivative rights. Such claims, the Court argued, could not but amount to separatism. Thus the Court developed a conceptual distinction between the realm of everyday life and culture, where "following a tradition" was legitimate, and the domain of politics, as that excluded such cultural "particularities." The Court concluded that since the HEP leveled such claims at the political domain, it was the state's lawful and democratic right to protect its unity and the public order and to seek the dissolution of the HEP.

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Within this distinction between everyday life and politics, the Court also referred to the question of language. It is here that the distinction between culture and politics became potently alive as a way to differentiate culture from politics. The Court reiterated the fact that Turkish was the official language of the Turkish state and the only one that was allowed in education and communication in the public sphere. Interestingly, the ideological argument was corroborated by pragmatic considerations. The Court stated that Turkish was the most widespread language in Turkey and that the number of people who did not use or know Turkish was very small.[32] Still, the Court acknowledged the existence of "local languages" that were used in everyday life at home and at work, and "even" in the printed press and the arts. Kurdish, according to the Court, was but one such local language that could not be regarded as a distinct "original" language. At the same time, the Court justified the idea that such local languages were banned in public education and in the media. Drawing a rather arbitrary line, the Court treated education and electronic media as domains of "politics" and the use of languages other than Turkish there as a display of separatism.

On the basis of the above-mentioned distinction, the Court moved to celebrate the unity of the nation and Ataturk's legacy of grounding Turkish indivisible nationalism as the foundation of the 1924, 1961, and 1982 constitutions. Drawing on Ataturk's writings and personal notes, the Court invoked his reminder that there had been attempts to inflict ideas of Kurdishness, Circassian-ness, and Bosnian-ness on the people of Anatolia in the past, but that these were attempts by foreign forces capitalizing on the repression of the Ottoman Empire. Hence, the Court ruled that in the modern Turkish Republic the granting of minority status on the basis of differences of language or race was incompatible with the unity of the homeland and the nation. The state was unitary, the nation was a whole, and arguments to the contrary could only be seen as unwarranted foreign influences intensified by the rhetoric of human rights and freedoms.

In sum, the court emphasized that the nation was established on the basis of living together and that instead of separatism, nationalism called for bonding within the body of the nation. The Court reiterated the "factual point" that minorities in Turkey were recognized in the Lausanne Treaty, and that this status was given—once and for all—only to the non-Muslim communities of Armenians and Greeks. On these grounds, the HEP stood for principles that were

[32] The population distribution of native speakers of Kurdish is highly debated not only politically but also factually. To this day, no official statistics are collected concerning the spread and use of "native languages."

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unacceptable for the continuation of a democracy, so it therefore had to be dissolved.

Refah and Shari'a

The Refah Party was accused of being a center of activities against the laicism principle of the Turkish state by trying to replace the democratic political system with one based on Shari'a law.[33] The charges were based on a number of activities and positions taken up by the party and its leaders. First, it was alleged that Refah supported the struggle of female students and civil servants to wear a headscarf, although this struggle ran against the decisions of the NSC and conflicted with the law establishing the unity of education. Second, the prosecution targeted Necmettin Erbakan, Refah's leader and a former prime minister. Erbakan was accused of hosting a dinner party for some leaders of the *tariqas*—Sufi orders—at the official residence of the prime minister, thus conveying the impression that the state welcomed people "who were well known for their activities against laicism" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 38). Third, Refah was accused of its position regarding the training of religious functionaries at special schools. In the era preceding the case, these state-run schools were deemed a breeding ground for Islamists by the secular circles that spent considerable effort toward closing a majority of them. Refah's support of these schools, despite the "fact" that there was no need for such schools and in defiance of the decisions to that effect by the NSC, was presented as a sign of Refah's push for a Shari'a order. Finally, public speeches by Erbakan and other party members were used as evidence of Refah's efforts to bring a Shari'a order to Turkey. An example taken on by the prosecution was a speech made by Erbakan allegedly supporting legal pluralism on the basis of the Islamic idea of the Medina Act, also known as the Constitution of Medina (a historical agreement signed by the Prophet Mohammed and the Median tribes). In the speech, Erbakan stated that "the just order will be established . . . Now Turkey has to decide one thing. Refah Party will bring the just order. The 60 million will decide whether the period of transformation is soft or hard, sweet or bloody . . . " (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, p. 37).

The prosecution's strategy was to flatten out the differences in tone and orientation existing among Islamists and to reduce them all to a single threat represented by a force seeking a "State of Shari'a." Refah was depicted as the representative of this

[33] *Shari'a* in this context refers to a system of government based on Islamic principles. This usage of the term is different from its use as Shari'a law in the scholarship, which signifies a culturally specific mode of lawmaking and law-finding.

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monolithic Islamist threat. Part of the evidence against Refah was based on a compilation of newspaper articles in which Islam in general and Refah in particular were described as working against women's rights and against progress and development. Another part of the indictment simply rested on citing anti-Islamic statements to the effect that the Koran's essential premises are not compatible with democratic principles. The prosecution then asserted that the principles advocated by Refah ran against the Turkish state's commitment to a progressive secular order where state administration is not handled according to religious laws but according to rational and scientific evaluations. Once again, Ataturk was extensively cited, relying on talks where Islamic identity was posed as a threat to Turkish national/ist identity.

The final part of the indictment cited different kinds of question-and-answer sessions from the Islamist mainstream newspaper *Akit* on issues such as music and urination. The readers asked the columnists about the role of music in Islam or about different kinds of urination according to Islam. The prosecutor concluded by suggesting rhetorically, "It should be the right of the Turkish people to ask how the fundamentalist mentality that sees it imperative to find a consensus even on such topics and that spends considerable effort to achieve that will solve contemporary problems via religion" (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, see p. 191 in the Official Gazette for a summary of this quote, the original version of which was taken from the verbatim printout of the party's records).

The charges against Refah were therefore constructed around a stark contrast between Shari'a law and the Turkish constitutional political order: Divine laws are superior according to Shari'a, whereas the Turkish constitution identifies itself as the foundational text. According to Shari'a law, nationalism should not be embraced; according to the Turkish constitution, "Ataturk's nationalism" is the foundational building block. According to Shari'a law, all Muslims must follow Koranic principles in private and public life, whereas according to the Turkish constitution, "no protection shall be afforded to thoughts or opinions contrary to . . . the nationalism, principles, reforms and civilisationism of Ataturk."[34]

Defending against the charges leveled at it, Refah argued that there were no clear statements prohibiting headscarves in statutes that regulated the dress codes in state institutions. Refah also cited the relevant statute that stated that dressing was free in institutions of higher learning. Regarding high schools for the training of religious functionaries, Refah claimed that there was a need for such schools in a country where 99% of the population was Muslim.

[34] Preamble of the Turkish constitution (1995).

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Refah cited Ataturk's speeches in which he observed that everybody needed to learn about their religion. Refah also claimed that the speeches of Erbakan and others—allegedly contradicting the laicism principle—not only enjoyed a principled parliamentary immunity but also had to be understood in context and not as purposeful statements of religious fundamentalism. All in all, Refah insisted that it had to be protected under general norms of individual freedom of conscience, enjoyed through the constitutional guarantees of human rights and freedoms.

The Refah defense was based on appropriating the terms used by the prosecution and reframing them. In particular, Refah argued that the constitution distinguished between laicism and atheism. The defense thus offered its own definition of laicism based on Article 4 of the party program: "Laicism is not enmity against religion. On the contrary it is a principle developed and implemented to protect freedom of religion and freedom of conscience from all sorts of violation" (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, p. 50). At other points in the Court statement, the party described laicism as the capacity to adhere to any religion and practice it in ways that do not destroy the public order. Thus framed, Refah in fact argued that its policies were based on the defense of the laicism principle and cited speeches given by the party's leadership in which they stated that they adhered to the principles of laicism.

Refah further intensified its appropriation strategy by questioning the adherence of the prosecutor himself to laicism. Upholding laicism had implications for the realm of adequate procedures and appropriate rational and scientific fact-finding methods. Accordingly, the defense argued that by relying on flimsy evidence such as newspaper articles discussing Islam in a most general and "unscientific" way, the prosecution was contradicting the laicism principle. Finally, Refah also reappropriated the idea of "progress." Against charges that it represented an obstacle on the road to progress, Refah argued that its relentless fight against corruption positioned it as a flag bearer of progress and development along the lines of contemporary Western civilization.

In its decision to dissolve the party, the Court did not directly address Refah's appropriation strategy. Instead, it focused on the laicism principle articulated in the preamble of the Turkish constitution. The Court found that laicism was an inherent part of Ataturk's principles and accordingly, defined it as "a way of life that has destroyed the medieval scholastic dogmatism and has become the basis of the vision of democracy that develops with the enlightenment of science, nation, independence, national sovereignty, and the ideal of humanity" (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, p. 255). With such a loaded definition, the Court invoked the dichotomy introduced in the indictment between coun-

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tries where religious thought and regulations dominate and countries relying on the laic order, where religion "is saved from politicization, saved from being a tool of administration and kept in its real respectable place which is the conscience of the people" (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, p. 256).

In parallel to the imagery the Court developed while dealing with the HEP, the distinction between everyday life and politics underlies the Court's rationale in the case of Refah as well. In the case of Refah, this distinction exists on two separate planes. On one level, religion is depicted as a private concern of citizens, a matter of "conscience," and hence as part of the "private" realm. This depiction allowed the Court to portray its decision as one that "saved" religious life from the contamination of politics. In fact, for the purpose at hand, the Court suggested that excluding religion from the political domain was a measure to safeguard the dignity of religious life. Culture and everyday life were thus portrayed as "pure" domains that must be protected from politics. Clearly, this move was inherently political in its implications as it insisted on a fundamental rupture between culture and politics and, consequently, insisted on the Court's ability to simultaneously define where culture ends and politics begins. The aspirations of the Refah Party were excluded from the political domain based on this distinction.

On yet another level, the distinction between culture and politics allowed the Court to reiterate its adherence to the principle of unity and to justify the dissolution of Refah precisely on the grounds that the latter threatened this principle of unity. Note how the Court understood laicism as a method of social transformation from an ummah (religious community) to a nation. An ummah was depicted as a social configuration that by definition lacks unity because religious life cannot evolve into a modern coherent political structure. It always remains—according to a logic based on distinguishing culture from politics—a dispersed form. The "non-modern" social tie that it provides is based on a shared culture and everyday practices. In other words, a nation is perceived as precisely a product of safeguarding politics from religion. Finally, in this view it is the emergence of a nation that can give rise to unity. Thus, the distinction between culture and politics served the Court not only to justify the exclusion of religion from political life but further to explain how unity could be preserved. As in the case of HEP, in the Refah case, it was also the image of unity that guided the Court.[35] In both cases, unity was to be achieved by excluding

[35] There is no constitutional court in Israel, and its Supreme Court's tasks are of a different register. Yet Peled's 1992 study of the Supreme Court's impact on delineating the borders of the political domain in the 1988 elections—regarding two cases involving one party representing ultra-religious groups and another representing minority groups—offers an interesting comparative case in terms of substance. The Supreme Court reviewed

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some social aspirations from the political domain and relegating them to the domain of culture. For this reason, I hereby turn to examine at greater length the concept of unity and its relation to concepts of progress and democracy, which occupy a key position in the framework of these decisions.

Unity, Progress, and Democracy

In both cases, despite the nature of the different threats, the one clear perceived danger emanating from the HEP and Refah was the threat to the principle of unity. In the case of the HEP, unity was threatened mainly because the party allegedly sought minority rights for Kurds. The concrete meaning of the term *unity* changed at different moments in the decision. At times it meant the unity of the national population, of its overarching similarity. Here, the idea is that although there are some superficial differences, people living in Turkey are similar in their fundamental national identity. A political movement such as the HEP is considered dangerous because it tried to create differences or emphasize the significance of existing differences. This entailed a challenge to the fundamental similarity among the population at large and thus a danger to the unity of the people.

At other times in the decision, the HEP was seen as trying to destroy the indivisible unity of the nation-state with its people. This is in the context of the feelings of adversity that the HEP allegedly fomented within the citizenry. In this framework, the people of the state are almost always in agreement with the state. There is a vision of a fundamental public consensus and a shared social contentment with the status quo. The Court, for instance, knew for a fact, yet with almost no discussion and without proof, that the HEP's arguments about the Kurdish people, their needs and suffering, were not substantive. The HEP as such was deemed to not represent the people but rather a separatist line of action that created problems when there really were none. According to the

the decisions of the Elections Council in the case of the ultra-orthodox Jewish Kach Party and the joint Arab-Jewish Joint Progressive List for Peace. The latter was seen to present a threat to the Jewish foundations of the Israeli state. This perceived threat was similar to that of the separatism associated with the HEP. However, the Kach Party was banned due to the threat it allegedly caused to the democratic basis of the Israeli state. This threat was similar to that of Shari'a that Refah allegedly supported. The Elections Council had banned the Kach Party and allowed the Progressive List for Peace to run. The Supreme Court upheld both decisions. Peled argues that these decisions can be understood in the context of the different conceptualizations of citizenship for Arab and Jewish citizens. He notes that Israeli Arabs enjoy citizenship rights limited to notions of liberal citizenship, i.e., those rights that basically amount to freedom from arbitrary state intervention. The Jewish citizens of Israel, while enjoying these rights, can also engage in practices of republican citizenship; that is, they can engage actively in politics that is basically defined as political contentions around the definition of the common good of Jewish Israel.

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Court, only by external and unfounded incitement and manipulation could citizens be led to criticize the state and demand policies that address their Kurdish identity (e.g., the Kurdish language and history, and the Kurds' integration into education programs) and/or the problematic nature of the conditions under which they live (e.g., poverty, insufficient infrastructure, unemployment).

At other times, the Court also referred to the unity of the state in terms of its polity and/or territory. As mentioned above, the Court ruled that the Lausanne Treaty established once and for all the question of minorities in Turkey. The Court understood the HEP to be leaning toward suggesting federalism or other forms of autonomous rule. This was seen as a major threat against the foundations of the unitary state. The HEP's actions were thus deemed to be a threat in the long run, as its supporters were thought to be aspiring for autonomous rule and/or national land.

Interestingly, these three senses of the term *unity* were invoked at various moments in the text of the case almost interchangeably. The unity of the state, the nation, and the people were all declared as the opposite of separatism, which the HEP came to represent. Thus the Court asserted that the HEP failed "to respect and care for the state, democracy, fraternity and peace, and especially for the indivisible unity of the country and nation" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 211).

The Court's justification for the dissolution of the HEP did not end with its conclusion that the HEP threatened the unity principle. Rather, the Court interpreted the threat to unity as being simultaneously a threat to Turkish democracy as well. Interestingly, the Court almost never touched upon notions of what it takes to be a democracy: the problems, the tensions; that is, the tendencies *within* democracy as a regime of governing actual people with multiple differences and who occupy positions in multiple structures of inequality. In the decision, democracy as such remained a formal category, an abstract entity in need of protection. Unity and democracy were bound together in a way that ensured that no conceptual or political tension could exist between the two. Once the political issues brought forward by the HEP had been thus reframed, it looked only "natural" for the Court to protect the Turkish democracy. Note the swift shift from unity to democracy in the decision:

> The right of the state to protect the unity of the country, the unity of the nation, is not limited only to the existence of the state, but in democratic countries it also includes the protection of human rights and freedoms in ways that are in line with the rule of law. The necessity of imposing sanctions against those political parties that threaten democratic life, that engage in actions that will end up in its abolishment, should be considered natural. (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 215).

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The outcome was an imbalanced picture of democracy where its importance was elaborated but its tensions and difficulties remained untouched. The Court's response to the political challenge of the HEP was framed in terms of the embedded right of a democracy to defend itself against an assault brought upon it through democratic means. From this point onward, the road to dissolution was a short one. The Court could then rely on many judicial sources, from international treaties to the constitution itself, to establish the idea that a democracy should not be used as a recipe for the self-destruction of a democratic regime.

In the case of the HEP, we therefore observe a strong connection between democracy and unity. Furthermore, the idea of progress is typically an inherent part of the conceptual package that binds unity and democracy. The idea of progress consists of notions such as development and modernization, which were articulated in the HEP decision as well. In fact, unity was seen as the culmination of Turkish progress, as "this feeling of being together and this sense of unity are based on a very long process of historical development" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 203). The Court also dismissed the idea that contemporary developments in other parts of the world—facilitating greater autonomy for local groups—should be followed in Turkey. It reasoned that in Turkey such processes had already taken place: "The structural changes observed in other countries that bring independence were already completed in Turkey by the disintegration of the Ottoman Empire. The historical process of Turkey is the proof of this" (Case No.: 1992/1 [Political Party Dissolution], Official Gazette, p. 209).

The Court thus considered the status quo that had been set in place when the Republic was established as the epitome of progress. It therefore reasoned that no further progress is possible with regard to the status of minorities in Turkey or to administrative local autonomy in general. On the contrary, what may appear as a progressive move elsewhere is in fact a regressive move in Turkey. In other words, the Court added another reason to the indispensability of the principle of the unity. It put the HEP in the position of threatening not only Turkish unity and democracy but also progress. In this way, unity, democracy, and progress were collapsed into each other, creating an epistemological bundle that could not be untangled.

In the case of Refah, we observe the same logic of collapsing unity, democracy, and progress. In this case, the reasoning of the Court proceeded in a different direction but ended up with the same bundle. This time, progress was the highlighted category. Refah was indicted as a political representation of the general Islamist threat. The root of the Islamist threat was in its being backward-

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looking, threatening to steer Turkey away from the road of progress. According to the Court, the major threat Refah represented was to the laicism principle of the constitution. At the hands of the Court, laicism became not merely the tenet of separation of religious and governmental spheres, or even of state control over religion, but also a crucial embodiment of the idea of progress. In turn, laicism functioned as a means of enhancing national unity. These mutual "collapsing" principles were discussed quite explicitly:

> The purpose of the laicism principle—which expedites modernization and is the founding principle of the Turkish Republic—has been to institute the state in line with rationality and rules of science. Laicism—that which is based on mutual respect, tolerance, and understanding—has also been the foundation of national unity. Freedom of thought and belief ties individuals and different groups together with trust, facilitates becoming a nation, and strengthens national solidarity. Free thought and belief—the turn to modern civilization—is an important step in national life. The respect that laicism represents to humankind and to religion, its approach towards religion that keeps religion in its own place, has opened the door to rationality, science, art, modern modes of administration, and all the necessities of civilization. Democracy is the opposite of Shari'a. This laicism principle—which is the sign of modernity—has also been the unfolding force of The Turkish republican transformation from ummah to nation. (Case No.: 1997/1 [Political Party Dissolution], Official Gazette, p. 257)

The Court considered Refah's support of the headscarf to be a visible manifestation of the party's threat to progress. Here again, the Court swiftly moved from "progress" to "unity." This move was enabled by assuming Refah's support of the headscarf as encouraged by anti-progressive forces that visibly emphasized their "difference" through their anti-progressive behavior. Progress was imagined as a unilinear path of "modernization and westernization" with clearly defined stages. The nation as a whole was to walk in this unilinear path. The laicism principle was of central importance because it marked a step in this road to progress that the Republic was proud of: the transformation from a religious community to a national one. Due to the Court's decision, we observe a rather flat historical portrayal of the Ottoman Empire that ignores the presence of diverse and rather specialized state structures and secular imperial laws of administration. Moreover, this framework denies the fact that the influence of religion in public life did continue in Republican history despite efforts to the contrary. In short, the historical and social developments that characterized the multiplicity of relations that Republican institutions had with religious institutions and communities, as well as the latter's internal diversity, were erased.

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In this way, the Court considered Refah's political support of the headscarf as a stance intended to create divisions among the people. As long as the practice of wearing the headscarf took place in everyday life, it did not constitute a threat. Yet once the issue was politicized, and this is what Refah did, support of the headscarf became at once a threat to progress and a threat to unity. In this way, the Refah Party's alleged threat to progress became the basis for casting it as a threat to democracy too. As in the HEP case, the Refah decision elaborated the importance of "democracy" as the epitome of Turkish historical progress as a united nation instead of articulating the specific dynamics of democracy as it is instituted and practiced in the Turkish historical and social context. In the end, as unity and democracy were constructed as inseparable, the Court could once again move to justify its decision as a legitimate defense of democracy itself.

Interestingly, the Court continuously made references to a number of international documents in both decisions.[36] In this sense, its decisions were very much an amalgam of nationalist collectivist documents, such as Ataturk's speeches or the problematic 1982 constitution, and international treaties such as the Helsinki Final Act of Security and Cooperation in Europe (1975) or the European Convention on Human Rights (1950). There was a significant degree of engagement on the part of the Court to articulate its decisions in the terminology of international treaties. In this vein, there was actually a dialogue between the defense for the parties and the Court. While the parties were discussing those elements of these treaties that highlight individual rights to freedom of thought, expression, and association, the Court was emphasizing the element of the the right of a democracy to defend itself. Limitations that can legitimately be placed by a state on fundamental rights and freedoms of citizens on the basis of protecting the regime were used very much like an open door to legitimize the decisions for dissolution. The content of the treaties themselves seemed to provide a number of themes from which both parties picked and chose what they needed in order to make their case.[37]

What is interesting here is that the decisions, while highlighting the importance of nation in their substance, could not but draw from international developments and reference points as their sources of legitimacy. While in these decisions the Court read the

[36] For an elaboration of the ways in which international treaties, as well as precedents of international bodies (such as the European Court of Human Rights) and the precedents of other constitutional courts were applied in these cases, see Kogacioglu (2003).

[37] See Arslan (2002) for a rather different take on the relationship of the Turkish Constitutional Court with international treaties and international bodies such as the European Court of Human Rights. Arslan portrays an inherent incompatibility between what he considers to be two different "legal paradigms."

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limitations on fundamental rights and freedoms with broad strokes, the fact that it felt the need to engage substantively with these documents, without suggesting their irrelevance or externality to the Turkish legal system, is important. This need to find a "middle way" between international and national documents may prove to be an interesting venue of legal interpretation on the part of the Court that may signify a hint of change in Turkish constitutional culture.

All in all, however, the constructs of progress, unity, and democracy, the ways in which they are brought together, and their taken-for-granted meanings—as the unity of the state with its people and as the progress of the country on a unilinear path—leave less room for a discussion of democracy as built of political tensions. By alluding to democracy but always through the terms of progress and/or unity, the Court has dealt with issues of democracy as a yes or no, presence or absence type of question and not as a matter of degrees of liberties and rights that are to be weighed against each other. In other words, in this vision, a real democracy is that which produces only progress and unity.

This conceptual package in turn has become the Court's way of validating only those political parties that would not challenge the identity and inseparability of progress, unity, and democracy. A shared feature of the HEP and Refah—despite their substantive political stances that were vastly different and at times on opposing sides—was that they both introduced into the Turkish political landscape the possibility of contemplating the tensions that exist or potentially exist between the aspirations to unity, to progress, and to democracy. In resolving to dissolve these parties, the Court in effect opted to consolidate the idea that such a problematization of the relations among these aspirations should lie outside the boundaries of the political domain.

Conclusion

The conceptual framework that underlies these dissolution cases is the distinction between culture ("customs" and "traditions," in the Court's vocabulary) and politics, or between the domains of everyday life and public life. In the Court's vision, culture is the domain of difference, and everyday life is where the social appears as a mosaic. Yet according to the juridical logic followed here, such differences should not be allowed into the domain of politics. It is the transgression of the cultural into the political that is deemed by the Court to represent a threat. Any political thought that brings forth the tensions between these constructs may pose a risk to the nation, especially when a political movement trans-

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gresses into the domain of culture proper; that is, when it builds links between the daily lives of citizens and the political terrain that are different from the prescribed secular nationalist ones. Ironically, what the Court perceives as a threat in this way also fits the description of social movements that try to bring about social change from below.

This threat is imagined through the lens of a unified understanding of three basic ideas that guide the Court's actions: ideas of progress, unity, and democracy. Progress in the sense of westernization and modernization amounts to being a core element of a democratic nation, while unity is often described as the culmination of progress. Politics is supposed to preserve nationhood precisely by preserving the unity of these constructs. Democracy in this way comes to be conceptualized as an abstract category and comes to mean the political regime that preserves these ideals.

Finally, the excessive number of parties dissolved since 1980 may have to do with this framework. The image of the boundary between culture and politics is not stable, but is in constant need of scrutiny. If unwatched, political movements may transform what is cultural and harmless into a threat to the package of unity, democracy, and progress. This emphasis on the boundary between the cultural and political leaves the latter, as always, vulnerable, in the Court's opinion. In a sense, the more the Court clears out the thorns that lead to what it deems an inappropriate coexistence of "cultural" and "political," the more they seem to emerge. Thus the Constitutional Court deems its task as not necessarily over with the dissolution of a single party. Rather than seeing dissolutions as exceptional moments in and of themselves, the Court perceives them as a natural outcome of its broader self-defined task of watching over the boundary between lines of actions that are "properly" cultural and those that are "properly" political. The unusually high number of dissolved political parties—eighteen in two decades—may be understood in light of this self-defined task of the Court.

The continual re-emergence of dissolved political parties under different banners and the founding of spare parties while a Constitutional Court case unfolds against a given party are produced in dialogical relation to the framework used by the Court. As the Court often resolves to ban political parties yet cannot do much against their re-establishment,[38] Islamist and pro-Kurdish parties opt for the strategy of continuing their line of action with ever-new

[38] In 1995, primarily in relation to the problematic dissolution of the DEP, the constitution was amended to enable deputies of a dissolved political party to continue to serve in the parliament (Articles 69 and 84 of the constitution). This standard was further relaxed by the 2001 amendment of Article 69.

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political parties. What is interesting is that these dissolutions do affect the substance of the political idiom of the political parties as they re-emerge after dissolution. While further research as to the parameters of these changes is clearly necessary,[39] the very constitutional legitimacy of political parties in today's Turkey has become a symbol of the Court's participation in shaping the boundaries as well as the content of the political process.

What we see here may also be the consolidation of the role of the Constitutional Court as another ardent custodian, next to the NSC, of the hegemonic republican vision of nationalism and secularism. While the Turkish Constitutional Court is still quite far from playing an active role in creating democratic openings for the expression of political alternatives that are not immediately in tune with the status quo, the novelty of its particular type of guardianship, that is, watching over the status quo through the idioms of law in general and constitutionality in particular, cannot be denied. After more than four decades of the Court's existence, we are yet to see the ways in which this practice of guarding can come to contest idioms and factors that preserve the status quo. Still, given the wide array of national and international sources the Turkish Constitutional Court feels compelled to address, its ultimate claim to constitutional justice and its alternatives in the country, the Court's importance in terms of the prospects of democratization in Turkey can hardly be overstated.

Finally, one impulse here may be to read such tensions in the Turkish constitutional and political contexts and the meanings deployed therein as features of yet another "problem" democracy. These contestations lend themselves to being read as reflections of certain defaults in Turkey's juridical or political dynamics or the historical trajectory that bore these institutions. The location of Turkey in the "non-West," its chronic problems with the "rule of law," and the socioeconomic indicators that place it among the poorest third of the world would also support this view. Notwithstanding such readings, one analytical alternative may be to engage this discussion of the Turkish Court in the framework of those tensions that may be found in most democracies, especially when they deem themselves to be under "threat." These meanings, after all, are produced in relation to the historical trajectory of Turkey in its quest for modernization, national unity, and security. In the post-9/11 era, it is hard to deny the increasing relevance to all countries of collectivist, nationalist etatism, strong militaries, and

[39] In the last fifteen years, as we move in time from the HEP of 1991 to today's DEHAP—with the DEP, OZDEP, and HADEP in between—or from Refah (via Fazilet) to today's governing Adalet ve Kalkinma (Justice and Development Party), it is possible to see significant changes in the tone of the arguments, as well as such key topics as the place and importance of the European Union.

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the impact of international juridical documents and organizations that characterize the Turkish juridical, political, and social domains. These constitutional struggles around the meanings of progress, unity, and democracy may well be read as reminders of the tensions that may be emerging in such countries as the United States.[40] Understanding juridico-political dynamics such as the ones elaborated here may be particularly relevant at times like this, when measures undertaken in the name of national security and against the threat of Islamist fundamentalism come to contest the basic premises of rights and freedoms in the much-celebrated "cradles" of constitutionalism.

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[40] See also Scheppele (2003c).

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