THE FUZZY BOUNDARIES OF (UN)CONSTITUTIONALITY: TWO TALES OF POLITICAL JURISPRUDENCE

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Having studied comparative constitutional law for over fifteen years, one of the things that becomes strikingly apparent are attempts by courts to portray obvious political rulings as stemming from an established constitutional doctrine. In this short essay, I wish to discuss two such instances: one is a pair of rulings by the Supreme Court of Pakistan concerning the legitimacy of the Musharraf-led military coup d’état of 1999, and later the ousting of Chief Justice Iftikhar Chaudhry by the Musharraf regime; the other is a landmark ruling by Turkey’s Constitutional Court concerning the supposed unconstitutionality of a constitutional amendment aimed at revising Turkey’s militant secularist outlook. The practical outcomes of each of these two episodes, contested as they may be, are certainly within the realm of reasonableness. It is the attempt by courts and judges to make an obvious political decision appear as if it logically flows from formal law and their invention of grand constitutional principles to support that appearance that make these decisions prime exhibits in the pantheon of poor legal decisions.

But first, a bit of theoretical context. One of the striking phenomena in late-20th and early-21st century government is the ever-increasing reliance on constitutional law and courts to deal with some of the most fundamental political quandaries a polity can contemplate. In the past two decades, the judicialization of politics worldwide has expanded its scope beyond flashy rights issues to encompass what we may term ‘mega-politics’—matters of outright and utmost political significance that often define and divide whole polities. Core political controversies are framed as predominantly constitutional ones, with the concomitant assumption that courts are the suitable forum to deal with them. The list of examples seems endless: the fate of the American presidency or national health care plan; what is the exact meaning of Israel’s self-definition as a Jewish and democratic state; the legitimacy of the German bailout deal or the status of German sovereignty in the larger EU; the validity of Russia’s war in Chechnya or accession to the WTO; the dollarization plan in Argentina; disqualification of political parties in Turkey, Belgium and Spain; the scope of Islamic law as a source of legislation in Egypt or Malaysia; whether sending Korean troops to Iraq is allowed; whether violation of term limits by incumbent leaders in Colombia, Uganda, or Venezuela is constitutional. In short, to paraphrase Alexis de Tocqueville’s observation with respect to the United States, there is now hardly any political disagreement in the world of new constitutionalism that does not sooner or later become a landmark constitutional case.

Just as the judicialization of mega-politics appears inexorable, so is the politicization of the judiciary—the inevitable flip side of judicialization. The more politically significant courts become, the greater the likelihood pertinent political stakeholders will seek to influence or control judicial appointments and outcomes. In that respect, an overwhelming body of evidence suggests that extra-judicial factors...
play a key role in constitutional court decision-making patterns, in particular in politically significant cases.\textsuperscript{4} Constitutional courts and judges may speak the language of legal doctrine but, consciously or not, their actual decision-making patterns are correlated with policy preferences and ideological and attitudinal tilts;\textsuperscript{5} as well as appearing to reflect strategic considerations vis-a-vis their political surroundings, panel compositions, professional peers, or the public as whole. This can be explained by reference to the costs that judges as individuals or courts as institutions may incur as a result of adverse reactions to unwelcome decisions, or through the various benefits that they may acquire through the rendering of welcome ones.\textsuperscript{6}

A case in point is the Supreme Court of Pakistan’s appraisal of the very legitimacy of the Pervez Musharraf-led military coup d’etat of 1999. Alleging runaway corruption and gross economic mismanagement by the government, General Musharraf seized power from Prime Minister Nawaz Sharif in a military coup d’etat on Oct. 12, 1999. Musharraf declared himself the country’s new Chief Executive, detained Prime Minister Sharif and several of his political allies, and issued a Proclamation of Emergency that suspended the operation of Sharif’s government, Pakistan’s National Assembly, and its Senate. Section 4(1) of the Proclamation stated that: ‘No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency.’ Section 4(2) stated that: ‘No judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive.’ In response, political activists opposed to the military coup filed a petition to the Supreme Court in mid-November 1999, challenging the legality of the overthrow of Sharif’s government and the Proclamation of Emergency, and demanding that Nawaz Sharif be released and his elected government be reinstated.

The Supreme Court of Pakistan is anything but a novice in adjudicating political dramas.\textsuperscript{7} In fact, there have been a myriad of landmark judgments by the Pakistan Supreme Court pertaining to political transformation and regime change in that country. Consider the following examples. In late 1992, a fierce political controversy


\textsuperscript{5} A well-known exposition of the so-called ‘attitudinal’ model of judicial behaviour in the U.S. context is Harold J. Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited} (Cambridge University Press, 2002).

\textsuperscript{6} For an overview of this approach see Lee Epstein and Tonja Jacobi, ‘The Strategic Analysis of Judicial Decisions’ (2010) 6 \textit{Annual Review of Law and Social Science} 341-358.

\textsuperscript{7} Since 1990 alone, Pakistan has known six regime changes: the demise of the first Benazir Bhutto government and the election of the first Nawaz Sharif government in 1990; the dismissal of Nawaz Sharif by President Ishaq Khan and the re-election of Benazir Bhutto in 1993; the election of the second Nawaz Sharif government in 1996; the 1999 ousting of the Nawaz regime through a military coup d’etat; the transformation of General Pervez Musharraf’s military regime into a civilian regime in 2001; and the demise of the Musharraf regime in 2008. The Pakistan Supreme Court has played a key role in each of these radical transitions, as well as in the countless political manoeuvres that surrounded them. Over the last year alone, the Court has been a key player in demanding that the government opens an official investigation with respect to corruption and money-laundering allegations against President Asif Ali Zardari.
erupted between Prime Minister Nawaz Sharif and President Ghulam Ishaq Khan over the government's proposed modifications to the scope of discretionary presidential powers under the Eighth Amendment to the 1973 Constitution. The Eighth Amendment afforded the President the discretionary power to dismiss the government and dissolve assemblies, and to appoint judicial and military chiefs, thus putting him in an effective position of command over the legislative and executive branches. Following months of reciprocal political manoeuvring, President Ishaq Khan exercised his powers under this Amendment in April 1993, and dismissed the Prime Minister and his cabinet, ordered the dissolution of the National Assembly, and called for a general election to be held in July of that year.

Aggrieved by the drastic action of the President, Nawaz Sharif — the democratically elected Prime Minister — filed a petition to the Supreme Court under Article 184(3) of the Constitution, which guarantees the fundamental political rights of Pakistani voters and elected politicians. The dismissed Prime Minister asked that the presidential order of dissolution of the National Assembly and dismissal of his government be declared mala fides, and therefore without legal authority; and that all steps taken as a result of the contested dissolution, including the appointment of an interim cabinet, also be declared null and void.8

In a historic judgment released in May 1993, amid mounting pressure within Pakistan's political system, the Court ordered that the National Assembly, the Prime Minister, and the cabinet be restored to power immediately.9 In accepting most of Nawaz Sharif's arguments, the Court declared unconstitutional the denial of the right to run the government as long as one enjoyed the support of the majority of the house. In every democratic society, Chief Justice Nasim Hasan Shah held, political parties compete for the right to form the government. The party winning a majority of the seats should control the government.10 The Court stated that according to the Constitution, the only way the President could establish whether or not the Prime Minister commanded the confidence of the majority of the National Assembly members was by summoning the National Assembly and requiring the Prime Minister to obtain a vote of confidence from the Assembly.11 In ordering the dissolution of the National Assembly, President Ishaq Khan exceeded the powers conferred upon him under the Constitution. The Court went on to declare that the Prime Minister was neither answerable to the President nor subordinate to him. In formulating the policies of his government, the Prime Minister was answerable to the National Assembly alone.12

However, such valiant and well-reasoned adjudication in that 1993 case was nowhere to be found in the later Court's ruling in the Musharraf case. In a widely publicized decision released in May 2000, the Pakistan Supreme Court drew upon the doctrine of 'state emergency' to unanimously validate the October 1999 coup as having been necessary to spare the country from chaos and bankruptcy.13 The Court readily admitted that Musharraf's actions were extra-constitutional. This recognition, however, was insufficient in itself to declare his regime illegitimate. How so? The Court stated that: ‘[o]n 12th October, 1999, a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra

9 Muhammad Nawaz Sharif v President of Pakistan, PLD 1993 SC 473 [Pakistan].
10 Ibid 554-560.
11 Ibid 560-570, 799-801.
12 Ibid 560-570.
constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of salus populi suprema lex....[S]ufficient corroborative and confirmatory material has been produced..., in support of the intervention by the Armed Forces through extra-constitutional measure. To support the application of a seldom-deployed 'doctrine' (and, of course, the reliance on a constitutional tenet to justify the application of an extreme, extra-constitutional, perhaps even anti-constitutional measure, appears in itself a paradox), the Court cited its own controversial ruling in a 1977 case following an earlier coup d'etat that saw the ousting of, and later the execution of, Prime Minister Zulfiqar Ali Bhutto by General Zia-ul-Haq (ruler of Pakistan 1977-1985).

It was further held by the Court in the Musharraf case of 2000 that the 1973 Constitution remains the supreme law of the land, subject to the condition that certain parts thereof have been held "in abeyance on account of state emergency". In other words: the Constitution remains intact with the exception of all parts of it that have been violated and/or suspended by the Musharraf-led coup d'etat. The Court went on to declare that: "having validly [emphasis mine] assumed power by means of an extra-constitutional [emphasis mine] step, in the interest of the state and for the welfare of the people, [it] is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely: ... measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it"; "All acts which tend to advance or promote the good of the people" (hmmm ...); and 'All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive' (i.e. Musharraf himself).

In short, the Court conferred full and complete legitimacy upon a military coup d'etat and its leader, all while supporting its decision with a vague, retroactively-applied 'doctrine' of state emergency that no objective test may establish or refute. It was a genuine national emergency situation because Musharraf and the military so said; thus, the coup d'etat, extra-constitutional as it was, is a posteriori constitutionally justified, based on the Court's own ruling in a stand-alone and equally dubious decision made over two decades earlier. And this entire chronicle of decision foretold is stretched over hundreds of pages of learned judicial reasoning.

Fast forward to 2007. In March of that year, then President of Pakistan Pervez Musharraf ordered Chief Justice Chaudhry to resign, presumably for being overly independent and therefore 'unreliable' from the government's point of view. Chaudhry was reinstated in July 2007, following an outcry by the legal profession. However, in early November 2007 Musharraf declared a state of emergency in Pakistan (which lasted until mid-December 2007), suspended the Constitution, dismissed Chief Justice Chaudhry for the second time in eight months, and appointed several loyalist judges to the Pakistan Supreme Court. Musharraf's decision came only days before the Supreme Court was set to rule on whether it was constitutional for him to serve as both the president and the head of Pakistan's military. In 2008, members of the Pakistan Bar Association took to the streets, demanding the reinstatement of Chaudhry and the bolstering of judicial independence in Pakistan more generally. Ultimately, Musharraf was forced to step down and leave the country, and was replaced by Asif Ali Zardari (husband of the late Benazir Bhutto, leader of the Pakistan People's Party [PPP] and

14 Ibid 1219.

15 Begum Nusrat Bhutto v Chief of Army Staff, PLD 1977 SC 657 [Pakistan].

16 So as not to lose what was left of the Court's dignity, Chief Justice Ishaq Khan added that the "prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in the national interest; therefore, civilian rule in the country must be restored within the shortest possible time" (1219-1223). Accordingly, the Court granted General Musharraf three years to accomplish economic and political reforms, and to restore democracy.
the current president of Pakistan), Chief Justice Chaudhry was ultimately reinstated in March 2009. And it so happened that a petition for a retroactive constitutional scrutiny of Musharraf’s declared state of emergency and initial ousting of Chaudhry came before the Court.

In July 2009 (with Musharraf now already in exile in London), the same Supreme Court of Pakistan that rubberstamped the military rule a few years earlier, now led by Chief Justice Chaudhry (who, it should be noted, sat on the court that rubberstamped Musharraf’s military rule in 2000), declared unconstitutional the state of emergency imposed by former President Pervez Musharraf in late 2007. Referring to the events described above, the Court said: ‘On 12th October, 1999, the then Chief of Army Staff, General Pervez Musharraf, now retired, once more, put the Constitution in abeyance and the whole of Pakistan was brought under the control of Armed Forces. The National Assembly, the Senate and the Provincial Assemblies were suspended, so also, the Chairman and Deputy Chairman of the Senate, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies were suspended and it was declared that the Prime Minister, Federal Ministers, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers and the Advisor to the Chief Ministers would cease to hold offices, followed by issuance of Provisional Constitution Order and the Oath of Office (Judges) Order 2000. General Pervez Musharraf (Rtd) self-styled himself as Chief Executive and started ruling the country under the new dispensation. Later, he, unceremoniously, occupied the office of President and in the coming years revived the Constitution with the Seventeenth Amendment.’ That the Supreme Court of Pakistan itself legitimatized that entire Musharraf-led political make-over is nowhere to be found in the ruling. Gone with the wind.

The Court went on to declare invalid the ousting of Chief Justice Chaudhry and the appointments of judges Musharraf had made during that state-of-emergency period. The fourteen-member bench that delivered the decision was headed by reinstated Chief Justice Iftikhar Chaudhry, whose attempted ouster by Musharraf spurred much of the unrest that led to Musharraf’s downfall. The ruling is filled with self-praise for the Court’s impartiality, its role as an apolitical guardian of the Constitution, and acclamation for judicial independence and democracy as ultimate constitutional values. ‘The Constitution is supreme, and this decision will strengthen democracy and democratic institutions,’ Chaudhry wrote in his decision. And he went on to declare that: ‘An independent and strong judiciary is a back bone of viable democratic systems all over the world. The time tested experience has proved that an independent and strong judiciary provides strength to the institutions running government, particularly those who roll on the wheels of democracy. Equally the independent and strong judiciary acts as an arbiter striking a balance among various segments of a Democratic system.’ That the reinstated Chief Justice himself presided over the Court that decided the legitimacy of his own ouster was not considered an obstacle to rendering an unbiased ruling by the court. In other words, a military coup d’état against an elected government is constitutional based on a state emergency doctrine; ousting a judge, based on the very same doctrine, is not. Judicial independence, suggested the Court, is a supreme constitutional value. Translation: constitutional ideas and doctrines are many. Their selective deployment in politically charged cases is often strategic. One thing is clear: attempts by the Court to disguise its clear motives and inclinations in doctrinal constitutional talk serve as a grim reminder of how fuzzy and vulnerable to judicial and political manipulations many of our sacred constitutional institutions and principles are.

18 Ibid s12.
A different, yet equally telling example of how supposed constitutional principles are created by courts to advance palpable political agendas heralds from Turkey. Comparative polls often suggest that Turkey, alongside the United States and India, are among the most religious polities in the world in terms of how likely people are to refer to God, depend on divine authority for decision-making guidance, or otherwise draw on religious morality or principles in their everyday lives. Nonetheless, the secularization of predominantly religious Turkey, led by Mustafa Kemal Atatürk, is perhaps the best-known example of separationist reformism in the twentieth century. After the demise of the Ottoman Empire, the Kemalist secular-nationalist elite rejected Islamic culture and laws in favor of secularism and modernism. Accordingly, the words ‘the religion of the Turkish State is Islam’ were removed from the Constitution in 1928. In 1937 the words ‘republican, popular, atheist, secular, and reformist’ were inserted into the Constitution to better reflect modern Turkey’s adherence to a strict separation of state and religion. Both the 1961 and the 1982 constitutions established an official state policy of laicism.

For many years, the Turkish Constitutional Court (TCC) served as a proactive guardian of the Kemalist vision of Turkey as a modern, secular nation. The historically powerful Turkish military, long-time advocate of such a vision, has had considerable impact on the Court’s composition and ideological mindset; it has thus enjoyed the Court’s backing throughout much of the past three decades.

Under the 1982 Turkish Constitution, the TCC is vested with the power to order the closure of political parties whose agenda is found to be ‘in conflict with the indivisible integrity of the State with its territory and nation, human rights, national sovereignty, and the principles of the democratic and secular Republic’ or when ‘the internal functioning and the decisions of political parties [are] contrary to the principles of democracy’.\(^9\) In 1998 and again in 2001 the Court drew on these provisions to dissolve two major Islamic parties—the Welfare (Refah) Party (1998) and the Virtue (Fazilet) Party (2001). In its decision in the Refah Party case, for example, the TCC relied mainly on the principle of lââcêthé referred to in the preamble to the Turkish Constitution: ‘A way of life that has destroyed the mediaeval 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.’\(^20\) In modern secular states, religious creed is a private matter, held the TCC, ‘saved from politicization, taken out of being a tool of administration, and is kept in its real, respectable place which is the conscience of the people’\(^,21\) In such countries, modernity has become ‘the basic building block of transforming the people from an ummah [religious community] to a nation’.\(^22\) Likewise, the TCC has been a consistent advocate of a religion-free dress code in public schools, repeatedly upholding a ban on the wearing of the Muslim headscarf (hijab) by Islamist female students in the public education system. As indicative as these decisions may be of the TCC’s ideological and cultural inclinations, these rulings do rest on established doctrine and on concrete prerogatives vested with the Court by the Turkish Constitution.

Nevertheless, in the past two decades Turkey has witnessed a dramatic resurgence of political Islam. The resurgence of religion is reflected, inter alia, by the growing public support for political parties that advocate principles of theocratic governance.\(^23\)

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\(^{9}\) Constitution of Turkey (1982), article 143.

\(^{20}\) Ibid.

\(^{21}\) Ibid.

\(^{22}\) Ibid.

\(^{23}\) For further discussion, see e.g. Ran Hirschl, Constitutional Theocracy (Harvard University Press, 2010).
As is well known, the moderately religious Justice and Development Party (AKP) won three consecutive general elections (2002, 2007, and 2011), receiving an unprecedented popular support that translated into 363, 341, and 327 seats respectively in the 550-seat parliament. Accordingly, the AKP has been heading Turkey's government for the last decade.

The changing political tide notwithstanding, the TCC continued to see itself as the guardian of the secular state against the new spectre of religiosity advanced by the AKP-led government. In May 2007, it annulled the parliamentary vote that designated the AKP party nominee, Foreign Affairs Minister Abdullah Gül, as president. It declared the first round of the presidential election illegal on the somewhat shaky constitutional grounds that less than the necessary two-thirds of all parliamentary deputies were in attendance for the vote. Prime Minister Recep Tayyip Erdoğan immediately responded by proposing new parliamentary elections, which the AKP won by a landslide. In April 2008 the TCC agreed to hear a challenge to the very constitutionality of the AKP. In a widely publicized decision issued in July 2008, the court came very close to banning the AKP but stopped just short of doing so; six of the eleven judges, one vote shy of the necessary seven votes, found the AKP platform unconstitutional (According to Article 149 of the Constitution, a minimum of seven votes — three-fifths of the eleven judges — are needed to order the dissolution of a party). In so doing, the judges signaled that no further Islamization will be tolerated by the Court and by its secularist and military establishment backers, but also averted a direct showdown with a democratically-elected government.

All of these rulings, however one-sided they may seem, were anchored in concrete constitutional provisions and based on established doctrine. And when no doctrine was readily available to aid the TCC in its efforts to protect Kemalist interests, it imported one — the idea of 'constitutional meta-principles', and the possible unconstitutionality of constitutional amendments if they run counter to such court-made constitutional über-norms. In February 2008, the AKP government proposed a constitutional amendment concerning dress codes in the public education system. The amendment (passed by an overwhelming 411–103 majority in the National Assembly and later approved by President Gül, both steps being in accordance and full compliance with the Turkish Constitution’s requirements for passing amendments) guaranteed equal access to the public education system, effectively lifting the ban on wearing Islamic headscarves in the public education system. This amendment directly challenged the official state policy of laïcité. In response, the Kemalist Republican People’s Party (the main opposition party) and another smaller secular party applied to the Constitutional Court, requesting the annulment of the amendments on the grounds that they violated the principle of secularism in Article 2 of the constitution. In other words, this was a challenge to the constitutionality of a constitutional amendment that was passed legally by a democratically-elected parliament.

Despite the high stakes, it is hardly surprising that in June 2008 the Constitutional Court declared that amendment unconstitutional because it contradicted the strict separation of religion and state enshrined in the Turkish Constitution.24 In the full ruling (9–2) released in October 2008, the Court underlined that the rules concerning headscarves have political and religious purposes and that changing them would exacerbate public polarization in Turkey. The Court warned that relaxing the ban for religious reasons might lead to pressure on believers or nonbelievers, or those who wear the scarves and those who do not, if the headscarves are used as a political symbol. 'Some people might feel obliged to wear a headscarf, which violates freedom of conscience,' the court added. The ruling tackled head-on the issue of the perceived religious threat to Turkish secularism. 'In a state regime where the nation has

24 TCC Decision 116/2008 [Turkey].
sovereignty, there can be no room for divine will based on divine orders.' The opinion
continued, 'In modern systems of law, sovereignty is based on human beings.
Legislative changes concern worldly matters, not religious affairs. Laws cannot be
based on religious foundations ... Freedoms that are not in line with secularism cannot
be defended and protected. Laws meant to protect secularism cannot be ignored. The
headscarf is incompatible with the secular structure of knowledge.'

Most importantly, the TCC asserted its authority, for the first time in Turkish
constitutional history, to review the constitutionality of constitutional amendments. It
stated that it had decided the case on the basis of substance, not as a procedural matter.
When a law is contrary to the fundamental principles of the Republic the Court has the
power to hear challenges to such laws only on the basis of substance, the TCC ruled.
Secularism is 'the basic principle of the Republic'; as such it enjoys ultimate protection
as the true grundnorm of Turkish political and constitutional identity. To reiterate: that
was precisely what AKP and its supporters were trying to amend. Essentially, then, the
Court ruled that Turkey's secular identity is unalterable, regardless of the fact that a
large majority of Turkish voters support such a change.

To be sure, the idea of a hierarchy of norms within a given constitution is not
unheard of; just as the practice of annulling constitutional amendments on
unconstitutionality grounds is not uniquely Turkish. The German Basic Law of 1949,
for example, renders impermissible amendments to certain core constitutional
provisions, including key rights principles laid down in Articles I-20 of the Basic Law.
Unlike in Germany, however, the Turkish Constitution does not designate 'secularism'
or any other principle as supreme to, or more fundamental than any other aspect of the
Constitution. The practice of examining the constitutionality of a constitutional
amendment had never been invoked by the TCC prior to, and, thus far, following, its
2008 ruling on the charged issue of the Islamic headscarf.25

In the landmark Kesavananda Bharati case (1973), the Supreme Court of India
introduced the 'basic-structure' doctrine, according to which the basic features and
structure of the Constitution of India are beyond the powers of amendment of the
Parliament of India.26 The Court held that amendments and other laws that violated or
attempted to change the basic structure or basic features of the Indian Constitution
would be held invalid.27 The response of the legislature to these rulings was the 42nd
Amendment, passed in 1976, which attempted to reverse the basic-structure doctrine.
However, the Court voided the provisions of the 42nd Amendment that contradicted the
basic-structure doctrine, and the doctrine has since remained established in Indian
jurisprudence.28 The introduction of the basic-structure doctrine by the Supreme Court
was a response to a severe threat to democratic values by the Indira Gandhi
government, and later to a legal state of emergency aimed at removing oversight over
elections and election fraud from the judiciary. In Turkey, by contrast, the Court
invoked a similar idea not against any threat to democracy or to the Court's jurisdiction
or independence, but in order to advance its own worldviews and policy preferences
against an ideological change of direction it manifestly disagreed with, despite the vast
majority of the Turkish populace having supported it in a resoundingly democratic
fashion.

The AKP and Prime Minister Recep Tayyip Erdogan were quick to suggest that
the Court had overstepped its authority. That position was also supported by the

25 The Islamic headscarf issue has been a perennial bone of contention in Turkish
(constitutional) politics. It has reached the European Court of Human Rights on a number
of occasions, most notably in Leyla Sahin v. Turkey: 19 BHRC 590 [2006] ECHR 73 [ECtHR].
26 Kesavananda v State of Kerala, AIR 1973 SC 1461 [India].
27 Indira Gandhi v Raj Narain, AIR 1975 SC 2299 [India].
28 Minerva Mills v Union of India, AIR 1980 SC 1789 [India].
dissenting opinions of Chief Justice Hasim Kılıç and Justice Sacit Adali, which stressed that under the constitution the Court can review constitutional amendments only in terms of their form, not their content, adding that the decision had overstepped the court’s authority and usurped parliament’s power. ‘When the Court conducts constitutional review by going beyond constitutional restrictions on its authority, then it is no different from other institutions under its supervision,’ they wrote. Well said.

In summary, there is a persisting resistance among constitutional courts and judges to accept the notion that constitutional law is a species of politics and that courts are a part of the political system, not a thing apart. This doctrinal separation of law and politics is even shakier when it comes to constitutional law in politically turbulent settings. The rulings discussed here effectively illustrate the demonstrably strategic (Pakistan) and attitudinal (Turkey) basis of judicial behaviour in politically charged cases. It is the strained, improvised and all-too-obvious attempts by the courts to conceal these extra-judicial motives by drawing on seldom-invoked constitutional doctrines and interpretive manipulations that make these rulings textbook examples of terrible constitutional jurisprudence. As the proverbial saying goes, it would be funny if it were not so sad.