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Judges Discover Politics: Justice, Realpolitik, and Judges' Activism in Contemporary Turkey

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Simons Papers in Security and Development

No. 33/2014 | January 2014

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Bakiner, Onur, *Judges Discover Politics: Justice, Realpolitik, and Judges' Activism in Contemporary Turkey*, Simons Papers in Security and Development, No. 33/2014, School for International Studies, Simon Fraser University, Vancouver, January 2014.

ISSN ISSN 1922-5725

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Abstract:

The case of Turkey presents unique opportunities to expand the theoretical horizons of research on the “legal complex”. This paper explores factors behind the growth of off-the-bench activism by judges and prosecutors between 1980 and 2010 and identifies three stages: the collusion between the military and high courts from the 1980 coup until 2005; the increasing politicization and polarization of the legal complex in 2005–2010; and the restructuring of the judiciary in the wake of the 2010 constitutional referendum. Attention is paid to how individual professionals and judicial organizations shape political and judicial processes, but also to the effects of the government’s quest to eliminate political rivals and rearrange the balance of power within the governing coalition.

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Introduction

Self-designated moderate Islamists build a broad-based coalition with liberals on a democratization campaign. Faced with a fierce secularist establishment determined to maintain the institutional status quo at any cost, the conservative-liberal coalition resorts to a popular vote. The election results give a clear mandate to the coalition's call to unseat the old guard. Yet, soon after this victory, some liberals distance themselves from the government, which they accuse of using increasingly authoritarian policies and mistaking majoritarianism for democracy. Other liberals continue to support the government, arguing that authoritarian backlashes are minor disturbances on the way to full democratization. Disagreement about the liberal reform agenda in the post-secularist era makes erstwhile allies rivals.

The careful observer would easily recognize that the summary above describes major political developments in Turkey under the Justice and Development Party [*Adalet ve Kalkınma Partisi*; AKP] governments (2002–present). What is perhaps less obvious is that it also presents an accurate picture of the changes in the judiciary around the same period. Despite its strong electoral mandate, the AKP government found it increasingly difficult to govern toward the end of its first term (2007) because military and judicial institutions were exerting tutelary power over the political process on the grounds of protecting the secular republic. The government found allies in political liberals, a small but intellectually powerful group, in its quest for eliminating military interventionism and high-court hostility. Around the same time, a number of increasingly vocal liberal judges and lawyers supported the government against Kemalist judges and prosecutors. The general election victories of 2007 and 2011 reinforced the government's mandate and delegitimized bureaucratic-military tutelage, and public support for the overhaul of the judicial institutions culminated in the 2010 constitutional referendum. The years 2010–2011 were decisive in terms of the conservative-liberal coalition's internal cohesion: while liberal intellectuals outside the judiciary began to criticize the government's heavy-handed tactics

against all forms of social protests and the disappointing pace of the overall democratization program, a number of liberal judges accused the conservative elements of taking over the judiciary.

This paper is an attempt to understand the interconnections between judicial politics and macro-level political developments in Turkey. Specifically it explores the intra-judicial and extra-judicial factors behind the birth and growth of off-the-bench activism by judges and prosecutors. I argue that the increasing judicialization of politics and the concomitant politicization of the judiciary in the mid-2000s created the impulse to break the self-perception of judges and prosecutors as public servants beyond and above society. A more permissive legal framework after 2004 allowed pioneering legal professionals to create civic associations designed to defend the professional standing of their colleagues. More importantly, these individuals and associations became central *political* actors when the conflict between the AKP government and its rivals played out in controversial court decisions, which led the government to restructure high courts and the judicial administration with a constitutional referendum in 2010. While self-designated liberal and conservative judicial professionals and intellectuals allied with the government, secularists opposed the government's reform agenda. The referendum results signaled a victory for the former group, but disillusionment within the conservative-liberal coalition led to further divisions soon after.

The recent developments in Turkey echo the scholarship on the "legal complex" comprising activist legal professionals and institutions fighting for (and sometimes against) political liberalism in critical historical junctures. The high degree of political polarization inside and outside judicial institutions resulted in the formation of rival factions of judges, prosecutors, lawyers and pundits. However, the case of Turkey presents unique opportunities to expand the theoretical horizons of research on the legal complex. First, the liberals saw government power as an enabler of, rather than constraint on, freedom. The hegemony of counter-majoritarian institutions, like the military and high courts, necessitated the alliance between the government and liberals. Second, the speed with which alliances shifted between 2005 and 2010 suggests that there is a lot more *realpolitik* to the legal complex than a simple liberal/illiberal dichotomy would predict. The government's quest for eliminating political rivals and rearranging the

balance of power within a governing coalition seems to have created the impetus for judicial reform.

The paper is organized as follows: I provide an overview of the literature on judicial activism and its implications for the politics of the legal complex. I argue that political struggles *in* and *around* the judiciary shape judges' activism on and off the bench. Then I present the history of judicial activism in Turkey in three stages: the collusion between the military and high courts from the 1980 coup until 2005; the increasing politicization and polarization of the legal complex between 2005 and 2010; and the restructuring of the judiciary in the wake of the 2010 constitutional referendum. In each historical stage, I pay specific attention to the ways in which individual and organizational members of the legal profession shape political and judicial processes with their words and deeds. The paper concludes with some observations on the future potential of judicial activism, given that the main protagonists of the governing coalition, including within the judiciary, are drifting apart.

Judges' Activism: On and Off the Bench

Judicial activism refers to judges' use of judicial mechanisms to influence political decision-making. Activism is usually associated with court rulings that defy the executive or legislative branches. The existence of constitutional review and judicial independence enables assertive court decisions, but recent research suggests that these are neither necessary nor sufficient conditions for judicial activism.¹ Aside from the formal attributes of the regime, the key factors that determine judicial activism include politicians' cost/benefit analysis in establishing potentially activist courts,² the degree of political fragmentation,³ public trust in

¹ Lisa Hilbink, "The Origins of Positive Judicial Independence," *World Politics*, Volume 64, Number 4, October 2012, pp. 587–621, 587–588.

² Tamir Moustafa (2007), *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt*. New York: Cambridge University Press.

³ Helmke, Gretchen, and Julio Rios-Figueroa, eds. 2011. *Courts in Latin America*. New York: Cambridge University Press; Smithey, Shannon I., and John Ishiyama, "Judicial Activism in Post-Communist Politics," *Law and Society Review* 36 (2002): 719–741.

courts,⁴ job security, ideational change,⁵ and court culture, which can be defined as “judges’ ideas about law and the judicial endeavor, and the practices they develop as they do their job.”⁶

Judicial activism is often associated with assertiveness against powerful political actors. However, judicial empowerment may also be a strategy used by hegemonic elites to entrench their power and privilege in the face of democratic challenges.⁷ Furthermore, judicial activism is not limited to appellate courts: circuit judges and prosecutors influence politics, especially when high-court judges are unable or unwilling to do so. As we shall see in the example of Turkey, the conflict within the judiciary became apparent when local courts began to counter high-court rulings that aimed to uphold impunity for state personnel in 2005.

Judges and prosecutors also engage in political activities off the bench. Practicing legal professionals as well as legal scholars are consulted in the drafting of new laws and constitutions in many countries. U.S. Supreme Court judges are known to voice their opinion on current affairs to influence the public opinion or build public support for their rulings. Drawing on her case study of Spanish judges under the Franco dictatorship, Lisa Hilbink notes that off-the-bench activism can take the form of writing newspaper columns, working on legal literacy programs, speaking on radio broadcasts, denouncing the government’s encroachment on legal principles, and proposing legal reform.⁸

⁴ Smithey, Shannon I., and John Ishiyama. 2002. “Judicial Activism in Post-Communist Politics,” *Law and Society Review* 36: 719–741.

⁵ Couso, Javier, and Lisa Hilbink. 2011. “From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile.” In Helmke, Gretchen, and Julio Rios-Figueroa, eds. 2011. *Courts in Latin America*. New York: Cambridge University Press; Lisa Hilbink, “The Origins of Positive Judicial Independence,” *World Politics*, Volume 64, Number 4, October 2012, pp. 587–621.

⁶ Diana Kapiszewski, “How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal,” in Couso, Javier, Alexandra Huneeus, and Rachel Sieder, eds. 2011. *Cultures of Legality: Judicialization and Political Activism in Latin America*. New York: Cambridge University Press: 59.

⁷ Hirschl, Ran. 2000. “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions.” *Law and Social Inquiry* 25(1): 91–149; Hirschl, Ran. 2004. *Toward Juristocracy*. Cambridge, MA: Harvard University Press; Björn Dressel, “Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand,” *The Pacific Review*, 23(5) (2010): 671–691.

⁸ Lisa Hilbink, “The Origins of Positive Judicial Independence,” *World Politics*, Volume 64, Number 4, October 2012: 593; 599.

How does activism shape politics in and around the judiciary? The “legal complex” approach, developed and examined in several co-edited volumes by Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley, integrates the diverse actors and activities that constitute public judicial action. The authors define the legal complex as “the system of relations among judicial institutions, legal occupations and legal academics in a given society.”⁹ The complex is understood as an action-oriented network, rather than a social group differentiated by membership in the legal profession.¹⁰ The issues that shape the legal complex at a given historical moment center on the defense of negative liberties. Judicial activism may be liberal or illiberal in character, and the legal professionals may be united or divided in their political stance. As a result, the relationship between the bar and the bench may be mutually supportive or mutually oppositional.¹¹

In what ways does the politics of the legal complex interact with the rest of the political system? As described in the introduction, the confluence between the politics within the judiciary and the broader context in which it is embedded is unmistakable in the case of Turkey. Does that mean that intra-judicial politics replicates extra-judicial politics? Or does the judicialization of politics blur the distinctions between public policy and judicial decision-making? I argue that the confluence owes to the two-way interaction between the judicial field and the political field to some extent, but an additional dynamic should be addressed as well: politics *within* the legal complex. Politicians may tamper with judicial institutions to further their agendas, but it is also likely that sharp disagreements between the members of the legal profession may invite political intervention. Assessing the recent developments in and around the judiciary in Turkey, I argue that the combination of inter- and intra-branch conflicts shaped the alliances in the legal complex:

Conflict between the government and high courts: The judicial establishment, and especially the Constitutional Court, challenged the AKP government’s policies, statutory

⁹ Halliday TC, Karpik L, Feeley MM. 2008. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. (Oxford: Hart): 6.

¹⁰ Lucien Karpik and Terence C. Halliday, “The Legal Complex,” *Annual Review of Law and Social Science* 2011.7: 220–221.

¹¹ Lucien Karpik and Terence C. Halliday, “The Legal Complex,” *Annual Review of Law and Social Science* 2011.7: 218.

proposals, and even the AKP's right to exist between 2007 and 2008. Once the government consolidated its power through election victories, it was poised to initiate a counter-offensive against the judicial establishment. This culminated in the 2010 constitutional amendments, which restructured high courts and the judicial administration.

Conflict within the judiciary: The oligarchical nature of the judiciary and its increasingly politicized rulings led a number of liberal-minded judges to revolt through contrarian rulings and public activism in the mid-2000s. Yet, the selection system for high courts and judicial administration was designed to reproduce the status quo. Therefore, the liberals turned to a powerful outside ally, the AKP government, to alter the constellation of forces inside the judicial branch through the 2010 constitutional amendments.

The intellectual power of the liberal judges and the material power of the government managed to sway the public opinion and eliminate veto players. Yet, the post-conflict settlement did not quite conform to the expectations of the liberals: the oligarchs were gone, but the liberals were sidelined in the new judiciary, which gave undue advantage to government-approved candidates in the elections for the judicial administration.

Data and Methods

An investigation that focuses on liberal reform and judicial politics cannot avoid normative questions. As it will become evident in the following sections, key junctures in recent Turkish political history, like the coup plot trials or the 2010 constitutional referendum, caused deep divisions not only among politicians and judges, but also within the academia, the members of which took part as observers and participants. While acknowledging the impossibility of eliminating the researcher's subjective judgment from the research questions and methods, I employ an interpretive approach that prioritizes judicial actors' self-understandings in narrating the history of judicial activism in Turkey between 2005 and 2013. Therefore, the descriptors "liberal" and "secularist/Kemalist" are used as self-designations.

I use newspaper and magazine articles, memoirs, academic publications, and civil society reports to reconstruct the recent history of judicial activism. Since it is a well-known fact that

media reporting tends to reflect, rather than transcend, the social and political cleavages in Turkey, I rely on diverse sources.

Politicized Apoliticism: the Judiciary in Turkey (1982–2005)

The Republican alliance has dominated the judiciary since the early 1960s, when constitutional review was introduced.¹² Aside from an ideology of secularism and statist nationalism (often referred to as “Kemalism” in short),¹³ what held the alliance together was a shared identity as civil servants tasked to protect the regime.¹⁴ This tutelary position allowed the judges to find common cause and build close connections with bureaucracies holding similar aspirations, most notably the military. The judiciary and the military have acted as the “guardians” of the regime, identifying internal threats and supervising popularly elected bodies.¹⁵ Nonetheless, periods of political upheaval led to splits within the seemingly coherent alliance at times, as witnessed in the high degree of incongruence between the military establishment and high court judges in the polarized atmosphere of the 1970s.¹⁶

The decidedly right-wing military coup of 1980 put an end to the pluralistic and highly polarized picture in the political realm, as well as within the judiciary. The Supreme Board of

¹² Belge, Ceren. 2006. “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey,” *Law and Society Review* 40 (3): 653–692. Belge includes the civilian and military bureaucracy as well as the Kemalist intelligentsia in the alliance. What holds them together is a shared Kemalist worldview (656). Also see: Shambayati, Hootan. 2002. “The Guardian of the State: The Turkish Constitutional Court in Comparative Perspective,” (paper presented at the Annual Meeting of the American Political Science Association, Boston, August).

¹³ Kemalism, a hegemonic ideology named after the founder of the republic, Mustafa Kemal Atatürk, includes secularism, Westernism and nationalism as its fundamental tenets. Although Kemalism should not be considered a set of attitudes without ideological content, its capacity to incorporate a wide range of ideological positions should be recognized – developmentalism, anti-imperialism, ethnic and civic forms of nationalism, etc. Parla, Taha, and Andrew Davison. *Corporatist ideology in Kemalist Turkey: progress or order?* Syracuse University Press, 2004: 7–11. The term “Kemalist” has been used to label oneself and others throughout the republican period so frequently that it is hardly a precise designation. For the purposes of this paper, I use the label “Kemalist” only for individuals and groups who use that self-designation.

¹⁴ Koğacıoğlu, Dicle, “Progress, Unity and Democracy: Dissolving Political Parties in Turkey,” *Law and Society Review* 38 (3) (2004); Shambayati, Hootan, and Esen Kirdiş, “In Pursuit of ‘Contemporary Civilization’: Judicial Empowerment in Turkey,” *Political Research Quarterly* 62 (4) (2009).

¹⁵ Tezcür, Murat. “Constitutionalism, Judiciary, and Democracy in Islamic Societies,” *Polity* 39.4 (2007): 479–501.

¹⁶ Belge, Ceren. 2006. “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey,” *Law and Society Review* 40 (3): 653–692, 658.

Judges and Prosecutors [*Hakimler ve Savcılar Yüksek Kurulu*] was established in 1982 to regulate, or better put, discipline the bench.¹⁷ Embodying the undemocratic spirit of the military government (1980–1983), the Supreme Board’s membership was limited to appellate court judges, the minister of justice and the undersecretary of the ministry. It lacked an independent secretariat or budget, and the ministry of justice had agenda-setting power in Board meetings.¹⁸ Despite repeated calls for the abolishment or dramatic transformation of the Supreme Board, the political momentum for change could not be built before the mid-2000s.¹⁹

Three trends dominated the post-coup judiciary. First, the legality of the coup and the Constitution of 1982 could not be questioned.²⁰ Second, court decisions reflected the national security principles adopted by the military-dominated National Security Council.²¹ Accordingly, socialist/communist, Kurdish and Islamist political parties and identities were consistently criminalized. Third, courts failed to prosecute the majority of human rights violations, especially those committed by state agents during the internal conflict with Kurdish rebels. State security was (and still is) prioritized over civil and human rights in Turkey.

The collusion between the interventionist military and high courts reached its peak in 1997–1998. On February 28, 1997, the National Security Council met to discuss the alleged

¹⁷ The new board merged the Supreme Board of Judges and Supreme Board of Prosecutors, two bodies recognized under the 1961 Constitution.

¹⁸ Hayri Keser & Fatma Niyazioğlu, “The Board of Judges and Prosecutors in Turkey,” *İnönü Üniversitesi Hukuk Fakültesi* 2(2) (2011): 119–156, 126–127.

¹⁹ There were numerous attempts for legal and judicial reform before (and during) the AKP governments. The 1982 Constitution was not fully replaced, but it was amended 18 times between 1987 and 2013, which reveals the degree of disaffection with its content. Legal change accelerated in the late 1990s, when Turkey was recognized as a candidate for European Union (EU) accession. The EU reform laws and the thaw in violence in the Kurdish region generated optimism, but the slow pace of reform, the military’s continued interventions into democratic politics, and state agents’ unwillingness to comply with the new legal norms took away the illusion that a rule-of-law revolution was taking place. Özbudun, Ergun. “Democratization reforms in Turkey, 1993–2004.” *Turkish Studies* 8, no. 2 (2007): 179–196; “1982 Anayasası’nın 87 maddesi yenilenmiş, değiştirilmiştir,” *Zaman*, September 24, 2013.

²⁰ Prosecutor Sacit Kayasu, who made an attempt to investigate the coup-era human rights violations in 2000, was disbarred by the Supreme Board of Judges and Prosecutors in 2003.

²¹ The National Security Council [*Milli Güvenlik Kurulu*] was a product of the 1960 coup, and its powers were expanded after the 1980 coup. The Council brought together the military high command and the representatives of the executive in monthly meetings, and the recommendations of the Council were binding on the government. A EU-accession reform package in July 2003 changed the composition of the Council in favor of civilians, and eliminated its executive powers by redefining it as an advisory board. Commission of the European Communities, “2004 Regular Report on Turkey’s progress towards accession, SEC(2004) 1201, October 6, 2004: 21–22.

threat of political Islamism. The target was the Welfare Party [*Refah Partisi*], an Islamist party that had formed a coalition government with the center-right several months before. The Council meeting resolved to eliminate the social and economic support structure behind Islamist political movements. The leader of the Welfare Party, Necmettin Erbakan, resigned his post as prime minister soon after the meeting. Following what some called a “post-modern coup,”²² the Constitutional Court dissolved the Welfare Party in 2008 and imposed a ban on the political activities of its senior members. Meanwhile, the army “started briefings for journalists and members of the judiciary on the fundamentalist threat.”²³ The follow-up Virtue Party [*Fazilet Partisi*] that replaced the Welfare Party was also banned by the Constitutional Court in June 2001.

This ruling had lasting implications that could not be foreseen by any of the actors involved: the younger and more moderate faction of the banned Virtue Party established the AKP in August 2001. The party’s conservative background, combined with its democratization and EU accession platform, brought it to power a year later. While secularist critics accused the AKP leaders of concealing their radical Islamist agenda, their commitment to the reform program in the early years of government won over centrist constituencies, and was praised by Turkish liberals and Western observers. This support proved crucial for the AKP’s survival when the high courts, especially the Constitutional Court, took an antagonistic stance against the government.

Judges Discover Politics: Formation of Judges’ and Prosecutors’ Civic Associations

Judges and prosecutors began to take active public advocacy roles in the mid-2000s. One reason for this change was external to judicial institutions: a more permissive legal framework encouraged legal professionals to organize. Another factor that triggered off-the-bench activism was the increasing polarization within the judiciary caused by court decisions in high-profile political lawsuits.

²² Cengiz Çandar, “Post-modern darbe,” *Sabah*, June 28, 1997.

²³ Zürcher, Erik J. *Turkey: a Modern History*. IB Tauris Publishers, 2004: 301.

Article 16 of the Law of Associations (1983) [2908 sayılı Dernekler Kanunu] prohibited judges and prosecutors from establishing civic associations. In line with the spirit of the 1980 military coup, the law projected the fear that civil society activism would compromise civil servants' professionalism and impartiality. The law was at odds with international norms concerning the freedom of assembly. As part of Turkey's EU compatibility reforms, a new Law of Associations [5253 sayılı Dernekler Kanunu] lifted the ban in 2004.²⁴ Pursuant to this change, the Judges and Prosecutors Association [Yargıçlar ve Savcılar Birliği; YARSAV] was established in June 2006.

YARSAV's self-stated goals can be summarized as follows: ensuring judicial independence and impartiality; promoting respect for human rights and the rule of law; protecting ethical conduct; defending judges' and prosecutors' interests in hiring, training and professional advancement processes; and improving the living conditions of judicial professionals.²⁵ Although it was an umbrella coalition of different political views, the secularist judges and prosecutors were the clear majority.

YARSAV consistently emphasized the importance of judicial autonomy from government, or to be more precise, from the AKP government. It held that the authority to appoint legal professionals should be transferred from the Ministry of Justice to the Supreme Board of Judges and Prosecutors. The association made a successful appeal to the Council of State to suspend a ministry-administered exam to appoint judges and prosecutors in 2006,²⁶ but the victory was short-lived: after a minor legal battle in which the Constitutional Court upheld the Ministry's decision and the Council of State subsequently suspended yet another appointment exam, the relevant regulations were amended to set the ministry's right to appoint legal professionals on firm legal footing.²⁷

²⁴ Nevin Ünal Özkorkurt, "Yargı Bağımsızlığı Açısından Osmanlı'da ve Günümüz Türkiye'sinde Yargıya Genel Bir Bakış," *AÜHFD* 2008: 225–242.

²⁵ "Yargıçlar ve Savcılar Birliği Derneği Tüzüğü." <http://www.yarsav.org.tr/index.php?p=217>

²⁶ Saadet Yüksel, "Türk Anayasa Hukukunda Hakimlerin Bağımsızlığına Genel Bir Bakış," *İÜHFM C. LXX, S. 72* 2, S. 71–98, 2012: 88.

²⁷ For the Ministry's public announcement on the amendments, see: http://www.pgm.adalet.gov.tr/duyuru/yeniadli_ilan_mart07.htm

YARSAV has since criticized the government and its allies, especially the powerful Gülen movement,²⁸ for undermining judicial independence by pressuring judges and packing courts. Needless to say, YARSAV's call for independence from government interference has found support from the secularist opposition. Former chairwoman of the association, Emine Ülker Tarhan, was elected as an MP from the secularist Republican People's Party [*Cumhuriyet Halk Partisi*; CHP] in 2011. The government and its allies have, on the other hand, regarded YARSAV as the judicial wing of the secular-republican old guard that sought to undermine the democratically elected government through a "judicial coup."²⁹

It was in the context of increasing polarization within the legal complex between 2005 and 2009 (see next section) that a rival organization to YARSAV was born. Intellectual exchanges between liberal-minded legal professionals who had been publishing their views on law, politics and society in national newspapers since 2005 culminated in the Association of Judges and Prosecutors for Democracy and Freedom [*Demokrasi ve Özgürlük İçin Yargıçlar ve Savcılar Birliği*; *Demokrat Yargı*] in late 2009. As some of its founders later described, it was a "contentious coalition" between leftists and the religious conservatives.³⁰ The founding members were known to be vocal critics of the judges and prosecutors who sought to ban the AKP and entrench impunity for state personnel.³¹ Among the founding members was Osman Can, who

²⁸ The Gülen movement is a faith-based political and business network, led by Fethullah Gülen, a cleric known for his politically moderate and socially conservative views. The movement emphasizes faith-driven service [*hizmet*], and has focused on acquiring clients and recruits through private university preparation courses in Turkey, and Turkish-language high schools in parts of Central Asia and Africa. Its embrace of nonviolent Sunni Islam and interfaith dialogue has appealed to sympathetic Western audiences in the post-9/11 context. Its tendency to organize in the media and education sector, and avoid political confrontations with the powers-that-be has won much praise, while also raising suspicions that the movement was attempting to infiltrate key political institutions (like the police and the judiciary) without provoking a backlash from the political or military elites. As it will become clear later in the article, the movement and the AKP were allies in their common defense of limited liberal reform and social conservatism, but their relationship has deteriorated since 2012. "Ruşen Çakır ile İslamizasyon, Cemaatler, AKP, Kürt Sorunu ve Gazetecilik Üzerine [A Conversation with Ruşen Çakır," *Tanyeri*, November 2010: 16–23. www.solkitap.net%2FS-A%2Ftanyeri-3.pdf

²⁹ Morton Abramowitz, "Turkey's Judicial Coup D'etat," *Newsweek*, April 5, 2008.

³⁰ "Demokrat Yargı Eşbaşkanı Orhan Gazi Ertekin'le Söyleşi, Siren İdemen ve Yücel Göktürk, 'Yeşil Gece'," *Express*, s: 121, Temmuz-Ağustos 2011, *Express* ilave: sf: 1–16 (reprinted in Orhan Gazi Ertekin, Faruk Özsu, *Türkleşmek, İslamlaşmak, Memurlaşmak: Ak Parti, Cemaat ve Yargının Hikayesi*. Nika Yayınevi, 2013): 33.

³¹ The legal drama following the Şemdinli incident triggered this dialogue. "Demokrat Yargı Eşbaşkanı Orhan Gazi Ertekin'le Söyleşi, Siren İdemen ve Yücel Göktürk, 'Yeşil Gece'," *Express*, s: 121, Temmuz-Ağustos 2011, *Express* ilave: sf: 1–16 (reprinted in Orhan Gazi Ertekin, Faruk Özsu, *Türkleşmek, İslamlaşmak, Memurlaşmak: Ak Parti, Cemaat ve Yargının Hikayesi*. Nika Yayınevi, 2013).

had resigned from YARSAV one month before. Can had become a rising star among the liberal and conservative circles for his views against the proposed ban on the AKP in 2008, and his advocacy for a new constitution.³²

Demokrat Yargı's founding principles expressed some priorities that were markedly different from YARSAV's, like the end of military tutelage, the reorganization of the Supreme Board of Judges and Prosecutors, and equal rights to judges of all degrees.³³ The new association strongly condemned past military coups, and constitutions promulgated under military regimes. Aside from upholding judicial independence, two warnings in the founding document stand out: first, powerful judicial institutions have often justified their disrespect for democratic political processes with the claim that high courts are outside (or beyond) politics. This feigned apoliticism, far from protecting judicial impartiality, has served as an ideological fig leaf for their political interventions. Second, judicial decision-making should be understood as a responsibility toward the public, rather than a right over it.³⁴ Therefore, accountability to the public and its elected representatives should be restored.

In line with these principles, *Demokrat Yargı* members' public statements conveyed the message that relations of domination *within* the judiciary, rather than government interference, constituted the chief threat to judicial independence in Turkey. Judicial reform had to target the oligarchical counter-majoritarian structure within and around the judiciary that used high court activism to counteract legislative initiative, uphold illiberal legal norms, and stifle dissenting judges and prosecutors. Its advocacy for change found resonance among government circles, as the AKP leadership faced aggressive opposition by the high courts in the mid-2000s. The government and liberal judges found common cause in dismantling the old guard.

³² See: "Taboo-breaking jurist Osman Can: Judiciary cannot be supra political," *Today's Zaman*, January 10, 2010.

³³ "YARSAV'ın artık rakibi var," *Haber Türk*, December 17, 2009.

³⁴ "Osman Can'dan YARSAV'a alternatif birlik," *Zaman*, December 17, 2012.

The Judicial Crises (2005–2009) and the Off-the-Bench Judicial Activism

High-profile court rulings have assumed the center stage in Turkish politics since 2005. The prosecution of military officers and a civilian collaborator accused of bombing a bookstore in Şemdinli became a judicial battle between the advocates of criminal accountability and forces of impunity. Soon after, three high court rulings tested the limits of militant secularism and the AKP government's power to resist a hostile judiciary. In 2007 the Constitutional Court reversed a constitutional amendment that would get around the headscarf ban by prohibiting discrimination on the basis of clothing; in the same year the Court invalidated the election of the AKP's Abdullah Gül on procedural grounds; and finally, in mid-2008, it nearly banned the AKP for allegedly anti-secular activities. Various other important trials took place simultaneously with, or soon after, the secularism-related rulings: the 2007 assassination of journalist Hrant Dink, several military coup plots, and past human rights violations by state agents were investigated between 2007 and 2013.

The heightened political profile of trials prompted the increasing salience of the legal profession in political debates. Judges, prosecutors and lawyers began to discuss their views on law, politics and society publicly. YARSAV and Demokrat Yargı came into existence as organized judicial advocacy groups in this historical juncture. Given judges' and prosecutors' well-documented tendency to position themselves outside, or even beyond, politics in Turkey, their visibility as political commentators is a surprising phenomenon.³⁵ Furthermore, the public debates revealed a high degree of polarization within the legal complex, pitting alliances of legal professionals, politicians and bureaucrats against one another. As we shall see, political and judicial power were initially contested between two opposing poles (civilian secularists and their allies in the military and judiciary vs. the coalition of pro-government forces and liberals). It will become clear later in the paper that the post-2010 political landscape reflected a more fragmented picture: the defeated Kemalists lost power and prestige inside and outside the legal complex, but the pro-government conservative-liberal coalition itself split soon after the 2010 referendum victory.

1.1 ³⁵ Judges have been considered civil servants both as a professional and as a social status category. As a result, their public image has been shaped by silence, secrecy and apoliticism until recently. Kürşat Bumin, "Yargıda bizzat yargıyı tartışmaya açan yazılar," *Yeni Şafak*, September 26, 2011.

Şemdinli

On November 9, 2005, a bookstore owned by a former Kurdistan Workers' Party (PKK) militant in the southeastern town of Şemdinli was attacked with a grenade. The locals captured the assailants on the scene, and the resulting police investigation revealed that two of them were members of the Gendarmerie [*Jandarma*], accompanied by an informer.³⁶ In addition, the grenades used in the attack were registered with the Gendarmerie. The case pitted prosecutors and judges who sought to investigate the criminals' connection to the military high command against high court judges bent on dismissing calls for accountability.

The legal drama began to unfold when the Supreme Board of Judges and Prosecutors disbarred prosecutor Ferhat Sarıkaya, the first to implicate the generals, in 2006. Continuing the hearings without Sarıkaya, the Van 3rd High Criminal Court sentenced the defendants to lengthy prison terms for murder and membership in a terrorist organization in 2006, but the Supreme Court of Appeals [*Yargıtay*] overturned the decision, ruling that military courts should have heard the case. Subsequently, a military court released the defendants. Following the 2010 constitutional amendments (which I discuss in detail below), which extended the jurisdiction of civilian courts vis-à-vis their military counterparts, the Court of Jurisdictional Disputes [*Uyuşmazlık Mahkemesi*] moved the case to civilian jurisdiction. The Van 3rd High Criminal Court re-tried the defendants, handing out lengthy prison sentences for murder and membership in a criminal organization in January 2012. The 9th Criminal Chamber of the Supreme Court of Appeals overturned the part of the verdict related to membership in a criminal organization, but upheld the Van local court's murder ruling in October 2012. The Van court insisted on the suspects' membership in the criminal organization in its new ruling in May 2013.

The Şemdinli trials revealed the divisions within the legal complex. The tennis match between a local court and the Supreme Court of Appeals raised important judicial and political questions about the judiciary's role in investigating state crimes. Should civilian courts or military courts hear cases involving crimes committed by military personnel? Was the indictment against General Yaşar Büyükanıt, accused of influencing the trial process by praising one of the defendants, legitimate? Should state personnel be sentenced on charges of membership in a

³⁶ The Gendarmerie is a branch of the Armed Forces that fulfills policing responsibilities outside urban areas.

criminal (or terrorist) organization for crimes committed while on active duty? Government officials, opposition leaders, military spokespersons, and of course, lawyers, prosecutors and judges were engaged in an acrimonious debate over these questions, which exposed the fault lines of civilian–military relations and judicial politics. While liberals and the Kurdish movement supported the prosecution, the secularist opposition blamed the pro-government judges and prosecutors for orchestrating a campaign to discredit the military. The AKP government lent timid support to the prosecution, but was careful not to alienate the military or the high courts over the Şemdinli case.³⁷

High courts, AKP, and the secular order

The AKP's roots in political Islam, liberal reform agenda and endorsement of the free market cemented a broad-based coalition throughout the 2000s.³⁸ Yet, it also faced considerable opposition in its early years, especially by individuals and social groups who doubted the party's democratic and secular credentials. The secularist CHP, the military and high courts countered the AKP as an opposition bloc.³⁹

Political tension reached a climax in April 2007, when the AKP declared Abdullah Gül as its presidential candidate.⁴⁰ Massive anti-government demonstrations by secularist civilians, called the Republic Protests, signaled a political crisis.⁴¹ While the protests were ongoing, Chief of General Staff Büyükanıt expressed in a memorandum the military's will to defend the secular

³⁷ Güneş Murat Tezcür, "Judicial Activism in Perilous Times: The Turkish Case," in *Law and Society Review* 43 (2) (2009): 305–336, 329, 330.

³⁸ Sebnem Gumuscu & Deniz Sert (2009), "The Power of the Devout Bourgeoisie: The Case of the Justice and Development Party in Turkey" *Middle Eastern Studies*, 45:6, 953–968 .

³⁹ Cizre, Ümit. "Introduction: The Justice and Development Party: Making Choices, Revisions, and Reversals Interactively." In Cizre, Ümit (ed.) *Secular and Islamic Politics in Turkey: The Making of the Justice and Development Party* (2008): 1–14.

⁴⁰ Public statements by secularist civilian and military leaders seem to suggest that they were primarily opposed to the fact that Gül's wife wore the headscarf, which to them signified a challenge to the ban on displaying religious symbols in public. "Q&A: Turkey's presidency battle," *BBC News*, August 28, 2007. Liberal pundits rejected the reductionism implied in secularist fears, arguing that Gül's election consolidated the democratization of Turkish politics and the integration of the Islamist movement to the mainstream. See, for example: Soli Ozel, "All change for Turkey," *The Guardian*, August 28, 2007.

⁴¹ The democratic credentials of the protests have since been subject of heated debate. Secularists consider the demonstrations as civilian and democratic in character, while for government supporters, the protests were part of a conspiracy to make the country ungovernable through coordinated civilian and military action.

constitutional order,⁴² which was understood to be a thinly veiled threat against the government. In May 2007, the Constitutional Court invalidated the first round of voting in the parliament on the grounds that the quorum of two-thirds was not met. The Court's interpretation of the quorum requirement clearly prioritized political calculation over legal reasoning, as it implied that a one-third minority in the parliament could paralyze presidential elections by simply boycotting the process, which was precisely what the CHP did in the subsequent rounds of voting. The AKP called for snap elections to break the deadlock. The party's astounding victory in the July 2007 general elections (securing roughly 47%, more than twice as many votes as its closest rival, the CHP) consolidated its rule and delegitimized its opponents.⁴³ With the support of newly elected Nationalist Action Party [*Milliyetçi Hareket Partisi*; MHP] MPs, who did not boycott the elections, quorum was met and Gül was elected president in August 2007.

The next standoff concerned the ban on wearing the headscarf. Turkish secularists had long opposed the display of religious symbols in public, including in political office, public sector jobs and universities. Many women were denied the right to education as a result of a headscarf ban in universities, which was upheld by Constitutional Court rulings.⁴⁴ Lifting the ban was one of the campaign promises of the AKP that appealed to conservative voters as well as many liberals, but the Constitutional Court would surely strike down any statutory change as unconstitutional. Instead, the party embarked on the alternative strategy of building a broad parliamentary coalition to get around the ban through a constitutional amendment. The AKP leadership thought that expanding the constitution's "equality before law" definition by including freedom from discrimination on the basis of clothing would open the door to lifting the

⁴² "Excerpts of Turkish army statement," *BBC*, April 28, 2007.

⁴³ Various studies find that economic rather than ideological factors shaped the vote for the party in the 2007 elections: "political Islam and sensitivities concerning freedom of conscience and religion also continue to play some role in determining partisan affiliations towards the AKP, yet they seem to be secondary to economic satisfaction and prospects for economic improvement felt by the voters." Kalaycıoğlu, Ersin. "Attitudinal orientation to party organizations in Turkey in the 2000s," *Turkish Studies* 9.2 (2008): 297–316, 310. Also see: Çarkoğlu, Ali. "A new electoral victory for the 'pro-Islamists' or the 'new centre-right'? The Justice and Development Party phenomenon in the July 2007 parliamentary elections in Turkey." *South European Society & Politics* 12.4 (2007): 501–519.

⁴⁴ A 1988 law lifting restrictions on the headscarf (3511 Sayılı Yasa, *Resmi Gazete* No. 20032, December 27, 2008) was annulled a year later by the Constitutional Court (E: 1989/1, K: 1989/12, March 7, 1989). Another legislative attempt (3670 Sayılı Yasa, *Resmi Gazete* No. 20679, Oct. 28, 1990) faced annulment by the Court in 1991 (E: 1990/36, K: 1991/8, April 9, 1991).

headscarf ban, since the constitution itself was not subject to substantive constitutional review.⁴⁵ The strategy worked as planned, as the AKP and the MHP passed the amendment in the parliament in February 2008.⁴⁶

However, the Constitutional Court had a different idea about constitutional review. Since it could rule on the procedure of an amendment but not its substance, the Court employed a line of reasoning⁴⁷ that expanded its competence by collapsing the distinction between form and content. It ruled that since the secular character of the regime was enshrined as an irrevocable principle of the 1982 Constitution, an amendment that would jeopardize secularism would violate the irrevocability provision (Article 4), and therefore be *procedurally* invalid.⁴⁸ The pattern of decision-making bore striking similarities to that observed during the presidential election crisis: the secularist CHP, facing defeat in the parliament, took a contentious political issue to the Constitutional Court, which gladly accepted its jurisdiction over the case, using a dubious procedural argument to rule against a government-supported initiative.⁴⁹

The next stage of the legal drama concerned not only the AKP's policies, but its very existence. The Constitutional Court has frequently used its authority to ban political parties to defend the regime against what it saw as separatist, subversive and religious fundamentalist movements.⁵⁰ The chief prosecutor of the Supreme Court of Appeals, Abdurrahman Yalçinkaya, asked the Constitutional Court for the closure of the AKP in March 2008. In its July 2008 ruling, the simple majority of the Constitutional Court identified the AKP as a focal point of anti-secular

⁴⁵ Turkey's Constitutional Court is mandated to oversee the procedure of a constitutional amendment, but not its content.

⁴⁶ Act No. 5735, *Resmi Gazete*, February 23, 2008, No. 26796, p.1.
http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=TUR&p_classification=01.01&p_origin=COUNTRY

⁴⁷ Uzun, Mehmet Cengiz. "The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education," *Penn State International Law Review* 28 (2009): 383–426.

⁴⁸ E.2008/16, K.2008/116, June 5, 2008. <http://www.anayasa.gov.tr/en/content/detail/141/>

⁴⁹ The Court's ruling closed legal venues within the existing constitutional order, but the ban has since been superseded *de facto* in most universities and public institutions.

⁵⁰ Kogacioglu, Dicle. "Progress, unity, and democracy: dissolving political parties in Turkey." *Law & Society Review* 38, no. 3 (2004): 433–462.

activity and ruled to cut much of its public funding, but its failure to secure a qualified majority saved the party from a ban.⁵¹

The AKP government learned a valuable lesson from the judicial-political crises of 2007–2008: a strong mandate to govern and the decreasing likelihood of a military coup did not ensure political consolidation if the judicial institutions were to remain hostile. A complete overhaul of the high courts was necessary. Thus, the AKP leadership decided to redesign high courts and the judicial administration to curb the influence of anti-government jurists in 2010.

Uncovering the Deep State: The Ergenekon and Balyoz trials

Around the same time as the secularism-related rulings, the Turkish judiciary found itself adjudicating over the long history of coups, coup attempts, and human rights violations. The country had suffered two full-fledged military coups (1960 and 1980) and two incidents in which the military forced the civilian government to resign (1971 and 1997). The military high command's tendency to use alleged anti-secular activities, Kurdish separatism, and/or the communist threat as an excuse to intervene into civilian politics is well-documented. It was against this historical backdrop that reports of arrests in connection to a coup plot made the headlines in June 2007. Since then, the *Ergenekon* (named after a legendary valley in Turkish mythology) and *Balyoz* [Sledgehammer] trials have shaped political debates. In addition to the coup plots against the AKP government in its first term in office, the trials uncovered the history of extra-judicial killings, massacres, mass graves, torture, and forced removals, which mostly targeted civilian Kurds during the internal conflict with the PKK rebels, as well as many leftists, liberals, and members of minority groups at different periods.

At the risk of over-simplification, there were three kinds of opinions. For the supporters of the prosecution, the trials represented nothing less than a rule-of-law revolution, as scores of retired and active-duty military personnel, including generals, faced judicial accountability for the first time in the nation's history. One commentator even called the Balyoz trial Turkey's "Nuremberg."⁵² Their critics dismissed the trials as a campaign to discredit and demoralize the

⁵¹ E.2008/1, K.2008/2, July 30, 2008.

⁵² Cengiz Çandar, "Balyoz Davası: Türkiye'nin Nürnberg'i. . ." *Radikal*, 23 September 2012.

Armed Forces, whose guardianship of the regime disturbed the Islamist AKP government. A third opinion agreed in principle with judicial accountability for coup attempts and human rights violations, but expressed skepticism with respect to the way the prosecution was handling the case. Many commentators pointed to the long pre-trial detention periods, the collection of evidence through wiretapping and the surveillance of electronic communications, and the hastily prepared and lengthy indictments which contained information that was at best tangentially related to the cases at hand.⁵³ In the end, the sympathetic critics have considered the trials a missed opportunity in Turkey's coming to terms with its past.⁵⁴

The *Balyoz* verdict jailed over 300 defendants, most of whom were retired or active-duty military personnel. The Supreme Court of Appeals upheld the majority of the sentences in October 2013, while acquitting 36 and asking for a re-trial for 88. The *Ergenekon* verdict sentenced 17 defendants for life, including former Chief of Staff İlker Başbuğ, and handed harsh sentences to the majority of the 275 defendants, among them military personnel and civilians, who are likely to appeal in the coming months.⁵⁵

The *Balyoz* and *Ergenekon* trials began in 2007, before the AKP ban ruling (2008) and the constitutional referendum (2010), and ended in 2012–2013. Therefore, they reflect the contentious politics in and around the judiciary in those years. A number of legal professionals were punished by their colleagues because they were on the “wrong” side of the dividing line. İlhan Cihaner, a prosecutor accused of having ties to the “deep state” was arrested, only to be reinstated by the Supreme Board of Judges and Prosecutors.⁵⁶ The *Balyoz* and *Ergenekon* defendants complained about the courts' arrest warrants when trial without arrest would be a viable option. For example, one of the defendants, Mehmet Haberal, successfully petitioned the Supreme Court of Appeals to punish nine judges who did not release him on health grounds. Those in favor of the prosecution, including the prime minister, decried the punishment as

⁵³ H. Akin Unver, “Turkey's ‘Deep-State’ and the Ergenekon Conundrum,” *Middle East Institute Policy Brief*, no. 23 (April 2009); Bill Park, “Ergenekon: power and democracy in Turkey,” *Open Democracy Net*, September 17, 2009. <http://www.opendemocracy.net/article/ergenekon-power-and-democracy-in-turkey-0>

⁵⁴ Emma Sinclair-Webb, “The Turkish Trial That Fell Far Short,” *The New York Times*, August 6, 2013.

⁵⁵ “Turkey Ergenekon case: Ex-army chief Basbug gets life,” *BBC News*, August 5, 2013.

1.2 ⁵⁶ “Europe: Lies and whispers; Turkey's coup plotters,” *The Economist*, February 27, 2010: 59.

tampering with the courts during the trial process.⁵⁷ In sum, much of the legal drama took place outside the courtroom, as all parties to the conflict were trying to remove the legal professionals perceived as obstacles.

Off-the-Bench Responses to the Judicial Crisis

The Şemdinli incident, and especially the disbarment of the first prosecutor investigating the case, was the first test for the fledgling judicial associations. Would judges and prosecutors stand up for their colleague, or would they concur with the Supreme Board's decision that prosecutor Sarıkaya had abused his authority by implicating the military high command? Public debates on Şemdinli reflected a neat dividing line: the military high command, the CHP, and Kemalist pundits supported the Supreme Board, while liberals and pro-government sectors spoke against the disbarment. YARSAV was notably silent throughout, which was interpreted as giving the Board's decision tacit consent.⁵⁸ The judges who would later establish *Demokrat Yargı* criticized YARSAV's silence. Orhan Gazi Ertekin, the co-founder of *Demokrat Yargı*, expressed support for the activist judges and prosecutors who stood up against higher-ups.⁵⁹

YARSAV's website contains no documents between March 2007 and April 2009, when the major legal battles took place. However, the association's president, Ömer Faruk Eminağaoğlu,⁶⁰ maintained a public presence throughout the debates. He opposed the

⁵⁷ "Yargı o kararlarla güvenilirliğini bitirdi," *Hürriyet*, June 18, 2010.

1.3 ⁵⁸ The only document that cites the Şemdinli case on YARSAV's website is a press release dating August 27, 2011. The document does not state an opinion on that case; instead, it criticizes the vocal defenders of the Şemdinli prosecutor who fell silent in the face of the disbarment of a prosecutor who was investigating a corruption chain with alleged ties to government circles. "Deniz Feneri Soruşturmasını Yürüten Cumhuriyet Savcılarının Görevden Alınması Hakkında Basın Açıklaması." <http://www.yarsav.org.tr//index.php?p=264>

⁵⁹ Orhan Gazi Ertekin, "Çeteler ve 'küçük yargıçlar'," *Zaman*, April 3, 2008. Posing the question of whether this case would trigger a bottom-up revolution in the judiciary, in a similar vein to what happened in France and Italy in the 1970s, Ertekin argues that such a transformation is unlikely given the lack of a non-partisan human rights awareness in Turkish politics and society.

⁶⁰ The controversy around Eminağaoğlu is interesting. Many pro-government commentators, including liberal ones, have labeled him a friend of the coup-mongering civilian-military establishment for his harsh criticisms of the Ergenekon trial process. However, he was also one of the members of the Court of Appeals who ruled in Hrnt Dink's favor when Dink was accused of insulting Turkishness. More recently, he asked the Constitutional Court to declare the "insulting Turkishness" clause (Article 301 of the Penal Code) unconstitutional. "301. madde için iptal başvurusu," *Milliyet*, August 29, 2013.

constitutional amendment to lift the headscarf ban,⁶¹ and supported the Constitutional Court's annulment decision, arguing that only a constituent assembly would have the authority to make changes concerning the irrevocable principles of the constitution.⁶² He was a member of the prosecutorial team that prepared the indictment in the AKP ban case. In turn, the government explored his connections with the military coup plots with the help of wiretapping. In 2009 the Ministry of Justice asked for his disbarment, but the judge who saw his case, Osman Kaçmaz (who later became a YARSAV candidate for the Supreme Board of Judges and Prosecutors), cleared him of charges.⁶³ Kaçmaz himself faced charges of abusing his authority and violating secrecy during criminal investigation. Clearly, there was a life-and-death struggle between the Kemalist judges and the government in those years.⁶⁴

The judicial crises of 2007–2008 highlighted the role of liberal intellectuals in legitimizing the AKP government in the eyes of domestic and international observers who were too keen to interpret the developments through the false dichotomy of secularism vs. Islamism. Instead, the liberals argued, the judicialized conflicts were a power struggle between the old and the new elites, and the moderate Islamists were the “good guys.”⁶⁵ Osman Can, the co-founder of *Demokrat Yargı*, was an active player in the AKP ban decision: as the Reporting Judge of the Constitutional Court, he argued against the proposed ban on the AKP, dismissing the prosecution's claim that the party threatened the secular order. Consequently he became a hero among the pro-government circles, but was dismissed from his university position.

Liberals in the legal complex overwhelmingly supported the prosecution in the Ergenekon and Balyoz trials in the beginning. When high courts and the judicial administration began to punish the judges and prosecutors who saw these cases, *Demokrat Yargı* members

⁶¹ “YARSAV: Türban teklifi devrim yasalarına aykırı,” *Hürriyet*, January 29, 2008.

⁶² “Ulus yetkisi kullanamazsın,” *Hürriyet*, June 9, 2008.

⁶³ “Mahkeme: Eminağaoğlu için davaya gerek yok,” *Milliyet*, February 9, 2010.

⁶⁴ Interestingly, Eminağaoğlu's highly political profile seems to have cost him his seat at YARSAV. He did not receive enough votes to secure a position on the board in the association's elections in November 2009. His successor, Emine Ülker Tarhan, reiterated the association's position that the judiciary should remain independent and politically unaffiliated, but overall she maintained a less confrontational profile.

1.4 ⁶⁵ See, for example: Şahin Alpay, “Making Sense of Turkish Politics,” *The International Spectator: Italian Journal of International Affairs* 43(3) (2008): 5–12.

declared their support for their colleagues in trouble.⁶⁶ It was only after the breakup of the conservative-liberal coalition that *Demokrat Yargı* took a critical stance towards the coup trials.

Turkey's 1789?: the Constitutional Amendment of 2010

As promised in its 2007 election campaign, the AKP government appointed a commission of liberal-minded constitutional scholars to draft a new constitution to replace the undemocratic 1982 text. The commission delivered a draft constitution, which, among other things, proposed to democratize the selection procedure for high courts and the judicial administration, and introduce an appeals process for the decisions taken by military courts and the judicial administration.⁶⁷ Despite the initial euphoria, however, the constitutional project fell off the agenda in 2008. Those sympathetic to the government pointed to the interventions of high courts (described above) to explain why the government had no time or energy to pursue a constitution project. Ergun Özbudun (one of the members of the AKP-appointed constitution commission) and Ömer F. Gençkaya noted that in addition to the judicial crises, “possibly some differences of opinion within the [AKP] itself caused the project to be silently shelved at least for the time being.”⁶⁸ The AKP leadership’s penchant for selective reform, rather than full-fledged democratization, might be another plausible explanation: the party committed itself to building a broad-based coalition for a constitutional amendment to lift the headscarf ban in early 2008, instead of pushing for its original campaign promise of overhauling the constitution.

In early 2010, the government announced a new approach to constitution-making. While the commitment to ratifying a new constitution in the future was not abandoned, the proposal was to amend more than twenty articles of the 1982 constitution to expedite the democratization process. The constitutional amendment proposal covered a host of issues ranging from lifting the

⁶⁶ “Mahkeme sonuçlanmadan hâkime ceza vermek gözdağı,” *Zaman*, June 17, 2010.

⁶⁷ Arslan, Zühtü. “Turkey’s Bid for the New Constitution.” *Insight Turkey* 9.3 (2007): 7–17.

⁶⁸ Özbudun, Ergun, and Ömer Faruk Gençkaya, eds. *Democratization and the Politics of Constitution-making in Turkey*. Central European University Press, 2009: 105.

impunity of the makers of the 1982 coup to socioeconomic rights.⁶⁹ Redesigning the judiciary was at the heart of amendments.⁷⁰ Four sets of proposals stood out in this regard: (1) changing the size and composition of the Constitutional Court and the Supreme Board of Judges and Prosecutors; (2) introducing an appeal process for some Supreme Board of Judges and Prosecutors and military court decisions;⁷¹ (3) allowing individual citizens to make personal applications to the Constitutional Court; and (4) restructuring the jurisdiction of civilian and military courts in favor of the former.

One of the key items of the 2010 constitutional amendment was a proposal to change the selection procedure for membership on the Supreme Board of Judges and Prosecutors, which was composed of high court judges and justice ministry representatives. There were, broadly speaking, two proposals to redesign the Board: one view, popular with the government, defended the expansion of membership to lower-court judges and prosecutors, as well. The alternative option, advocated by *Demokrat Yargı*, was to include as Board members lower-court judges and prosecutors, as well as representatives from other components of the legal complex, such as lawyers and legal scholars. While the first proposal aimed to democratize the Board's membership by ending the hegemony of high-court judges, the second proposal conceptualized the Board not merely as an institution regulating the legal profession, but also as a field of political contestation that would build the long-ignored connections between the judiciary and the broader social and political forces in which it was embedded.⁷² The first proposal prevailed.

Supporters of the amendments rightly feared a Constitutional Court veto similar to the one that annulled the headscarf reform. Osman Can caused a minor political earthquake when he declared, as the Reporting Judge of the Court, that the parliament could ignore a partial annulment decision by the Court, since the Court had no authority to rule on the substance of a

⁶⁹ For a full review of the amendments, see: Ergun Özbudun, "Turkey's Search for a New Constitution," *Insight Turkey* 14(1) (2012): 39–50; Bali, Asli Ü. "The Perils of Judicial Independence: Constitutional Transition and the Turkish Example," *Virginia Journal of International Law* 52(2) (2011): 235–320.

⁷⁰ Fevzi Bilgin, "Turkey's 'Constitutional Moment'," *The Washington Review of Turkish & Eurasian Affairs*, June 2010.

⁷¹ The amendments only ensure judicial review for the Board's impeachment decisions. Hayri Keser & Fatma Niyazioğlu, "The Board of Judges and Prosecutors in Turkey," *İnönü Üniversitesi Hukuk Fakültesi* 2(2) (2011): 119–156.

⁷² "HSYK: Hakimsiz ve Savcısız Yüksek Kurul," *Yeni Şafak*, March 14, 2010.

constitutional amendment.⁷³ He resigned from the Court soon after the comment. In the end, the Constitutional Court did not rule against the amendments, but took the issue to a popular referendum.

The amendment referendum took on a political significance beyond the proposed changes because the AKP portrayed the vote as a giant step toward “advanced” democracy. There was no shortage of revolutionary metaphors: declaring his support for the referendum process, Osman Can once referred to the overall social and legal change around 2010 as Turkey’s 1789 moment.⁷⁴ The secularist opposition campaigned against the referendum, arguing that the reconstruction of the judiciary amounted to government takeover, rather than democratization. The Kurdish political movement, dismayed by the absence of proposals regarding Kurds’ cultural rights, campaigned for a boycott. All eyes turned to liberals who had thus far maintained the pro-government alliance against bureaucratic and military tutelage, yet expressed disappointment with the limited amendment proposals.⁷⁵ Most liberal public figures, including the leadership of *Demokrat Yargı*, declared that they would support the amendments under the motto “not enough, but yes” [*yetmez ama evet*].⁷⁶ The referendum was ratified by 58% of the voters on the September 12, 2010. A new beginning for the judiciary was underway.

Fallout: The Supreme Board Elections and the End of the Conservative-Liberal Coalition in the Judiciary

The election for ten seats on the Supreme Board of Judges and Prosecutors was the first step following the constitutional amendments. It was the first time that legal professionals working at lower-level courts would vote for the Board members. The democratic transition of the Supreme Board was off to a rough start, however. The Supreme Electoral Council [*Yüksek*

⁷³ “Meclis’in Yüksek Mahkeme’ye karşı direnmesi meşru,” *Milliyet*, June 13, 2010.

⁷⁴ “Osman Can: Türkiye bir devrim süreci içerisinde,” *Zaman*, April 17, 2010; “Darbe yargısının sonu geldi,” *Zaman*, August 29, 2010.

⁷⁵ The national threshold of 10% for general elections rules out the parliamentary participation of small parties and regional political movements (like the Kurdish political parties). Although the Law of Political Parties, rather than the constitution, should be amended to lower the threshold, the AKP’s reluctance to eliminate the most striking obstacle to full democratic participation often leads critics to question the sincerity of the party’s commitment to the reform agenda. Haldun Gülalp, “The Battle for Turkey’s Constitution,” *The Guardian*, September 4, 2010.

⁷⁶ “‘Yetmez ama evet’ kampanyası,” *Taraf*, July 2, 2010.

Seçim Kurulu], a body that regulates and monitors elections in Turkey, imposed a propaganda ban on candidates. The decision eliminated the possibility that individual candidates' principled ideas would influence the vote, and increased the likelihood that voters would choose candidates based on vaguely defined "blocs." It was in this context that rumors of an unofficial list of candidates, preferred by the Ministry of Justice, began to circulate.

The election was held on October 17, 2010. The pro-government candidates won all the seats.⁷⁷ Deputy Secretary of the Ministry of Justice and allegedly the person behind the Ministry list, İbrahim Okur, received the highest vote. YARSAV and *Demokrat Yargı* failed to send members to the Board. Thus, the election signified not only the triumph of the pro-government camp within the judiciary over the anti-government camp, but also, a rift within the coalition for judicial reform: individuals more closely aligned with the government claimed the victory for themselves, while the liberals were sidelined.

The Board elections complicated the politics of the legal complex. Perhaps not surprisingly, YARSAV regarded the election results as a confirmation of their suspicion that the government was eroding judicial independence by taking over judicial institutions. Politicians and pundits who identified themselves as Kemalists tended to agree with this analysis. However, the election results forced the secular-republican alliance to realize something about themselves, too: they had no appeal for the lower-level judges and prosecutors, especially those living in the provinces.

It was not only YARSAV that protested, however. Many commentators and legal professionals who supported the 2010 referendum expressed disappointment with the post-referendum victory of ministry bureaucrats and subsequent developments in the judiciary.⁷⁸ Despite repeated denial by the Ministry of Justice, the smashing victory of Ministry-affiliated judges was attributed to ministerial interference during the campaign process. There was variation in opinion among liberal observers when it came to identifying the culprit. Some pointed the finger at the ministry bureaucrats who sought to maintain the oligarchical status quo

⁷⁷ "HSYK Adalet'in," *Taraf*, October 18, 2010; Cüneyt Ülsever, "Yargı bağımsızlığına el-Fatiha", *Hürriyet*, October 18, 2010.

⁷⁸ Ahmet Altan, "Faili meçhul yargı," *Taraf*, December 15, 2011; Neşe Düzel, "Ümit Kardaş: Üç general girdi diye vesayet bitmedi," *Taraf*, December 19, 2011.

within the judiciary by using the AKP's new hegemony.⁷⁹ Others argued that the Gülen movement's long-standing plan to put sympathizers in key positions in the police and the judiciary bore fruits with the Board elections.⁸⁰

Many members of *Demokrat Yargı*, the government's ally until several days before the Board election, cried foul.⁸¹ *Demokrat Yargı* judges accused the Gülen movement for orchestrating a court-packing campaign that rewarded loyalists to the movement, while screening out liberals, leftists, and Alevis – in general, candidates who were not pro-AKP.⁸² The change of personnel in the Supreme Court of Appeals in mid-2011, in which a list of 160 candidates replaced outgoing members, seems to have reinforced *Demokrat Yargı*'s belief of court-packing.⁸³ The confrontation with the new Board deepened the rift within the association: Osman Can, one of the founding members, left *Demokrat Yargı*.⁸⁴ He joined the AKP in September 2012, and was appointed to the party's central decision-making and administrative board.⁸⁵ It seemed that there was no conjunction to hold together the two parts of the famous slogan: “not enough” and “yes” drifted apart.

The nuance in YARSAV's and *Demokrat Yargı*'s similar criticisms reveals a key difference in their position on judicial reform: while the former portrayed the election as a confirmation of their fear of government takeover, the latter blamed the outcome on a mixture of court-packing and an impoverished judicial culture that failed to assert its professional and

⁷⁹ See: Melih Altınok, “AKP uyuma statükonun bürokratlarına uyma,” *Taraf*, October 5, 2010.

⁸⁰ Oral Çalışlar, “Yargıdaki sorun Cemaat mi, zihniyet mi,” *Taraf*, February 10, 2013. Also see: Demiray Oral, “Yeni yargı savaşları,” *Taraf*, February 9, 2013; Alper Görmüş, “HSYK seçimleri ve ‘muhafazakâr demokrat’lar,” *Taraf*, October 15, 2010.

⁸¹ The internal strife within the association had to do with the nature of cooperation with the Ministry of Justice. According to Orhan Gazi Ertekin, the majority rejected Osman Can's suggestion to draw a list of candidates with the ministry, opting instead for an independent bloc.

⁸² “Cübbeniz sizin olsun artık!,” *Radikal İki*, August 25, 2013.

⁸³ “Türkiye'deki din kilisesi yargıyı devletleştirdi,” *Hürriyet*, July 3, 2011.

⁸⁴ Orhan Gazi Ertekin refers to disagreements within *Demokrat Yargı* to explain Osman Can's resignation. Can, on the other hand, holds that he did not want to take part in a judges' association after his decision to leave his post at the Constitutional Court. “Osman Can'ın prensip istifası,” *Taraf*, November 1, 2010.

“Osman Can: Türkiye yeni anayasasını yapmazsa parçalanmaya doğru gider,” *Zaman*, December 1, 2010.

⁸⁵ “Eski Anayasa Mahkemesi raportörü Can, AK Parti'de,” *Zaman*, September 27, 2012.

political autonomy from the bureaucracy.⁸⁶ For YARSAV, judicial reform was over-politicized, whereas for *Demokrat Yargı*, the failure owed to a *lack* of independent political thinking. The fragile judicial institutions became battlegrounds for political actors because they lacked a self-identity or collective memory, argued *Demokrat Yargı* judges.

Demokrat Yargı and other supporters of the 2010 constitutional referendum faced difficult questions in the wake of the Supreme Board elections. When Kemalists and most leftists warned the supporters of the constitutional amendments that court-packing was the government's motivation for judicial restructuring, liberals dismissed them. Furthermore, the Gülen movement's striving for judicial hegemony had mostly been laughed off by liberals as a Kemalist conspiracy theory; yet after the October 2010 Supreme Board elections this claim was fully endorsed by *Demokrat Yargı*. Liberals, including *Demokrat Yargı* judges, frequently attended workshops and conferences organized by the Gülen movement.⁸⁷ The fallout ended not only the former alliance, but also many liberals' public endorsement of the movement as a benign civic force.

Demokrat Yargı members tried to smooth out their contradictions by distinguishing between procedural democracy and the cultivation of a participatory democratic culture. They said they supported the 2010 constitutional amendments to assure the end of an oligarchical system within the judiciary. When they were criticized for naivety in light of the post-referendum developments, they argued that these developments confirmed their conviction that procedural democracy within the judiciary is a necessary, but not sufficient condition for full democratization.

Minister of Justice Sadullah Ergin, ministry bureaucrats, and a few members of the legal complex defended the election process and results.⁸⁸ This camp argued that judges' associations like YARSAV and *Demokrat Yargı* did not speak to the ideas or aspirations of most legal professionals; therefore they lost in the elections. Accordingly, perceived problems with the new judiciary were considered either the leftover from the old guard, or bumps in a transitional

⁸⁶ Ali Bayramoğlu, "HSYK seçimlerine nasıl bakmalı?" *Yeni Şafak*, October 20, 2010.

⁸⁷ "Abant Platformu'nda 'Vesayet ve Demokrasi' masaya yatırılacak," *Zaman*, June 23, 2010.

⁸⁸ "Ergin: Hakimlere telkinde bulunmadık," *Hürriyet*, October 18, 2010.

period. Pro-government sectors stated time and again that the “normalization” of Turkey as a fully civilianized and democratic country was underway, and only required the deepening of reforms launched under the AKP government.

A Pyrrhic Victory? Recent Developments in the Judiciary: 2011–2013

In his reflection on the Supreme Board elections, Kemal Şahin, *Demokrat Yargı*'s losing candidate, referred to the election results as a “Pyrrhic victory” for the government.⁸⁹ These ominous remarks seemed off the mark at a time when the government had finally managed to subdue formidable adversaries like the military and high courts. Besides, the rift within the conservative-liberal coalition did not cost the AKP many votes. In fact, the party increased its vote share to roughly 50% in the June 2011 general elections. As one commentator noted: “the divided and stagnant nature of the opposition in contrast to the increased geographic reach of the AKP vote are all signs that the AKP has emerged as a dominant party.”⁹⁰ What could possibly go wrong for the government, then?

First of all, the new judiciary has not satisfied the desire for justice. The overwhelming consensus is that precious little has changed in judicial behavior since late 2010. The president, prime minister, opposition leaders, political activists, pundits, justices of appellate courts, and even judges on the Supreme Board of Judges and Prosecutors, have all expressed dissatisfaction with the new judiciary. Lengthy pre-trial detentions, the use of secret witnesses that give an undue advantage to the prosecution over the defense in coup-related trials, formal and informal sanctions against dissenting prosecutors, judges' use of statutes of limitations in cases concerning grave human rights violations, and the ongoing persecution of peaceful activists stand out as widely reported failures of the justice mechanism in Turkey.

The new Supreme Board has sparked controversy over its appointment, re-appointment and sanction decisions. Former president of YARSAV, Ömer Faruk Eminağaoğlu, was

⁸⁹ “HSYK Adalet'in,” *Taraf*, October 18, 2010.

⁹⁰ Çarkoğlu, Ali. “Turkey's 2011 general elections: towards a dominant party system?.” *Insight Turkey* 13.3 (2011): 43–62, 45.

transferred to a different province by the Board without his consent,⁹¹ and has been indicted for contempt of court and participating in a peaceful protest.⁹² A number of YARSAV members faced disciplinary action under the new Supreme Board.⁹³

Administrative punishment did not hit once-powerful Kemalists only. There have been allegations of illegitimate promotion and transfer decisions since the new Board began its operation in late 2010, and two cases brought these claims to the headlines. Tolga Onur, a young lawyer aspiring to become a judge, was denied entry for an unpaid utility bill.⁹⁴ Around the same time, Didem Yaylalı, a training judge, ended her life. Her family and friends said that the cause of her suicide was the denial of promotion by the Supreme Board of Judges and Prosecutors, presumably owing to her lifestyle that did not fit the new Board's conservative norms⁹⁵ – a claim rejected by the Board.⁹⁶

Moral outrage over the new judiciary's behavior is only part of the story. Judicial realpolitik has recently taken a new turn. On February 7, 2012, undersecretary of the National Intelligence Organization, Hakan Fidan was summoned to court for organizing secret talks between the PKK and the government. Fidan was not arrested, but the incident sparked controversy over the future of the governing coalition. What seemed to be a confrontation between police intelligence and the National Intelligence Organization raised the suspicion of a divide between Prime Minister Recep Tayyip Erdoğan's inner circle, which included Fidan, and the Gülen movement. Commentators pointed out that the police chiefs and prosecutors loyal to the Gülen movement orchestrated this standoff to test Erdoğan's power – an accusation vehemently denied by the movement's spokespersons. Denouncing the "state within the state," Erdoğan initiated a quiet yet ambitious campaign to curb the Gülen movement's influence in the police and intelligence units. Since the February 7 incident, pro-Erdoğan and pro-Gülen pundits and politicians have fallen into a peculiar love-hate relationship, in which mutual accusations

⁹¹ "Yargıda büyük operasyon," *Milliyet*, June 20, 2011.

⁹² "Eminağaoğlu 10 günde 3'üncü kez hakim karşısında," *Milliyet*, February 23, 2012.

⁹³ "Yeni tasfiye süreci başladı," *Hürriyet*, May 21, 2012.

⁹⁴ Ayşe Arman, "46 liralık su faturası için meslekten atıldı," *Hürriyet*, September 10, 2013.

⁹⁵ "Genç hakim adayı Yaylalı intihar etti," *Hürriyet*, August 23, 2013.

1.4.1 ⁹⁶ "HSYK'dan "hakim adayı Didem Yaylalı" açıklaması," *Anadolu Ajansı*, August 23, 2013.

alternate with calls for unity – although the situation in late 2013 can be more accurately described as all-out war.

Naturally the conflict was carried over to the judicial realm, too. The prosecutor who summoned Hakan Fidan was serving on a Court with Special Authority (“special court” in short). The special courts, established in 2004 to combat terrorism and organized crime, operated as some kind of state-of-exception tribunals. The main coup plot trials and terrorism-related trials were carried out by these courts. Four months after the February 7 incident, they were dissolved.⁹⁷ Although critics who point to due-process violations under these courts have long called for their abolishment, it seems that their sudden closure was less a justice-seeking measure than Erdoğan’s response to the Gülenist judges and prosecutors who were overrepresented in these courts.⁹⁸

It is too soon to predict the political implications of this fallout. The swiftness and acerbity with which the conflict between the pro-Erdoğan and pro-Gülen camps broke out seems to have taken everyone by surprise.⁹⁹ It becomes clear from the statements of these camps’ spokespersons, as well as outside observers, that the conflict is primarily about the control of judicial and intelligence institutions.

Off-the-Bench Responses to the Recent Developments

YARSAV finds itself fighting an uphill battle in the wake of the recent judicial transformations. YARSAV-affiliated judges no longer dominate the higher echelons of the judiciary. Quite to the contrary, YARSAV denounces the persecution of its members at the hands of the new Supreme Board of Judges and Prosecutors through transfers and disciplinary action.¹⁰⁰ With respect to the coup trials, YARSAV has maintained its critical stance toward the prosecution throughout, but its emphasis has changed over the years: while YARSAV under the

⁹⁷ Accordingly, the courts will be disbanded after finishing their existing caseload.

⁹⁸ İsmet Berkan, “Cemaat ile hükümetin son savaş alanı: Özel yetkili mahkemeler,” *Hürriyet*, June 8, 2012; “AKP'nin elinde Cemaat'i bitirebilecek bir arşiv var,” *BirGün*, November 25, 2013.

⁹⁹ “AKP – Cemaat geriliminin arkasında ne var?” *BBC Türkçe*, November 19, 2013.

¹⁰⁰ “Dünya yargıçlarına YARSAV özel raporu,” *Hürriyet*, September 4, 2011.

leadership of Eminağaoğlu criticized the trials *as such*, the association's leaders after 2009 abandoned overtly political statements, and instead framed their objections in terms of fair trial standards. For example, following the verdict on the Ergenekon case, YARSAV asked the Supreme Board to investigate the due-process violations, especially the hearings that were held in a penitentiary center, closed to the public.¹⁰¹

Judges affiliated with *Demokrat Yargı* claim that the reconstruction of the judiciary in 2010–2011 did not culminate in its democratization.¹⁰² Rather, the Kemalist old guard's fortresses (the Supreme Board, the Supreme Court of Appeals, and the Council of State) were conquered by the conservatives,¹⁰³ who have thus far reproduced the nationalist and pro-state attitudes of the judiciary. *Demokrat Yargı* repeats its claim that judicial independence involves judges' freedom from their superiors as much as freedom from executive intervention. However, the target has changed: rather than the Kemalist high court judges, their post-2010 writings take issue with the conservative-nationalist hegemony within the judiciary.¹⁰⁴ In light of their assessment, they call for a de-centered, non-hierarchical judiciary,¹⁰⁵ but no longer consider collaboration with the pro-government forces a viable mechanism to achieve this end.

Demokrat Yargı has been supportive of the prosecution in the early phase of the coup trials, but quite unlike some of their former allies who rejoice in the harsh sentences against alleged coup-plotters,¹⁰⁶ *Demokrat Yargı*'s members have become increasingly vocal against the

¹⁰¹ "HSYK'ye soruşturma çağrısı," *Cumhuriyet*, August 14, 2013.

¹⁰² "Demokrat Yargı Eşbaşkanı Orhan Gazi Ertekin'le Söyleşi, Siren İdemen ve Yücel Göktürk, 'Yeşil Gece,'" *Express*, s: 121, Temmuz-Ağustos 2011, *Express* ilave: sf: 1–16 (reprinted in Orhan Gazi Ertekin, Faruk Özsu, *Türkleşmek, İslamlaşmak, Memurlaşmak: Ak Parti, Cemaat ve Yargının Hikayesi*. Nika Yayınevi, 2013): 35.

¹⁰³ *Demokrat Yargı*'s *plus ça change, plus c'est la même* line of criticism seems to be embodied in the professional life of its co-founder, Orhan Gazi Ertekin. The powers-that-be before the 2010 constitutional referendum denied him a promotion as a first-class judge. Minister of Justice Sadullah Ergin, then in alliance with *Demokrat Yargı* to end the Kemalist hegemony, protested the politicization of promotion decisions on a TV show, arguing that Ertekin was not promoted by the Supreme Board of Judges and Prosecutors simple because he was a dissident. The new (and presumably government-friendly) Board, elected after the 2010 referendum, also rejected his request for a promotion in 2011. "Ertekin'den HSYK ve Ergin'e isyan," *Vatan*, September 22, 2011; "Adalet arayan hakim," *Taraf*, May 11, 2013.

¹⁰⁴ Faruk Özsu, "Yargıyı anlama kılavuzu," *Radikal İki*, March 31, 2013.

1.5 ¹⁰⁵ Dink davası bir derin devlet davasına dönüşebilir,' *Agos*, September 20, 2013.

¹⁰⁶ "Hilmi Özkök, balyoz kararlarını Zaman'a yorumladı: Umarım iyi dersler çıkarılır," *Zaman*, September 23, 2013.

due-process violations following their fallout with the government. Especially when Ahmet Şık and Nedim Şener, journalists who investigated the activities of the Gülen movement were arrested in the course of the Ergenekon trials, *Demokrat Yargı* distanced itself further from the prosecution.¹⁰⁷ *Demokrat Yargı*'s Faruk Özsu lists all the due process violations throughout the trial process to conclude that naked power, rather than a concern for justice, guided the prosecutions.¹⁰⁸ Likewise, Orhan Gazi Ertekin argues that the Ergenekon trial process has obscured, rather than illuminated, the connections between the “deep state” and human rights violations in the country’s recent past.¹⁰⁹

In a somewhat surprising twist of events, YARSAV and *Demokrat Yargı* found themselves in alliance in the wake of the Supreme Board elections. In June 2011 the erstwhile rivals protested together the new Board’s decision to transfer judges and prosecutors without consent.¹¹⁰ Later that year, YARSAV’s former president Eminağaoğlu and *Demokrat Yargı*’s Kemal Şahin refused the inclusion of their name on the Supreme Court of Appeals candidate list. There is no indication that they acted in concert, but both of them described the injustices under the current judicial administration to justify their refusal.¹¹¹

Conclusion

The legal complex in Turkey has undergone dramatic changes in less than a decade. After a long period in which a secular-republican bloc dominated the bar and the bench, dissenting voices began to challenge the hegemony in the mid-2000s. Contentious politics within the legal complex was reinforced by the broader political context, whereby the AKP government sought to build a broad democracy-and-human-rights coalition to defend itself against hostile high courts. Thus, oppositional forces within the judiciary found a strong ally in the government. The shared

¹⁰⁷ Orhan Gazi Ertekin, “24 Mart muhtırası,” *Radikal İki*, April 3, 2011.

¹⁰⁸ Faruk Özsu, “Kurt ile kuzunun hukuk dansı,” *Radikal İki*, October 13, 2013; Faruk Özsu, “Alaturka Nürnberg,” *Radikal İki*, September 30, 2013.

¹⁰⁹ “Ergenekon öldü, yaşasın Ergenekon!” *Radikal İki*, August 11, 2013.

¹¹⁰ Sibel İnceoğlu, “Yeni Anayasada Bağımsız Bir Yargı İçin Neler Yapmalı? Uluslararası Belgeler Işığında Öneriler,” *TBB Dergisi* 2011 (95): 235–268, 257.

¹¹¹ “‘HSYK seçimlerine aday olmayacağız,’” *Milliyet*, November 17, 2011.

frustration with the “old guard” cemented the conservative-liberal coalition, whose crowning achievement was the restructuring of the Supreme Board of Judges and Prosecutors through a popularly ratified constitutional amendment in 2010. Soon after, however, the coalition split up, as the conservatives backed by the Ministry of Justice took over the Supreme Board, sidelining the liberals.

In many ways, the events that unfolded in Turkey between 2005 and 2013 should be interpreted as judicial realpolitik: a cut-throat competition in which laws, decrees, indictments, rulings, disbarments, appointments and transfers were the weapons available to the warring factions. Yesterday’s persecutors became today’s persecuted. Much like Machiavelli’s Florence, allies were fickle, cynicism was rampant, and internal conflict whetted the appetites of outsiders. Rephrasing Hobbes, life on the bench was “solitary, poor, *nasty, brutish*, and short.”

Yet the conflict was fought in the name of principled ideas, as well. As much as ideas were at the service of the competition for power, many protagonists also sought political and judicial power in their quest for redefining the founding principles of the polity. Part of the legal complex mobilized behind a conventional notion of judicial independence (i.e. autonomy from the government) to ward off what they perceived as the encroachments of the AKP government, while others sought to end the hegemonic preservation of the secularist elite by allying with the government. The due-process violations throughout the coup trials were minor aberrations on the way to ending the military’s impunity for some, whereas for others, the means of justice could not be separated so neatly from its ends. Almost all relevant actors agreed that the current constitution was deeply undemocratic, but disagreements inside and outside the parliament paralyzed efforts to draft a new constitution. Ultimately, the government and its allies see the recent developments as the progress of democracy and the rule of law, which will be improved further through gradual reform. However, the claim that the government-backed judicial transformations resulted in a new tutelary system has found adherents, not only among the secularists, but an increasing number of liberals, as well.