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THE ROLE OF THE JUDICIARY AND THE RULE OF LAW IN
DEMOCRATIZATION: THE CASE OF TURKEY AND THE CHANCES OF
DEMOCRATIC CONSOLIDATION

A Thesis

Presented to

The Faculty of the Josef Korbel School of International Studies

University of Denver

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

by

Semih Oktay

March 2016

Advisor: Joseph Szyliowicz

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Title: The Role of the Judiciary and the Rule of Law in Democratization: The Case of Turkey and the Chances of Democratic Consolidation

Advisor: Joseph Szyliowicz

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ABSTRACT

This thesis analyzes the role of the judicial system in democratic consolidation using Turkey as a case study. It reviews the theoretical literature on this topic and identifies the role played by such key elements of the political system as the legislature, the executive, civil-military relations, and party politics. The role of these factors in the development and functioning of the Turkish judicial system is then analyzed over time.

The first aspect of investigation comprised an overview of Turkish governmental development since 1920. The second period of focus was on the reforms from the foundation of the Turkish Republic to the beginning of the multiparty period in 1950. The third period of study was from the start of multiparty elections in the 1950s to the 1980s. The fourth period of analysis ran from the 1980s to the beginning of 2000s. The focus here was on the military coup of the 1980s, which signaled a setback in the democratization process, as well as a weakening of the legal system. It was also a reason for increasing ideological and political conflicts within the legal system. The fifth period of analysis focused on the period from 2002 to today.

The thrust of the analysis claims that Turkish governmental development can best be understood as taking place on a continuum from transitional governments since the 1950s to democratic constitutionalism. Specifically, the hybrid formation of the Turkish government is understood through a careful analysis of the development of the

judiciary branch, and many examples of such were provided throughout the text. Turkey has arguably set itself on the path of democracy and been pushing for a continuing blend of these aspects of government. As such, Turkey may not be called either a constitutional democracy or an authoritarian regime. It may not be called a failed state or an experimental state. Turkey is best understood as a vital hybrid of authoritarian and constitutional government dynamics, and one which can only reflect the prevailing cultural construction of government in Turkey by the people as it continues moving towards democratization.

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I would like to thank my parents and my brother for their support.

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CHAPTER ONE: INTRODUCTION

This thesis focuses on the case of Turkey with emphasis on the functioning of the judiciary in Turkey since 1950. There have been institutional barriers to the impartiality of the judiciary, which have impaired the democratization process, especially since the multi-party regimes of 1950. Constitution-making is another troublesome area that still shows a lack of progress due to a lack of unity within the population. The constitution-making process is variously interrupted by the military, elite groups, and political parties. This analysis focuses primarily on the period from 1950 to 2016 regarding these areas of government. It explores the role of the bureaucracy, elite relations, and competition, and it explains how the military often intervene in these areas. This period shows ongoing deficiencies within the Turkish democracy, the judicial system, and the constitution. Liberal democracy still does not exist in Turkey; rather, Turkey can be classified as a hybrid regime, making it a relevant case study for the cultural construction of governance.

Turkey presents a unique case for democratization theory. Turkey has been in the process of democratization since the 1920s. Yet, democratic consolidation has never been completed in Turkey. Military interventions, the dominance of party politics in different periods, and the absence of reforms in the judiciary can be listed as significant problems in the democratization process. Institutional challenges and the impact of political views of political parties and individuals on the independence of the judiciary

are significant. This is all significant as the horizontal check of the judiciary on legislative and presidential acts is an essential part of democracy.

The Turkish case study demonstrates deliberate judicial reforms and constitutional changes since the 1980s. This has significantly challenged the legitimacy of the judiciary. Both formal and informal institutions affect the functioning and independence of the judiciary. Absences within the court and the lack of constitutional reforms must also be examined based on historical and political factors within a country's history. This Turkish case study shows that the judiciary has, at different times, played a role of both facilitating and hindering democracy in Turkey. Political interference in judicial decisions is eliminating the separation between the executive and the judiciary in Turkey, a distinction that is essential in a liberal democracy.

In practical terms, the attainment of democratic consolidation is a continuing process. Although Turkey is clearly an electoral democracy, it is not a liberal democracy, despite the process of democratization that has been under way. The judiciary is the most prominent institutional body that guarantees the continuation of efforts at democratization. The rule of law determines the legitimacy of a state. In this regard, an independent judiciary would allow the dismantling of any ineffective institutions that are obstacles to democratic consolidation.

Moreover, the judiciary is the only institutional body that guarantees the maintenance of the rule of law. For this reason alone, the relationship between the legal system and democratic consolidation is a vital part of democratization. The judiciary functions as the primary guarantor of the rule of law and the separation of powers.

Democratic consolidation can be accomplished only over the long term, and it requires cooperation among civil and governmental actors. The Turkish case allows for a comparison and contrast between the act of choosing theoretical ideal types of governance and manifesting the culturally constructed realities of the same.

THESIS STATEMENT

This thesis analyzes the existing democratization frameworks and the requirements for democratic consolidation in transitional regimes of Turkey since 1950. Liberal democracy is identified as one possible ideal type of democracy within all possible frameworks. However, this thesis considers how the role of the independent judiciary, the rule of law, and the constitution are requirements for democratic consolidation in democratizing countries – yet, they are ultimately cultural constructions of the society in which they are formed. Challenges to judicial independence are also examined. In this regard, civil and political societies, the rule of law, and constitutionalism are interrelated and may produce different results. Furthermore, from this point of view, it becomes inevitable that historical and political factors arising from within the culture of a given country will shape the forces of politics in general, and of democratization, specifically. Thus, Turkey represents the difference between theory and reality, as it continually draws from ideal types of governance, and proceeds to culturally construct its own processes for democratization.

SIGNIFICANCE OF THE TOPIC

An independent judiciary functions as a major index of the guarantee for the continuation of democratic consolidation in Turkey. An independent judiciary maintains the rule of law as a means to prevent the authoritarian tendencies of political actors and the executive branch. The absence of judicial review procedures and the manipulation of the legal system present dangers to the rule of law.

Overall, the historical nature of this thesis allows it to serve as a reference for future studies in the fields of (a) governance theory, (b) process of democratization, and (c) government in Turkey. This is all even truer in light of the significant number of legal changes since 2007.

Maintaining the trust of the public is necessary for the functioning of democracy and the judiciary. This relationship has received widespread attention from scholars and has been studied thoroughly. Analyzing the literature in these areas and identifying the dimensions of this relationship is crucial for understanding the democratic consolidation process in Turkey.

The decline of democracy in Turkey indicates the necessity of establishing a functioning judiciary and a pluralistic constitution. The Turkish case is also significant since the process of democratization, including the functioning of the judiciary, has been stagnant and has been interrupted several times by political actors and the military since the 1960s. The independence of the judiciary, and also the impartiality of it are even more significant considering the worsening of the current functioning of the judiciary

since 2007. A major issue in the Turkish context is that the functioning of the judicial system is highly dependent on the political structure, on the entire political system. This restricts how the judiciary acts. In this regard, the orientations of the president, the military, the government, and the prime minister towards the role of the judiciary are significant.

ORGANIZATION OF THE THESIS

This thesis builds on democratic consolidation theories to promote understanding of the deficiencies within the Turkish judiciary, and how these deficiencies affect the process of democratization. The first part of the analysis focuses on democratic consolidation frameworks, and it suggests ways scholars have achieved a consensus on what is needed for a consolidated democracy. Also, it emphasizes views explaining how the judiciary might help or hinder democratization efforts in a country. This thesis presents transitional regimes, such as delegative democracies, as a means to analyze challenges to judicial independence efforts in different contexts.

This thesis examines historical judicial reforms and constitutionalism to understand how the judicial independence has been interrupted in the past, considering the relationship between the executive, legislature, and the military. In this context, it analyzes how these relationships can reflect on the present-day judiciary. It is also essential to review historical constitution-making since it has often been regarded as a challenge to Turkey's democratization process. Comparison of the previous changes

within the judiciary to the changes made since the beginning of 2000 is also important to understand the present deficiencies within the judiciary and its decision making.

SUMMARY AND CONCLUSION

Chapter One serves as an introduction, and it highlights the central theme of the project: to utilize a case study of democratization in Turkey since 1950 as an exemplar of the way theories of governance interact with external and internal factors affecting the judiciary, including other important factors such as the the role of the military. Influence and affect of these factors on the judiciary, in comparison to theories, are significant to acknowledge since these factors determine how the rule of law is implemented by the judiciary; democratization can be guaranteed only by the rule of law and the functioning of the judiciary which must maintain the rule of law. Furthermore, every society must choose its ideal forms of governance, and then the most culturally acceptable form of that government will be instantiated; thus the role of the culture in democratization is also examined.

Chapter Two presents a review of the literature. The focus is on the consensus among scholars regarding the definitions of democratization. Specifically, how does a society know when it has achieved full democratization? On the one hand, there are numerous examples of necessary and sufficient conditions for democratization in the literature. On the other hand, there is no consensus regarding specific definitions or criteria for achieving full democracy in every society.

Chapter Three presents the first of the four installments in the case study analysis of Turkey. The first installment is simply a review of the history of Turkish government since the foundation of the Turkish Republic in the 1920s until the present day. It will be useful to engage in this overview up front, in order to allow for a more detailed appreciation of the nuances and the eventful development of constitutionalism in Turkey. For example, in the US or Canada, such a history would be comparatively theoretical as it would read like a textbook application of chosen principles of government. However, in Turkey, one must sensitize oneself to a different story.

Chapter Four presents the second and third more detailed sections of analysis. The second period is from the start of multiparty elections in the 1950s to the 1980s. It covers the interference of actors such as the military and politicians with the judiciary starting with changes made in the multiparty period and continuing with the military coup of 1960 caused by the increasingly authoritarian acts of politicians. The third period runs from the 1980s to the beginning of 2000s. The military coup of the 1980s, in particular, was a massive setback in the democratization process and also a vital factor in weakening the legal system.

Chapter Five presents a fourth detailed period of analysis that extends from 2002 to today. These years may also be divided between the first JDP era from 2002 to 2007, and the two following JDP eras from 2007-11, and from 2011 to today.

Chapter Six offers the conclusion of the analysis in which the historical case study of democratization in Turkey is summarized with a view to the future of democratization in the twenty-first century. It will not be a simple story with a

predictable outcome. It will be the real story of a real struggle of a culture for a constitutional democracy.

CHAPTER TWO: A REVIEW OF THE LITERATURE - DEMOCRATIC
CONSOLIDATION FRAMEWORKS, THE ROLE OF THE JUDICIARY, AND THE
RULE OF LAW IN LIBERAL DEMOCRACIES

Juan J. Linz and Alfred Stepan, claim that democratic consolidation can be achieved by guaranteeing that there are five mutually reinforcing arenas that support consolidation (Linz and Stepan 7). These areas are a civil society, political society, the rule of law, state apparatus, and economic society. Prerequisites are “a lively and independent civil society, a political society with sufficient autonomy and a working consensus about procedures of governance, and constitutionalism and a rule of law” (10). An essential part of consolidation is “A high degree of institutional routinization” (10). In other words, democratic consolidation requires an ample precedence of established beliefs and routines to be already built into the system.

Interestingly, state apparatus and a highly economic society are not always necessary factors for democratization (14). However, they supplement three interacting arenas. A more fully developed economic society in any country calls for a framework of laws and regulations produced by politicians, respected by the public, and enforced by police agencies (14). The legitimate role of a political society requires both compromise and mediation between the people and the state (10).

A comprehensive review by Andreas Schedler, analyzing concepts of democratic consolidation, is similar to that offered by Linz and Stepan. Schedler identifies five concepts involved in democratic consolidation (Schedler 2). These concepts are “avoiding democratic breakdown, avoiding democratic erosion, institutionalizing democracy, completing democracy, and deepening democracy” (Schedler 2). Democratic decay can endanger consolidation before it begins. Democratization can fail by “a gradual corrosion at its backstage leading to fuzzy semi-democracy, to some hybrid regime somewhere in the middle of the road between liberal democracy and dictatorship” (15). The hegemony of particular parties may result in manipulating the media and may threaten competition between political organizations (17). Another level of democratic consolidation necessary to reach full democratization is the need to consolidate the constitution of a country and to eliminate hegemonic political parties.

The last stage of democratic consolidation requires the deepening of the quality of democracies. This phase includes “governmental performance, public administration, judicial systems, party systems, interest groups, civil society, political culture, and styles of decision making” (24). Guillermo O’Donnell also claims that the institutionalization of complex bodies such as the executive, parties, and sometimes the judiciary is necessary for democratic consolidation (O’Donnell, “Illusions about Consolidation” 38). Even a brief review of the literature suggests that there is a difference between the theory of democratization and the actual forms it may take in any given culture.

Wolfgang Merkel emphasizes the need for constitutional, representative, and behavioral consolidation (Puhle 4) as a part of the processes of democratic

consolidation. This model also requires “the consolidation of civic culture and civil society” (Puhle 4) in support of the democratization process. Thus, it is possible to point to a developing theme that runs throughout the literature: every ideal form of governance requires the support of the society to be established, and the form it takes will represent the cultural construction of that form of ideal governance that can be accommodated and assimilated most easily by the society at a given time.

UNDERSTANDING HYBRID REGIMES: INTERACTION OF AUTHORITARIAN ELEMENTS WITH DEMOCRATIC VALUES

Scholars speak about hybrid regimes as the type of states that are classified as democratizing countries, yet still retain remnants of traditional authoritarian regimes on many levels. Electoral authoritarianism (Diamond 24) and competitive authoritarianism (26) are common terms to describe hybrid regimes that cannot be classified as fully democratized. In authoritarian contexts, “formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority” (Levitsky and Way 52). Four criteria are necessary for a regime to be classified as a democracy and not as an authoritarian state:

1. “Executives and legislatures ... [must be] chosen through elections that are open, free, and fair” (53).

2. Liberties “including freedom of the press, freedom of association, and freedom to criticize the government without reprisal” (Levitsky and Way 53) must be respected and protected.
3. Elected government officials must “not [be] subject to the tutelary control of military or clerical leaders” (53).
4. Violations of these principles can occur in all democratic countries. However, these violations must not be widespread enough to impede democratic challenges to governments (53).

In regimes classified as competitive authoritarian regimes (53), frequent violations of these criteria are common. Their legislatures are classified as comparatively weak, but they can become the focus of opposition activity (56).

Hans-Jurgen Puhle analyzes defective democracies and predicts how their deficiencies can challenge the rule of law and constitutional review. Defective Democracies can be classified in many different categories. Illiberal/exclusive democracies are characterized by infringement of political liberties (Puhle 11). In delegative democracies, the checks and balances are ineffective (11). They are also characterized by a “principle of horizontal accountability ... [that] has been reduced or abolished” (11). The executive is dominant over the legislature, and/or it governs by decree (12). Courts do not have effective power in this context. The rule of law is also defective in this type of democracy, and civil rights are limited.

Delegative democracies are characterized by personalistic leadership styles (O'Donnell, "Delegative Democracy" 162) and majoritarianism. Another feature of delegative democracy is "the weakness of 'horizontal accountability', i.e. accountability to other autonomous institutions of the state such as the legislature or the courts" (162). Thus, the president can exploit accountability in a delegative democracy. In a delegative democracy, the president is taken as the embodiment of the nation and is the primary custodian and definer of its interests (O'Donnell, "Delegative Democracy" 59-60). Illiberal democracies can violate civil liberties like the freedom of speech, information or association and also the rule of law as well (Puhle 15). These violations restrict participation and thus are exclusionary in nature. Another area is regarding the rule of law. Practices of both "constitutional and juridical order" (15) are missing in defective, illiberal democracies. The existence of formal institutions is necessary for democracies. Defective Democracies have institutions that are replaced by "informal, clientelistic or populist mechanisms and interactions" (15).

The judiciary is a significant area of political dispute (Levitsky and Way 56). The government can "attempt to subordinate the judiciary, often via impeachment, or, more subtly, through bribery, extortion, and other mechanisms of co-optation" (56). This may result in a reduction of both domestic and international legitimacy (57) for the government. The executive can also restrict the press and/or prosecute independent and opposition journalists (58).

A functioning judiciary is essential for an autonomous political, civil society's, freedom of association to exist. The rule of law should maintain legal guarantees of civil

liberties (Linz and Stepan 7). The rule of law needs a “legal culture with strong roots in civil society [that are] respected by political society and the state apparatus” (14). To maintain this, “a rule of law embodied in a spirit of constitutionalism is an indispensable condition” (10). In return, “the necessary degree of autonomy and independence of civil law and political society must further be embedded in and supported by the rule of law” (10).

DEFINED ROLE OF JUDICIARIES LIBERAL DEMOCRACIES,
CHALLENGES TO JUDICIAL INDEPENDENCE, AND THE SIGNIFICANCE OF
THE RULE OF LAW

There is no scholarly consensus, or common agreement, on how the role of the judiciary affects democratic consolidation. It should be acknowledged that most scholars see judicial independence as essential to a liberal democracy (Russell 1). It is not possible, however, “to prescribe the social, economic, and political conditions required to produce and maintain the minimal requirements of judicial independence” (4). There are “normative issues on which there neither is nor may ever be a consensus among political scientists” (5). There are also empirical issues related to the judicial system. Criteria for choosing judges affect “the fundamental purpose of judicial independence” (5).

It is this ambiguity of definition and execution that allows for the culturally constructed forms to come to light. In fact, without firm criteria for democratization,

then one thing that may always be expected is for the forms of democratization to take on more and more aspects of being culturally constructed. In other words, each society must ultimately construct its own democratization processes, and pursue the manifestation of governance that suits the culture of the society best.

Common, universal patterns, however, can still be identified by analyzing the effects and influences of the judicial system on democratization. In liberal democracies, the conventional view is that democratic accountability often needs to take precedence over judicial independence (Russell 13). Countries in the transformation process face “restrictions on judicial independence of the most fundamental kind—[the] political direction of judicial decision making” (1). Also, “the methods of appointing, remunerating, and removing judges—the traditional focal points of concern about judicial independence” (14) are threats. Furthermore, “promotions and transfers, modes of discipline short of removal, professional evaluation, training, and continuing education” (14) reveal other challenges to judicial independence.

Judicial independence may be threatened by outside forces, but also by forces from inside the judiciary itself, by senior judges using administrative and personnel controls to direct the decision making of individual judges lower in the judicial hierarchy. In this context, the legal elite can serve as an instrument for maintaining the external political elite’s control of the judiciary (7). The administration and review of the work of courts and judges clearly need a careful balance between democratic accountability and judicial independence (19). Executive bodies play a significant role in keeping this balance.

REQUIREMENTS TO IMPROVE JUDICIARIES FOR DEMOCRATIC CONSOLIDATION

Comparative studies show that having an independent judiciary inhibits authoritarianism in all types of states (Gibler and Randazzo 696). Standard views of the role of the judiciary in democratization are diverse. Judiciaries can be seen as a representative of majoritarianism and the state's most elite interests. However, in stable, relatively consolidated democracies, the judiciary provides checks on both the legislature and the executive branches. To reach this stage, the judiciary must be developed and be stable over time. Also, in stable democracies, the judiciary has the responsibility of interpreting the Constitution (Gibler and Randazzo 698). The judiciary must reflect public opinion and reach a consensus to guarantee its legitimate authority. Thus, as is also the case in constitutional matters, judges must leave the responsibility of enforcing their decisions to the culture itself (698).

The judiciary will be only able to guarantee its review function arising from the principle of the rule of law when it has mechanisms to guarantee its independence and impartiality to make it effective (Erozden et al. 7). A state must retain "constitutional institutions and mechanisms in order to create a system limited by the supremacy of the law" (7). The most important of these needs is "judicial review of legislative and executive actions, and administrative decisions in terms of their conformity with the law" (7).

Institutionalization of the judiciary's branches is necessary, and judicial review must exist to control the functioning of judicial branches. The rule of law in transitional democracies allows "the development of a constitutional culture which teaches state actors that the legal bounds of the system cannot be transgressed" (Larkins 606). However, judicial independence is essential for the court to function and maintain the rule of law. The impartiality of the judiciary and the exclusion of its authority from ideologically and politically based attacks are also essential (Larkins 609). Since it is important to measure these two factors, the judiciary must cooperate with other social and political institutions (611).

JUDICIAL STRUCTURES OF COUNTRIES AND THE ROLE OF CONSTITUTIONS IN JUDICIAL INDEPENDENCE

Judiciaries "are vulnerable, in varying degrees, to the power of legislatures to create, modify, and destroy legal structures as well as to establish and alter the system of appointing, removing, and remunerating judges" (Russell 13). Constitutional changes in these countries have been designed to restrict the control of the legislature over the judiciary (13). There are views that constitutional guarantees do not indicate the protection or implementation of judicial independence (22-23). When democratizing countries are lacking a strong tradition of judicial independence, it is still useful to implement protection of the judiciary in the constitution. There are views regarding the dangers of excessive power in the Constitutional Court and constitutionalism within

democratizing countries. It is argued that constitutional review (Hazama 422) can easily preserve political hegemony (422). However, “active constitutional review seems to contribute to democratic consolidation if the constitutional review is endowed with a strong mission of securing democratic principles such as horizontal accountability” (435).

A common argument around the world regarding constitutionalism has been that “Court-based constitutional review [is] a way of controlling executive and legislative action” (Uran and Pasquino 88). Thus, “Constitutional courts can make a significant contribution to the preservation of the rule of law, the protection of the individual’s fundamental rights and the strengthening of democracy” (88). Furthermore, such reviews are “perceived as important factors of stabilization in many countries characterized by new or fragile democratic systems” (Uran and Pasquino 88). Here, again, it is possible to observe the tenuous link between the legitimacy of government and the cultural approval of the government in any society.

SUMMARY AND CONCLUSION

The fundamental dynamics explored in this thesis appear as the processes of democratization. In every form of constitutionalism today we see consist of three branches: legislative, executive, and judicial. However, juxtaposed with the three branches of government is the culture of the society itself and furthermore, the role of the military. Ultimately the three branches of government come together to support

forms of democratization. Yet, at this point, the forms of democratization will become culturally constructed entities.

On the basis of the information presented in the first two chapters, it is possible to make several fundamental generalizations about the processes of democratization that are relevant to Turkey.

1. The agency responsible for maintaining the rule of law is the judiciary. The executive controls the legislature, and the legislature needs to be strengthened. Based on these factors, the rule of law can simply be not effective in cases where the judiciary is not functioning or influenced by other actors such as the executive, the legislature, and the military. As will be presented in the Turkish case as well, the relationship between the executive, the legislature, and the military are very significant also directly or indirectly shaping the functioning of the judiciary.
2. The evolution of the rule of law and the functioning of the judiciary can only be understood by examining different periods in a country's history. In this regard, as mentioned in democratization theories, a given country might experience different phases of democratization such as democratic backsliding or a hybrid democracy. Furthermore, how the judiciary acted based on these changes and against these changes in different periods of the country also define how the rule of law existed. Institutionalization of the judiciary and its reforms can simply be influenced in general by the influence of other actors such as the executive, the military, and the

legislature. As a result, the judiciary might not always guarantee enforcement of the Constitution and the supremacy of the rule of law.

3. The absence of institutionalization can indicate that one or more of these actors might be influential over the judiciary in different periods of the country's history. These absences are also significant regarding the understanding of current deficiencies within judicial systems and whether these practices still exist within the political system. As presented by democratic consolidation frameworks, different actors might have replaced their dominant roles over the political system and the judiciary. This can indicate that efforts of democratization might have been repeatedly interrupted and can even present a greater danger to reach next stages of democratization: democratic consolidation and democratic deepening.
4. Along these lines, one major problem has been the dominant role of the executive branch in many countries.
5. Another major issue has been the problematic nature of fast-paced reforms indicating that in hybrid democracies a major threat has been constant changes within different periods of the judiciary by different actors.
6. Thus, the judiciary often cannot guarantee the rule of law due to internal political competition over the judiciary. Also, to external factors influencing the judiciary, the

rule of law can also be challenged by directly influencing the composition of the judiciary, such as the selective appointment or removal of judges.

7. The balance of power between different actors and the judiciary, autonomous political society, and institutionalization of the judiciary and the constitution are essential for guaranteeing the rule of law. In this regard, competition within political parties, freedom of the media, and institutionalization of independent political culture must be retained and guaranteed. The judiciary, the executive, and the legislature should act within their powers and should not exceed their powers.

TABLE 1

The Continuum of Governance: Based on four criteria for a regime to be classified as a democracy and not as an authoritarian state

Democracy		Authoritarianism
1. Executives and Legislatures	<div style="border: 1px solid black; padding: 5px; display: inline-block;">Blending in the Continuum of Governance</div> 	1. No Representation
2. Basic Rights and Liberties		2. No Rights and Liberties
3. Elected Officials		3. Appointed Officials
4. Culture of Democracy		4. Culture of Oppression

Note: (from Levitsky and Way 53).

Table 1 indicates a fundamental structure of democracy and the continuum of components resulting in an authoritarian society. Review of these governmental bodies

by the judiciary and fair elections within these different bodies are essential. Military authorities must also not have control over these bodies. The power struggle between the executive, the military, the legislature, and the judiciary indicates that checks and balances cannot be enforced within the political system. It can also be constantly violated. Independent judiciary and accountability to courts can be guaranteed by maintaining separation of powers between these forces, and allowing balanced judicial reforms over extended periods of time.

Overall, the existence of legal culture in political society and embodiment of the rule of law within the constitution are also necessary to analyze within different periods of a country, in different phases of democratization. This conceptual framework allows the analysis of the evolution of democratization in Turkey since 1950. The next chapter will present an overview of twentieth-century events describing the birth and development of Turkey as a constitutional democracy.

CHAPTER THREE: A BRIEF HISTORY OF THE EVOLUTION OF CONSTITUTIONALISM AND RULE OF LAW IN TURKEY

The Constitution should be regarded as a necessary component of protecting the rule of law and the independence of the judiciary. The participatory nature of the constitution, requiring the involvement of political actors the civil society, was hard to achieve. Constitutions, by establishing rules for all political institutions, provide a framework for countries to govern themselves collectively (Isiksel 706). However, governments cannot pass laws that contradict the constitution (707). Separation of powers “guard[s] against the arbitrary use of power and enable[s] the effective functioning of government through a division of labor” (707). Turkey is accepted by many as having competitive elections and multiple electable political parties (710). Constitution making is regarded a crucial issue in Turkey since “the actors who inhabit the system understand the constitution as being fundamentally determinative of their political fortunes” (705).

The Turkish Constitutional Court has been a significant body, as it has been able to nullify any law that it found unconstitutional since the beginning of the multiparty regime. Thus, it plays an important role in the checks and balances against governments, and the protection of the rule of law. The president has the right to veto legislation before it faces any constitutional review (Hazama 430). This reduces the need to refer to

legislation or other measures to the Constitutional Court (Hazama 430). Despite the veto power, legislation can be presented to the president again. Thus “constitutional review provides virtually the only veto point available to the opposition parties and members of parliament in the Turkish legislative processes” (429).

The roots of the Turkish Constitutional Court must be examined thoroughly, and it is important to understand the origins of the Constitution. The 1924 constitution did not include a constitutional review procedure (Uran and Pasquino 89). Modernization efforts marked the initial stages of the Turkish Republic. This period started in 1923 and began “the process of modernization which is mainly about building a nation state with [a] secular identity” (Karadut 94). The constitution of 1924 focused on the nation-building process. It was regarded as fundamental in nature (Ozbudun, “The Judiciary” 274). Starting with the Constitution of 1960, “Constitutions opted for a centralized review system by giving this task to a special court rather than to general courts” (275). This special court, the Constitutional Court, gives final rulings on cases it decides. When it “annuls a law, it cannot act as the legislature and lead to a ‘new practice’” (279). Thus “the Court is not allowed to interfere with the legitimate margin of appreciation of the legislature” (279).

The 1950s marked the beginning of a multiparty era. The majoritarian party system threatened Turkish politics from the 1950s to the constitution of 1960 (Karadut 94). A Turkish constitutional review originated from the reaction to the abuse of the legislative majority in 1950. The Democrat Party, which won Turkey’s first democratic election (Hazama 425), evolved to be a repressive party. The constitution of 1961 was

designed to transform Turkey “from a majoritarian democracy into a pluralistic democracy” (Hazama 426). It included “the supremacy of the constitution, the separation of powers and support for a pluralistic and participatory society” (Hazama 426). It also “strengthened the independence of the judiciary and established (for the first time) a constitutional court empowered with judicial review” (Isiksel 714). However, the constitution of 1960 “also granted a constitutional role to a new National Security Council (MGK) of military officials” (Armstrong, par. 5). The National Security Council “effectively shared executive power with the elected Cabinet” (Armstrong, par. 5).

Turkey was one of the first countries to have judicial reviews of the constitutionality of laws (Ozbudun, “The Judiciary” 275). Since its foundation in 1961, the Constitutional Court has “often pursued an activist approach that put it in collision with the elected branches of government” (275). The Constitutional Court’s main function is to review the constitutionality of laws (276). It “also exercises financial control over the legality of the acquisitions, incomes, and expenditures of political parties” (276). Another major function is “trying high office-holders for crimes connected with their official duties” (276). The Constitutional Court’s jurisdiction “encompasses both substantive and procedural review” (277).

There was concern that the Constitutional Court’s jurisdiction would extend over the decisions of the high courts (279). The Constitutional Court’s role, however, was “limited to an examination of the question of unconstitutionality” (279). To strike down a constitutional amendment, a two-thirds majority of participating judges is necessary. It

is important to note that “the decisions of the Constitutional Court are final” (Ozbudun “The Judiciary” 279). In Turkish political history, the Constitutional Court has always acted to preserve secularism (280), and a “centralized, unitary nation-state” (280). The Constitutions of 1961 and 1982 “opted for a centralized review by giving this task to a special court rather than to general courts” (275). If a trial is challenged as unconstitutional, it is referred only to the Constitutional Court (275). The Constitutional Court can also rule regarding party closure cases, and has the final say on decisions (276). Both executive and legislature must apply the final ruling given by courts as stated by the Constitutions of 1961 and 1982 (285).

The constitution of 1980, following the military coup and created by the military government, was “characterized by an authoritarian constitution and remarkably tight constitutional discipline” (Isiksel 716). It was known to change the existing 1961 constitution, which was regarded as more liberal than the 1980 constitution (716). The different constitutions had different procedures for choosing judges (Ozbudun, “The Judiciary” 275). The constitution of 1961 “provided for a mixed body, partly chosen by the other high courts, and partly by elected branches of the government” (275). In comparison, the 1982 constitution eliminated Parliament from the process, which it transferred to the President (275). Claims criticizing the Court’s activism included the number of party closure cases it approved and its excessive activity in other court cases (Uran and Pasquino 89, 91-92). Furthermore, critics gave the closure of twenty-eight political parties as a primary source of concern. The constitutional amendments of 2010 also changed the selection procedure for judges (Ozbudun, “The Judiciary” 275).

The Constitutional limits on Turkish politics were significantly influenced by the 1982 coup. This coup created the basis of the constitution, and dealt with the inability of politicians at the time, such as Turgut Ozal, to focus on these reforms (Hazama 476). It has been argued in this context that the Court was ineffective in dealing with military rule and that it often resisted changes to make party closures harder. The Court could not have questioned or invalidated the laws passed by the National Security Council, a result of the 1982 changes. In this context, the Court was criticized for not ruling against any of the violations at the time (Ozbudun, “The Judiciary” 277). By the 1990s, however, consensus between ruling parties had developed, and there were agreements on constitutional changes and packages for reform (Hazama 476).

The main problem with the 1982 constitution was “its total capitulation to the military’s agenda” (Isiksel 717). The 1980s marked the beginning of the globalization of Turkey (Karadut 95). In the post-military coup era, at the end of the 1980s, during the period of Turkey’s globalization efforts, Turkey started to democratize again (95). To comply with European Union (EU) requirements, more than a third of the Constitution was amended (91) by the end of the 1990s.

The constitution of 1982 restricted the activities of political parties (Ozbudun “Democracy, Tutelarism, and the Search for a New Constitution” 296). Nineteen parties had been banned since the establishment of 1982 constitution (296). According to the EU, the closing of political parties is a continuing problem (296). Political parties expressed the need to maintain an independent judiciary and to remove immunities from party deputies. Regarding legislation, reforms required by the EU accession process

since the late 1980s have benefited the process. However, a new constitution is still required (Boztas 52). As a result, a new constitution that concerns change in the legislature must be “drafted by a particular group of parties but ... a total of decisions made by all members of the assembly will [need to] meet the expectations of Turkey” (Boztas 54).

THE ROLE OF THE MILITARY AND ITS RELATION TO THE JUDICIARY’S FUNCTIONING IN TURKEY

The guardianship role of the army has been prominent since the beginning of the Turkish Republic. Guardianship means neutralizing threats, the internal and external, secularism, and nationalism. An argument has been that coups, statements, and meetings were examples of military involvement (Sarigil 169). Studies have shown that the army involvement was intended “to protect the secular order and to save the state apparatus, rather than to establish a protracted military regime” (169). It has been argued that institutional developments since the 2000s, which reduced the involvement of the military in politics, have been unexpected (169).

Early periods of Turkish Republic were “characterized by civilian supremacy and the relegation of the military into a secondary position vis-à-vis the ruling Republican People’s Party (Cumhuriyet Halk Partisi [CHP])” (173). In this regard, several laws were passed. A new law in 1923 prohibited serving military officers from running for public office (174). The period until 1960 was marked by “effective civilian

control of the armed forces” (Sarigil 174). The military maintained the role of guardianship, starting in this period. However, it was simply a symbolic role until the beginning of 1960. Instead, the government regarded the military as an “instrument of education, social mobilization and ‘nation-building’” (174).

It has been argued that activism within the military augmented after 1960 and resulted in a military coup. The CHP’s electoral loss to the Democratic Party led certain army members to question the legitimacy of the party. As a result of the coup, “the 1961 Constitution simply divided sovereignty among the legislative, judicial, and executive bodies (including the military)” (175). Another change was that the “National Security Council [was] established by the same constitution as part of the executive” (176). The National Security Council has consisted of both civil and military members since 1982. As a result of having “substantial executive powers, the council constituted one of the legal checks on the government” (176). This led to “a political system with double executives: the civilian authority (the government) and the military authority (the military-dominated MGK)” (176).

THE CONTEXT OF HISTORY

The MGK was an essential source for the military, allowing it to maintain its influence since the constitution of 1961 (Sarigil 176). Initially, the MGK had a role to provide information to the government. Although, “after each military intervention, the MGK increased its legal powers and the number of military members at the expense of

civilians” (Sarigil 176). However, it has been argued that the influence of the military increased within the MGK following changes within the constitution, especially after the constitution of 1982. After the constitution of 1982, MGK included five military members and five civilian members (Sarigil 176).

In the historical context, the EU had a major role in changing the attitudes of the military regarding interference in politics, and changed the power dynamics between actors, both positively and negatively. Ruling governments since 2000s started to implement EU accession criteria and requirements, and this meant reducing the influence and authority of the military in political scene. The military’s legitimacy would have been questioned if it had blocked any governmental actions (Sarigil 176-177). Changes within the MGK since the beginning of the 2000s resulted in the increasing participation of civilians within the MGK and reduced the interference of the military. The secretary of the MGK, who used to be a member of the military, is now chosen from the civilian members. The parliament has also increased its control over the budget of the MGK (178-179). The military court’s decisions on civilians were eliminated (179). Furthermore, “principle of retrial according to the decisions of the European Court of Human Rights (ECHR) was introduced into military courts” (179). In this context, the “executive powers of the secretary general of the MGK were eliminated while the MGK itself was reduced to an ‘advisory/consultative body’ ” (178).

SUMMARY AND CONCLUSION

Since the foundation of the Turkish Republic in the 1920s, to the beginning of the multiparty system in 1950s, and on through the affirmation of constitutionalism, rule of law, and the compartmentalization of the military Turkey has been a model of the manner in which a culture allows itself to construct democratization over a period of time. In the next chapter, a more detailed analysis of pivotal events in twentieth-century democratization of Turkey is explored.

CHAPTER FOUR: THE LAST HALF OF THE TWENTIETH CENTURY - TURKISH
DEMOCRATIZATION AND IMPLICATIONS FOR THE FUNCTIONING OF THE
JUDICIARY

THE ROLE OF THE HIGHER COUNCIL OF JUDGES AND PROSECUTORS
WITHIN THE TURKISH JUDICIARY

The Higher Council of Judges and Prosecutors (HSYK) is a significant body of the Turkish judiciary, and it must be examined in today's context, especially its changing role and composition after 2007. The composition of the HSYK was also questioned for being ineffective in the democratization era starting in 1950. The HSYK "oversees the legal curriculum for students, admission into the profession, [and] the appointment, promotion, and disciplining of judges and prosecutors" (Michek and Misztal). Subordination of the HSYK to the Justice Ministry would mean the end of the rule of law as lawmakers and law enforcers would become the same. In Turkey, the president has control of the executive.

The composition of the HSYK is an important and recently debated issue in Turkish politics (Ozbudun, "The Judiciary" 286). Out of 22 members of HSYK, ten "are elected by all general and administrative judges and public prosecutors" (286). Furthermore, "five regular members [are] elected by the two high courts, without any

interference by the executive branch” (Ozbudun, “The Judiciary” 286). The president selects the four remaining members (286). In practice, this appears to be a functional system and is a “common practice in European democracies with a high council of judiciary” (286). However, the judicial activism and political stance of the judiciary have repeatedly been questioned. Furthermore, the judiciary was often regarded as an area of ideological competition in Turkey. Despite recent changes, the judiciary still holds a central place in political debates (289).

THE IMPORTANCE OF THE LEGISLATIVE FUNCTION AND RELATION TO THE JUDICIARY IN TURKEY

It must be acknowledged that “the Grand National Assembly of Turkey (GNAT) has been the cornerstone of the Turkish constitutional system in theory” (Ozbudun *The Constitutional System of Turkey: 1876 to the Present* 59) since the beginning of Turkish Republic. The GNAT has had powers typical of “a parliamentary government system, namely, making laws, supervising the executive, and adopting budget laws” (64). Furthermore, “the laws passed by the GNAT are promulgated by the President of the Republic within 15 days” (66). The president can return some of these laws for revision; however, the revised laws can be submitted back to the parliament. As a result, the only option the president has at this point is to take the case to the Constitutional Court (66).

The constitution of 1924 defined the GNAT as “the supreme power of the state endowed with the executive as well as legislative powers.” (59). In the constitution of

1924, the Turkish National Assembly was “the single authority in the legislative function” (Ozbudun *The Constitutional System of Turkey: 1876 to the Present* 49). The constitution of 1961 maintained this setting. However, “it established somewhat more balanced relations between it and the executive” (59). Although the military had played significant roles in formulating the Constitutions of both 1961 and 1982 (51), the 1961 constitution was more democratic in nature. In the process of the constitution making, there were two political parties (the CHP and the CKMP) (51) in 1961.

The 1960s represented the competition between the Republic’s founding party, the CHP, and the rightist Democrat Party. Party competition in the 1970s between leftist and rightist parties ended with the military coup of 1982. Until the 2000s, the number of parties increased significantly. This period from 1980 to 2000 also represented an increasing role for and an increasing number of centrist and Islamist parties. As a result of this context, the legislative function was limited as a result of military coups (54). The military itself changed the constitution in 1982. Dramatic changes as a result of the military coup included the increasing power of the military over the legislature until the 1990s. In this context, the “Military dominated [the] Turkish legislative function [and] forced Prime Minister Demirel to resign during the 1971 Cahier” (50). Furthermore, the “State Security Courts were established for the first time” (50).

The military involvement in the 1980s led to “The 1981 constituent assembly [,] which acted more systematically [and] was designed [by] the law legislated by the National Security Council on June 29, 1981” (50). This resulted in the inclusion of the National Security Council within the assembly and secured the Council’s position

(Ozbudun *The Constitutional System of Turkey: 1876 to the Present* 50). As a result, the “Constituent Assembly composed of the National Security Council and the Advisory Council would perform the legislative function” (50).

The constitution of 1982 “strengthened the executive in general and the Presidency of the Republic in particular at the expense of the GNAT” (59). The argument for the involvement of the military was that the new government had to receive the support of the military to rule. In this context, the council would also disregard the contribution of the assembly at times when it regarded it as necessary (50). The military extended its power “within the legislative function [in] that the President of the NSC became the President of [the] Turkish Republic after the coup” (51). Furthermore, “Members of the NSC were included in the Presidency Council which was established for six years” (51). Overall, the legislative function stayed limited between the 1960s and the 1980s (50). Throughout these periods, the prime minister also defined the role of the parliament, especially in decisions within parties (59).

Within the constitutional system in Turkey, legislative power maintains a commanding position. The current constitution, like the previous constitutions, forbid “the delegation of legislative power to any other body” (72). Also, especially since the 1960s and 1970s, “Strong personal leadership and strict party discipline [have] reduced the GNAT to a secondary rule, especially during the periods of single-party governments” (72). Periods of single-party government in Turkish history since 1960’s have proved that a party can maintain significant power. Examples of single-party periods, such as 1965-1971, 1983-1991, and 2002-present (Ozbudun *The Constitutional*

System of Turkey: 1876 to the Present 67), show this pattern. This makes it highly unlikely that ministers will be ousted by votes of no-confidence (67).

Turkish politics maintains a dual executive position with power split between the President of the Republic and the Council of Ministers. (Ozbudun *The Constitutional System of Turkey: 1876 to the Present* 73). Until the constitution of 1982, the position of the presidency was regarded as symbolic. In this regard, the argument was that the military had attempted to strengthen the position (73). However, after the end of the term of the president in 1989, “the balance of power shifted considerably to the Prime Minister and the Council of Ministers” (73). It has been argued that even after the president’s term following the military coup, the president has not had a conflicting attitude with the Prime Minister (76). The position of the president became questionable only during the era of the JDP when the conflict between the party, the opposition, and the acting president increased and resulted in discussions over radical presidential changes such semi-presidentialism (75-76).

Furthermore, “the legislative power was considered to belong solely to elected parliaments” (Erozden et al. 13) until recent political changes took place. Thus, “in a sense, the establishment of constitutional courts means sharing this power with the judicial branch” (13). It must be acknowledged that “the common practice in Western democracies is the selection of all or the majority of members of the constitutional courts by political bodies” (13). Based on this view, it is argued that the democracy is strengthened by restricting the Constitutional Court’s role to prevent it from overacting and annulling many laws (13). Turkey presents a unique case regarding the election of

Constitutional Court members in recent history (Erozden et al. 13). Based on changes in 1982, the president appoints three regular members (out of eleven) (14) and one substitute member (out of four) at his discretion (14). He also appoints eight regular and three substitute members proposed by the courts (14).



FIGURE I. A TIMELINE OF SIGNIFICANT EVENTS IN THE EVOLUTION OF 20TH CENTURY TURKISH GOVERNMENT

SUMMARY AND CONCLUSION

The second period of study in this thesis covered the start of multiparty elections in the 1950s to the 1980s. It addressed the interference of actors such as the military and politicians with the judiciary starting with changes made in the multiparty period, and

continuing with the military coup of 1960 caused by the increasingly authoritarian acts of politicians.

The third period ran from the 1980s to the beginning of 2000s. The military coup of the 1980s, in particular, was a massive setback in the democratization process and also a vital factor in weakening the legal system. Yet, it also had a positive ultimate influence on those who pushed for compartmentalization of the military. The critical periods of Turkish development from 1950 - 1980, and then from 1980 – 2000 had different highlights and themes, but they also simply represented a country and a culture coming to terms with itself within the framework of a constitutional democracy.

In Fig1. A series of changes in the Turkish government in the twentieth century is depicted beginning with the new constitution. It then chronicles the development of constitutionalism through the allowance of constitutional revisions and culminates in the theme of imposing limitations on the military. Going into the twenty-first century, the chief difference between governments is that the democratization process has become rooted and planted firmly in the culture of Turkey. Furthermore, the military has been compartmentalized once and for all. This was especially significant since that achievement was accomplished with the help of former military who had become government officials. Thus, Turkey has made great strides in its democratization process in the twentieth century. In the next chapter, a brief survey of the twenty-first-century developments of the Turkish government is engaged.

CHAPTER FIVE: THE TWENTY-FIRST CENTURY - REFORMS IN THE
JUDICIARY, THREATS TO THE RULE OF LAW, AND THE LEGITIMATION OF
THE JUDICIARY IN CONTEMPORARY TURKEY

Trials such as Ergenekon and Sledgehammer were criticized for being based on invalid evidence. International actors saw them as violations of human rights. The new policy changes to the Supreme Council of Judges and Public Prosecutors in 2010 were criticized since the executive branch maintains significant control over the HSYK. The political crisis over the graft probe in January 2014 also led to questions about the independence of the judiciary. After the corruption scandal, the JDP government insisted that in any further investigation the government must be informed of the results. The executive branch directly challenged the legal system by preventing further investigations of the corruption scandal. It also transferred hundreds of judges and prosecutors from their positions based on the claim that parallel bodies existed within the judicial system and that the judiciary was aiming to weaken the authority of the government.

Starting in 1999, reforms within the judiciary were required by the EU accession process (Keyman and Aydin-Duzgit 15). Changes included “the abolition of the infamous State Security Courts that used to deal with crimes against the state, allowing retrial in civil and criminal cases” (15). Also, it ended the

jurisdiction of military courts over civilians (Keyman and Aydin-Duzgit 15). Reforms in the judiciary started in the 2000s during coalition governments, and the JDP initially appeared to follow this path. Historically, it has been argued that “the judiciary, with the 1982 Constitution drafted under the military regime, enjoyed a privileged position” (Asik 146). In comparison, a new argument is that the judiciary became subject to the executive branch (146). Based on this argument, “military tutelage is being replaced by civilian tutelage with the [complicity] of some prosecutors and judges” (146).

The Turkish judiciary maintains a close connection with the executive. The lower courts within the judiciary are influenced strongly by, the higher levels of the judiciary, which is regarded as troublesome (Benvenuti 320-21). Reforms initiated in the 2000s consisted of programs aimed at teaching judges and public prosecutors to train others (325). Recent reforms have been based on “the introduction of training catalogues connected with contingent needs, such as human rights and EU law, but [they have still] not affect[ed] the institutional framework” (328). Two judicial reform packages were adopted in 2004, followed by a “Judicial Reform Strategy Action Plan launched by the Turkish Government in 2009” (310).

The JDP electoral victories since 2002 changed the existing balance of power between the state elites (Keyman and Gumuscu 45). The JDP “used the EU reform process as an instrument of political survival followed by power consolidation after 2007” (Saatçioğlu 86). The JDP claimed to support EU accession reforms from 2002 to 2007. The EU decided to open accession talks in 2005 (86). The EU praised the JDP for changes aimed at eliminating the political influence of the military (87). The major

argument has been that the JDP depended on following a liberal agenda to maintain its political power during its first term. The party's "Europeanization has been a 'bottom-up' process consisting of 'selective and differential domestic changes'" (Saatçioğlu 89). Thus, it attempted to lessen views regarding the party's Islamist, conservative background. It also tried to survive against a "military-judicial secular establishment suspicious of its commitment to secular, democratic norms" (88). The JDP government initially acted in a way that did not confront the military or the judiciary, and it claimed to be committed to EU accession criteria (Keyman and Gumuscu 48). However, the counter view was that the party's "ideological commitment to EU membership was one motivation for the AKP government initiating reforms targeting the political powers of the military" (48). Thus, the view was that "Islamic political groups considered the Europeanization process a great opportunity to reduce the political powers of the military" (48).

Following the presidential election of 2007, the JDP "took several steps to curtail the power of the state establishment" (Keyman and Gumuscu 46). The presidency position represented a significant check of the state against the government. In the presidential election of 2007, the JDP attempted to choose its candidate for this position and succeeded (46). The judiciary, the military, and opposition parties tried to prevent this attempt. However, the result of the 2007 parliamentary elections strengthened the position of the JDP. The party won the election by 47% and elected its candidate, Abdullah Gul.

The JDP, which won the majority of votes in 2002, is regarded as a continuation of previous Islamist parties. The common view has been that the JDP is “an equally Islamist party with a ‘hidden agenda’ of establishing an Islamic regime in Turkey” (Ozbudun, “Democracy, Tutelarism, and the Search for a New Constitution” 294). Erdogan’s populism comes “at the expense of individual rights and liberties, an independent media, and the separation of legislative, executive and judicial powers” (Taspinar 50). The JDP weakened the military through the EU accession process (Keyman and Gumuscu 46) and through a series of trials since 2007 targeting several military personnel for allegedly interfering in politics (47). In this context, the JDP targeted the judiciary starting in 2007.

The aim of the Constitutional Court to block the party from choosing its candidate as the president was the beginning of the conflict (47). Overall, the party attempted to weaken the power of secular forces, such as the judiciary and the military, through revisions within the judiciary starting in 2007(48). Changing the composition of HSYK and attempting to change the constitution also supported these goals (48). Although an effort to improve civil-military relations (49) in Turkey was regarded as a positive step, these changes have not meant the triumph of democratization (49).

As part of the EU accession process, “EU officials asked the Turkish Ministry of Justice to prepare a strategy to enhance the independence, neutrality, and effectiveness of the Turkish judicial system” (Karakaya and Ozhabes 7). In 2008, the Ministry of Justice claimed to initiate reform packages to improve the professionalism, independence, and neutrality of the judiciary (7). These reforms were extended by

focusing on changes in the HSYK starting in 2010. (Karakaya and Ozhabes 8). The government claimed that reforms were “to accelerate the administration of justice by reducing the duration of trials, and second, to start a reform in the areas of human rights, especially the right to a fair trial” (8).

ERGENEKON, THE SLEDGEHAMMER TRIALS, AND THE DECLINING TRUST IN THE JUDICIARY

One continuous problem in the Turkish judiciary is long periods of detention (18). The problem “has represented a problem for personal liberty and security for many years” (18). In this regard, “as of 2010, 51 percent of the people in prisons in Turkey were simply under arrest while only 49 percent had actually been convicted” (18). Reforms since the beginning of the 2000s aimed at “expanding the possibility for granting probation ... [and] also aimed to create an effective and practical alternative to detention” (23). However, “detention continues to be ordered in many cases in which probation would have been sufficient, and the justifications for doing so continue to be simplistic stock phrases” (23).

The Ergenekon trial was initiated in 2007 and represented the conflict between the military and the JDP. The main source of conflict was the plan of the JDP to elect Abdullah Gul as the president of Turkey. The election of Abdullah Gul led the party to weaken the power of the military (Jenkins par. 2). The prosecutors of the Ergenekon trial claimed that the accused were part of a secret organization that was “responsible for

every act of political violence in Turkey over the previous 30 years” (Jenkins par. 3). The organization had the goal of overthrowing the government. Continuing through “the rest of 2008 and 2009 – backed by an aggressive media campaign by pro-Gulen newspapers, television channels and internet websites – prosecutors arrested an improbably diverse range of suspects” (Jenkins par. 4). However, “there was still no evidence that the organization even existed” (Jenkins par. 4). Furthermore, the “only characteristic shared by the suspects was that they were all critics, opponents or perceived rivals of the Gulen Movement” (Jenkins par. 4).

Trials were initially supported by external actors, such as the EU, and were regarded as ending the military tutelage (Rodrik 100). However, “what these trials represented rapidly changed following the arrests of journalists Ahmet Şık and Nedim Şener” (100), who were famous leftist journalists. Also, the violations in the course of the trials “have been covered up also by the intense disinformation campaign waged against the defendants by pro-government media” (101). It has been said that the Sledgehammer case was controversial, since the evidence given to prosecutors, such as CD records, were fabricated. Even though it was claimed that the alleged coup plans against the government had been made between 2002 and 2003, the CDs included recordings made in 2005. Furthermore, voice recordings examined included criticism of government policies that were made years after the claimed dates (101). It was also impossible to identify the ownership of these voice recordings and CDs (103). The Ergenekon trials also included the same pattern regarding the accused (106).

It is widely believed that a purge of the judicial system has occurred. Public confidence in the judiciary has been considerably impaired by “the collapse of trials in recent years targeting alleged military coup plots known as ‘Ergenekon’ and ‘Sledgehammer’” (Pamuk and Butler). The argument was that these trials were organized by Gulenists and the JDP when both sides were allied against the military. This was the case before the disagreements that led to their separation (Pamuk and Butler). Developments showed that prosecutors initiated several others cases, “of which nineteen were subsequently combined with the main Ergenekon investigation” (Jenkins par. 6). Overall, “over 1,200 people have been charged in the various politically [] motivated cases brought by pro-Gulen prosecutors” (Jenkins par. 7) and hundreds of them were jailed until their releases in 2014. All suspects in the Ergenekon trials were acquitted in March 2014. The suspects in the Sledgehammer trials were also acquitted in June 2014 (Gursel, par. 1). These developments significantly undermined the role of the judiciary, and “the Constitutional Court ruled their trial was flawed” (Pamuk and Butler). The failure of these trials indicates “a shift in the balance of political power in Turkey” (Jenkins par. 1).

THE JDP’S INCREASING CONFRONTATION WITH THE CONSTITUTIONAL COURT IN 2007

Another area of conflict in this environment was the confrontation between the JDP and the Constitutional Court, which resulted in the increasing power of the

executive. Constitutional changes have been criticized since 1982 by political parties and by civil society, and new changes were proposed beginning in 1987. However, it was argued that the main weaknesses within the 1982 constitution were maintained (Ozbudun “Democracy, Tutelarism, and the Search for a New Constitution” 299). Constitutional amendments between 1990 and 2007 “were accomplished through a process of intense inter-party negotiations and compromises and adopted by strong majorities in parliament” (Ozbudun "Turkey’s Search for a New Constitution." 299). The JDP was differentiated from other Islamist parties by being populist and by creating its economic class. The crisis of 2007 over the constitution became a defining point in Turkish politics and the democratization process.

The JDP attempted to elect a party member as president by using its majority. Constitutional amendments planned for 2010 have polarized Turkish society and politics immensely and resulted in deadlock. Thus, the future of major Constitutional changes remains uncertain (Ozbudun “Democracy, Tutelarism, and the Search for a New Constitution” 299-300).

THE REFORMS IN THE JUDICIARY SINCE 2009 AND THE JDP’S INCREASED ROLE IN THE EXECUTIVE AND THE JUDICIARY

A judicial reform strategy was announced in August 2009. A referendum was held in 2010 (Keyman and Aydin-Duzgit 15). There were disputes over amendments aiming to change the HSYK. It should be acknowledged that “the 2010 constitutional

amendments also marked an important step in the AKP's consolidation of power" (Ozbudun, "AKP at the Crossroads" 156). Before 2010, the judiciary exercised "control over the AKP government and its conservative policies" (156). Briefly, recent HSYK reforms and proposed changes within the judiciary were opposed by higher-ranked judges within the judiciary (Benvenuti 314). The Ministry of Justice now "authorizes inquiries and investigations by judiciary inspectors or senior judges or prosecutors" (315). Within the Ministry of Justice, "a ministerial commission controls the admission to the Justice Academy through an oral exam" (315).

A package of measures to improve the independence, impartiality, and professionalism of the judiciary was initiated in 2009. The reforms included constitutional changes starting in 2010. The changes in 2010 were criticized. Ten of the 22 members were to be elected within the HSYK, five to be selected by the high courts, and four by the President (Ozbudun, "The Judiciary" 286). Due to the reforms needed, the planned changes within the Constitutional Court included the election of the court's members (Muller, par. 5). Changes also included increasing the Court's composition to seventeen members (Muller, par. 5), "with the members from the higher courts now forming a minority rather than a majority" (Muller, par. 5). The president will elect fourteen members of the high councils of the judiciary (Muller, par. 5). The remaining three members are to be "elected by parliament" (Muller, par. 5).

Another package "passed in July 2012 abolished the much-criticized heavy penal courts with special powers" (Keyman and Aydin-Duzgit 15). However, replacement of these courts with the newly established Anti-Terror Courts (15) was controversial. These

courts “include specialized judges who are responsible solely for deciding on preventive measures during the investigation phase and who do not take part in the actual trial” (Keyman and Aydin-Duzgit 15). It is necessary to acknowledge that judicial independence “may not be sufficient in attaining *impartiality* among the cadres of the judiciary” (17). Thus, individual judges must not be driven by ideology and politics during decision-making (17).

The EU praised the initial changes within the judiciary. Supporters of this claimed that “now the Council represents the entire judiciary” (2). In this regard, ten members out of 22 within the judiciary are “elected by all general and administrative court judges and public prosecutors” (2). However, this required “the government to be immediately informed of the ongoing [secret] investigations and to take necessary measures” (2). It allowed the government to assign and change the police forces involved in trials (2).

However, the critics’ argument has been that the government gained “the majority at the Supreme Board of Judges and Prosecutors (HSYK) – the judicial council that decides on the promotion, reassignment and disciplinary procedures of judges and prosecutors” (Bozkurt, par. 2). This will allow the government to “exert greater political pressure on members of the judiciary and apply an overdue influence on judicial processes, which is an extremely dangerous development in the country” (Bozkurt, par. 2). The HSYK elections were the last stage of Erdogan’s attempt to control the judiciary. Following the corruption scandal of December 2013, laws were proposed to change the

structure of the judiciary. Although the Constitutional Court annulled many of these laws, they “were not applied retroactively” (Bozkurt, par. 4).

The JDP was accused of “using its control over Parliament to legally lower the barriers to appointment on the judiciary board” (Michek and Misztal). The HSYK today has a “22-member Supreme Board of Judges and Prosecutors (HSYK), including 15 seats and several leadership positions” (Michek and Misztal). The Minister of Justice assigns many of these, and many have argued that the government now has the support of the majority in the HSYK. These judicial changes allow judges “the ability to authorize wiretaps for an expanded range of crimes, including crimes against state security and against the constitutional order” (Michek and Misztal). Thus, “Recep Tayyip Erdoğan continues to consolidate power, undermine the rule of law and wear down any separation of powers” (Michek and Misztal).

Control of the executive of the HSYK grants “*de facto* sway over the administration of justice” and violates “a central component of Turkey’s system of checks and balances” (Michek and Misztal). Opponents of these laws in the judiciary, in the political opposition, and in international legal circles argued that these reforms were unconstitutional (Michek and Misztal).

INCREASING TENSIONS WITH THE OPPOSITION: GEZI PROTESTS AND HOW CLASH OF VALUES HAD IMPLICATIONS FOR THE JUDICIARY

The main challenge to Erdogan was the Gezi Protests in the summer of 2013. They began “when a group of young environmentalists occupied a small park next to Istanbul’s Taksim Square” (Taspinar 50). This was “a protest against plans to replace Gezi Park with a shopping centre” (50). The protest expanded across Turkey when the government did not back down from its goal, or when “the police brutally evicted the young activists” (Taspinar 50). Overall, “more than 8,000 people had been injured, and five killed in the protests” (50). For many young protestors, “the real problem was Prime Minister Erdogan’s increasing authoritarianism and conservatism” (51). Erdogan showed his belief in electoral democracy only by stating that the protests were supported by foreign media and governments (52). Also, YouTube and Twitter have been banned several times in Turkey since 2007. Especially since 2010, these were regarded as politically based acts by the JDP (“Turkey’s Social Media Ban is a Hark Back to the Old Bureaucracy”).

Furthermore, the pressure on the media has also significantly increased (Akser and Baybars-Hawk 302). A significant problem “is [the] judicial suppression of journalists who are prosecuted for various statements they have made in print, [on] Internet blogs, and even [in] phone conversations that were monitored” (312). These pressures included “pressure on the Dogan Media Group, the YouTube ban, arrests of journalists in the Ergenekon trials, [and] phone tapping/taping of political figures” (302). They also included “the exclusion of all unfriendly reporters from political circles” (302). In the Ergenekon trials, several journalists were arrested and classified as part of the Ergenekon organization (312). These journalists “have been held pending trial since

2007 and have not been found guilty” (Akser and Baybars-Hawk 312). Furthermore, “a report published by the opposition CHP (Republican People’s Party) stated that 1,863 journalists had been fired since the AKP [JDP] came to power” (Ellis, par. 4).

CORRUPTION INVESTIGATIONS AND THE FURTHER WEAKENING OF THE JUDICIARY

The alliance between the JDP and the Gulenists had ended by 2013. The Gulenists were accused of starting “a corruption investigation against 42 businesspeople with close links to the AKP leadership” (“Turkish President Signs off New Controls over Judiciary”). The government accused the Gulen movement of planning an investigation into corruption to control the government. (“Turkish President Signs Off New Controls Over Judiciary”). Thus, Erdogan initiated a “purge of suspected Gülen sympathizers from the apparatus of the state, including reassigning over 6,000 members of the police and more than 200 members of the judiciary” (Jenkins par. 9). Overall, “236 suspects—almost all military officers, including 86 generals and admirals, some of them retired” were released on June 2014 (Gursel, par. 1). Most of them were initially “convicted to lengthy jail terms” (Gursel, par. 1). As a result of the conflict with Gulenists, the JDP and Erdogan also agreed that the trials were unfair (Gursel, par. 15). Overall, the final decision of the Constitutional Court was “that the defendants’ right to a fair trial had been violated” (Gursel, par. 7).

In response, supporters of Erdogan claimed that ending the influence of the Gulenists within the judiciary would democratize Turkey (Pamuk and Butler). Erdogan first aimed at reducing the military's power and then weakened the judiciary. JDP supporters argue that increasing role of executive power is not simply due to state policies, but is also because of the involvement of other actors. Following the resulting bribery scandal, JDP loyalists were appointed to key positions in the judiciary (Bozkurt, par. 5).

Erdogan "had judicial directives changed to oblige police officers to inform their superiors of all investigations, regardless of whether they involve the government and its bureaucracy" (Baydar, par. 8). Erdogan praised the legal action against the Gulenist media and claimed that the arrests were lawful ("Erdogan Praises Turkey's 'Clean' Legal Process against Opponents"). Overall, all the suspects in the corruption trial were released in February 2013 ("No suspects left in jail in Turkey's corruption probe"). Although a second investigation into graft was initiated, the government allegedly halted it ("No suspects left in jail in Turkey's corruption probe"). The second case was announced to the public by prosecutor Muammer Akkas. He claimed that "investigation files had been taken from his hands after he issued arrest orders" ("No suspects left in jail in Turkey's corruption probe").

THE CONTINUING WEAKENING OF THE JUDICIARY AND THE EXECUTIVE
SINCE DEMOCRATIC BACKSLIDING AND POLARIZATION OF ANY
OPPOSITION RESULTING IN THE 2013 JUDICIAL CHANGES

Changes within the HSYK in 2013, after the corruption case, have been seen by many as controversial (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 3). Changes required that any attempts involving criminal investigations (3) be done “under the authority of public prosecutors to immediately inform the relevant administrative authorities” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 3). Furthermore, the prime minister at the time directed criticism regarding the trials to the HSYK. He “accused the signatories [of] being guilty of violating the constitution and stated that he would have put them to trial if he had the power to do so” (3). He also stated that increasing “the autonomy of the HSYK, and weakening the role of the Minister of Justice within the Council” (3) was a mistake. JDP officials attempted to change the structure of the HSYK again by presenting amendments within the parliament (3). They claimed that changes were aimed at extending the power of the legislature against the new structure of the HSYK. However, critics simply rejected this claim, and JDP members did not have the necessary votes to pass the amendment. Abdullah Gul, president at the time, also regarded the changes as unconstitutional (3).

The common view has been that JDP has been applying legal changes selectively in its last term. Another threat claimed in this regard was the possibility of the JDP focusing more on changing the structure of the Constitutional Court and moving towards

a presidential system. Changes regarding the HSYK were criticized by the EU and by critics of the JDP (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 2).

Furthermore, it has been argued that in 2014, the JDP attempted to increase its control over the judiciary through significant legal changes (7). JDP officials also proposed possible changes in the Constitutional Court. In this regard, members of the Court, “would be elected partly by the legislature and partly by the President of the Republic” (7). This has not yet been achieved. The reason for this is that the party “currently lacks the minimum constitutional amendment majority, i.e., the three-fifths of the entire membership of the Grand National Assembly” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 7).

On February 26, 2014, the president at the time, Abdullah Gul, signed a law that increased the government’s influence over the judiciary (“Turkish President Signs off New Controls over Judiciary”). The law allowed the justice ministry to control the process of appointing judges and prosecutors. Thus, the change reduced the powers of the HSYK. The law was regarded by many as another response by the government to a corruption scandal. Also, due to the corruption scandals, hundreds of judges and police officers were reassigned from their positions (“Turkish President Signs off New Controls over Judiciary”). Among the appointed were “144 new members nominated to the Supreme Court of Appeals and 33 to the Council of State” (“Turkey’s Top Judge Warns against ‘New Tutelage’”). Many of the judges were regarded as having ties to the JDP.

The 2014 report of the human rights organization Amnesty International listed that “the authorities became more authoritarian in responding to critics” (“Amnesty International Report 2014/2015” 373). In addition, the authorities were criticized for threatening the impartiality of the judiciary (“Amnesty International Report 2014/2015” 373). Furthermore, the government “introduced new restrictions on internet freedoms and handed unprecedented powers to the country's intelligence agency” (“Amnesty International Report 2014/2015” 373).

Another measure of criticism concerns the expansion of rights to the MIT (Turkish Intelligence Agency) in February 2014. The new law indicates that authorization for wiretappings can be obtained from a judge. Another controversial act of the bill has been that MIT “was proposed to work exclusively under Prime Minister Recep Tayyip Erdogan” (“Parliament commission passes bill granting excessive power to Turkey's intel body”). Furthermore, “A court of serious crimes in Ankara which will be chosen by the Supreme Council of Judges and Prosecutors (HSYK) will be authorized to try those charged with personal crimes” (“Parliament commission passes bill granting excessive power to Turkey's intel body”).

CHANGES IN THE HSYK SINCE 2014 AND THREATS TO THE JUDICIARY

The Constitutional Court was also regarded as the protector of secularism. In this context, the JDP’s competition with the court can be understood. The Constitutional Court was also targeted by the JDP for its attempt to close the party in 2008 (Armstrong, par. 3) based on alleged anti-secular activities (“Turkish court deciding AKP’s fate”).

The Constitutional Court declared that laws “violated the principle of separation of powers enshrined in the Constitution” (Michek and Misztal). Erdogan criticized the Constitutional Court for overturning the Twitter ban. He also indicated that HSYK decisions of the Constitutional Court were politically motivated and controlled by the Gulenists. The Minister of Justice, Bekir Bozdag, also criticized the Constitutional Court for overruling the ban and also indicated that the decision was political (Michek and Misztal).

In addition, the Constitutional Court stripped the Minister of Justice’s powers to appoint HSYK board members, to investigate judges, and to select HSYK presidents. The Minister of Justice was solely “to retain his power over the Justice Academy, the body responsible for training Turkey’s judges and prosecutors” (Michek and Misztal). Before this decision, the new HSYK law was used to dismiss “active judges and replace them with more than 100 AKP loyalists, many of whom had never served as judges previously” (Michek and Misztal).

New legislation that harms the rule of law by augmenting the executive’s role is still a problem. The Constitutional Court is regarded as the only judicial body capable of protecting the HSYK against these restrictive laws. However, this does not lessen the threat to the rule of law. The government can still control the judiciary, despite the overruling of these laws by the Constitutional Court (Michek and Misztal). The Constitutional Court’s overruling of the AKP’s changes to HSYK law, its Twitter ban, and its criticism of the Internet law presents the Constitutional Court as a protector of the rule of law in the present day. The powers of the Justice Ministry have been reduced

despite changes made by the JDP, and the HSYK is still protected by the existence of checks and balances. However, Erdogan continues to be a threat to the judiciary and the rule of law. Erdogan declared “that the next president, who will be elected by popular vote for the first time in Turkey’s history, will become the de facto executive” (Michek and Misztal). This claim indicates that he will attempt to strengthen the executive power over the judiciary (Michek and Misztal).

It has been argued that the HSYK elections of 2014 exposed the desire of the government to increase its influence over the judiciary (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 5). During “the election process, the government put its moral and logistical weight behind a pro-government group called the ‘Platform for Unity in the Judiciary’ (YBP)” (6). Furthermore, this group, even though it consisted of people from many different political views, claimed that if elected, it would “work in harmony with the legislative and the executive branches.” (6). Overall, the “election of ten main and seven substitute members by more than 13,000 first-degree judges and public prosecutors ended with the clear victory of the pro-government YBP group” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 6). As a result, “together with the *ex officio* members and the four members appointed by the President of the Republic, the government clearly dominates the new HSYK” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 6). The actions of the changed HSYK body included the suspension of “four public prosecutors who had played a major role in the 17-25 December 2013 corruption investigations involving certain ministers” (6). The HSYK also initiated the appointments of 3,000 new judges in 2014, and 5,000 are planned in 2015. It has been a

shared view that these appointments were made to eliminate any government critics within the judiciary, and specially marked another stage in the conflict with the Gulenists (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 6).

Other changes within the judiciary were not solely focused on HSYK rulings. Changes “involved the creation of special criminal judges with extensive powers” (5). These judges were given the right “to take all decisions related to the conduct of criminal investigations, such as detention, arrest, release, and seizure of property” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 5). Furthermore, “appeal against their decisions can now only be made before another special criminal judge” (5). Another argument was that “these judges were appointed by the First Chamber of HSYK – now dominated by the pro-government members after the February 2014 operation” (5). In this regard, the legislature was also accused of playing a part in these changes and of making changes based on political goals (5).

A Timeline of Significant Events in 21st Century Turkish Governance

- Starting in 1999, reforms within the judiciary were required by the EU accession process
- Changes included the abolition of the infamous State Security Courts
- Also, it ended the jurisdiction of military courts over civilians
- Reforms in the judiciary started in the 2000s during coalition governments
- Two judicial reform packages were adopted in 2004
- The JDP weakened the military through the EU accession process and through a series of trials since 2007 targeting several military personnel for allegedly interfering in politics - The Ergenekon trial. In this context, the JDP targeted the judiciary starting in 2007
- In 2008, the Ministry of Justice claimed to initiate reform packages to improve the professionalism, independence, and neutrality of the judiciary
- A judicial reform strategy was announced in August 2009
- The 2014 report of the human rights organization Amnesty International listed “Turkey’s most chronic problem as threats against the independence of the judiciary”
- Erdogan continues to be a threat to the judiciary and the rule of law. Erdogan declared that the next president, who will be elected by popular vote for the first time in Turkey’s history, will become the de facto executive. This claim indicates that he will attempt to strengthen the executive power over the judiciary
- 2014: The president, instead of parliament, became responsible for selecting judges
- Present - It is widely believed that a purge of the judicial system has occurred.

FIGURE 2. A TIMELINE OF SIGNIFICANT EVENTS IN THE DEVELOPMENT OF 21ST CENTURY TURKISH GOVERNMENT

The president, instead of parliament, became responsible for selecting judges. The primary role of the Constitutional Court is “reviewing the constitutionality of laws” (Ozbudun *The Constitutional System of Turkey: 1876 to the Present* 114). Other important functions include deciding on closure cases of parties (114). The 1961 constitution stated that of 15 judges, most were to be chosen by the high courts, two to be elected by the parliament, three by the national assembly, and two by the president. The 1982 constitution gave the president the right to choose these members from the high judiciary (112). The election of 15 members was increased to 17 in the 2010 Constitutional changes. However, the president still chooses 14 members out of 17 from the high judiciary. Thus, he maintains his dominant position (113).

Despite the criticism, recent arguments have included that “the Constitutional Court has gradually emerged as the principal defender of human rights and democratic standards” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 7) since 2010. Examples of successful rulings of the Constitutional Court include the HSYK ruling and rulings overruling the ban on YouTube (7). The Constitutional Court is regarded as the only independent body that still has significant power against the other branches of the judiciary (7). In 2014, the Constitutional Court ruled that the increasing power of the Ministry of Justice over HSYK appointments, organization, and meetings was unconstitutional (5). The Court also ruled that “the provision that terminated the positions of all HSYK personnel, save the elected members” (5) was unconstitutional. The ruling was still limited, since it could not declare that “involved persons [should]

return to their posts, since the Constitutional Court decisions are not retroactive” (Ozbudun, “Pending Challenges in Turkey’s Judiciary” 5).

SUMMARY AND CONCLUSION

The absence of functioning checks and balances and the rule of law resulted in public doubts about the legitimacy of the judiciary. These will in time result in further democratic backsliding (Bozkurt, par. 11). This significantly challenges democratic consolidation, due to the polarization in society (Keyman and Gumuscu 68). This pattern presents similarities to a period of the 1980s in which the judiciary’s composition was changed after the military coup. It eventually resulted in opposition to military influence on the judiciary.

Fig. 2 depicts a summary of important development events in Constitutional Turkey in this century. These years may also be divided into the first JDP era from 2002 to 2007, and the two following JDP eras from 2007-11, and from 2011 to today. The verdict is not so clear regarding the future of Turkish constitutionalism. The excesses of authoritarian rule have worn on the culture such that there are many signs the Turkish culture is now ready to ensure that far less authoritarian rule is implemented. The fact that Turkish culture still allows itself the choice of working within the framework of a constitutional democracy is itself a testament to the variability and subjectivity involved as a culture decides for itself what it means to have a constitutional democracy.

Essentially, the regime of Erdogan with its overtures of authoritarianism may be said to have represented the single greatest threat to the judiciary and the rule of law in

Turkey. It is perhaps as simple as that because the single authoritarian figure is anathema to the constitutional democracy. The allure of a dominant leader became part and parcel of the culture of Turkey since the 1980s, coming to greater level during JDP rule. However, based on criticisms and recent developments the culture may be said to be rescuing itself gradually from this pure authoritarianism in recent years. In the final chapter, a conclusion will summarize the tumultuous governmental history of Turkey with an eye toward the future.

CHAPTER SIX: CONCLUSION: EXISTING PROBLEMS IN TURKEY'S
DEMOCRATIZATION PROCESS - IMPLICATIONS FOR CHECKS AND
BALANCES AND FOR THE JUDICIARY

Without question, obstacles to the rule of law in Turkish context have been significant. Yes, it is true a comprehensive analysis of the problem has been slow in coming. Yet, if one is forced to determine whether the glass is half full or half empty, then one must conclude that the case of Turkey is one in which the culture shows similar pattern since the 1960s, gradually increasing towards 1980s to today. For nearly 60 years it has sought to push the envelope and merge a continuing hybrid of authoritarianism and democracy.

This is the truest picture of constitutional democracy in Turkey. In Fig. 3, the original Table 1 is brought back to depict the underlying dynamics of a continuum of governance at play. The best summary of Turkish governmental development is simply to say that Turkey is not either authoritarian or democratic, but rather it is involved in the journey to discover its own cultural construction of a constitutional government.

It is significant to acknowledge a journey toward a constitutional democracy since the rule of law is a requirement for democratization and consolidation. For the rule of law to exist, independent judiciaries are needed. The relationship between these is as follows. The forces of democratization are shaped by the different interrelated roles of

several actors. These actors include the judiciary, the military, and the legislature, including the prime minister. In the literature of democratic consolidation, the military is not typically stated as an actor in the democratization process influencing the rule of law. However, in many countries, the army is a dominant political force and can impose its will on the judiciary and shape the functioning of the rule of law. Thus, the military must be included as a key actor in an analysis of democratization in Turkey in order to truly understand the rule of law and the processes of democratic consolidation.

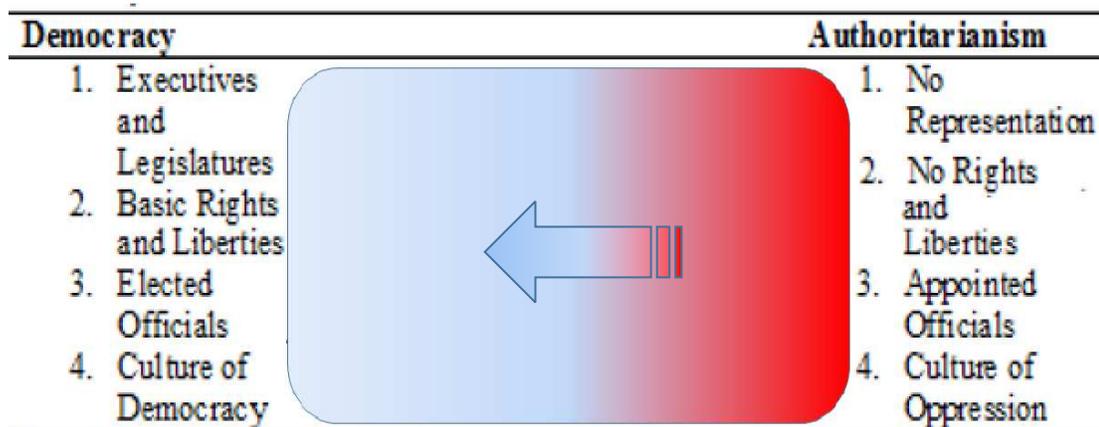


FIGURE 3. TURKEY EXISTS ON A CONTINUUM THAT CONTINUALLY PUSHES FOR A BLEND OF DEMOCRACY WITH AUTHORITARIANISM GRADUALLY SINCE 1960'S, AND CONSIDERABLY SINCE 1980's.

THE ELECTORAL SYSTEM AND MAJORITARIANISM AS IMPEDIMENTS TO THE TURKISH JUDICIAL SYSTEM

There have been shifts within the judiciary over time, and it is important to understand the reasons for these shifts. The army has played the role of the guardian of

the state, especially since the 1960s. In the 1960s, the judiciary acted as the chief provider of the rule of law and the defender of the regime. This was slightly changed in 1982. In this context, the prime minister had controlled the legislature prior to increasing the power of the president in recent years. Prime ministers in Turkish history have allowed certain elements of the judicial system to pass.

Majoritarianism is still an ongoing trend in Turkey. The constitution of 1982, introduced following a military coup, changed the landscape by reversing some of the changes made in the 1961 constitution (Lord 231). The constitution of 1982 was especially significant for its adoption of a ten percent threshold (237) for elections. The effect of this change “has been the divergence between the effective number of parties based on actual votes and seat shares, with the biggest gap apparent in the 2002 election” (237)

The electoral system that established the ten percent threshold allowed a “bias towards a strong executive by enabling parties to gain a majority of seats with just a plurality of the vote” (235). Thus, “the emergence of a single-party government in 2002 marks a return to the two-party system with a dominant party similar to the 1950s and 1980s” (237). The election threshold allowed the Justice and Development Party (JDP) to achieve a majority in the parliament. In the 2002 elections, the party transformed 34 percent of the vote into 66 percent of the seats, leaving 45 percent of the electors unrepresented (Lord 241). In the 2007 elections, 47 percent of the national vote allowed it to gain a 62 percent seat share (241). Thus, “the 2002-11 period of AKP government

saw the most durable government, and thereby the most majoritarian in Turkey's history of multiparty politics" (Lord 235).

Due to Turkey's dual executive, with powers split between the president and the prime minister, majoritarianism is at its greatest level when one party has the presidency and a majority in Parliament (236). Also, "under the 1982 constitutional regime the presidency and Constitutional Court are seen as the two key institutions with veto powers against parliamentary majorities" (236). Thus, "the strong, loyal, and disciplined AKP majority in parliament makes accountability to the legislature ineffective" (Ozbudun, "AKP at the Crossroads" 163).

Based on these, on January 2, 2015, The head of Turkey's Constitutional Court, Hasim Kilic, stated that the Constitutional Court was targeted for considering complaints against the 10 percent election threshold ("Turkish Constitutional Court Head Complains of 'Pressure' on Members"). The Court received government criticism of its ruling, particularly its ruling that the 10 percent election threshold is unconstitutional ("Turkish Constitutional Court Head Complains of 'Pressure' on Members"). Furthermore, some JDP members have claimed that this decision was an attempted coup ("Turkish Constitutional Court Head Complains of 'Pressure' on Members"). As a result of the pressure, the agenda of the Constitutional Court was hidden from the public during the decision phase ("Turkish Constitutional Court Head Complains of 'Pressure' on Members"). Hasim Kilic criticized the government regarding the criticism the Constitutional Court has received "for the ruling overturning bans on Twitter and YouTube" ("Turkey's Top Judge Warns against 'New Tutelage'"). Kilic warned the

government against creating another tutelage. Kilic regarded purges within the judiciary after the corruption scandal as aimed at restructuring the judiciary (“Turkey’s Top Judge Warns against ‘New Tutelage’”).

In this context, attempts at “a potential move to [a] fully presidential system” (Lord 231) today indicate a greater level of majoritarianism (231). The constitution of 1982 also established the President as the guardian of the state and made it easier for attempts at presidentialism (235). The increasing role of the executive since the beginning of the 2000s is apparent (235). The constitutional changes of 2007 “have solidified semi-presidentialism, having paved the way for a popularly elected president” (236). Before this change, the president was “elected indirectly by a two-thirds majority in parliament” (236).

Another worry has been that “the capture of the presidency means that the parliamentary majority can also exercise far more influence over appointments that are determined by the president” (236-37). There was division regarding the presidential candidate of the JDP for the 2007 presidential elections due to the Islamist background of the candidate. Thus, “greater Islamist control of presidential powers, underpinned by a perception of the presidency as the last bastion of secularism” (237) was the worry.

THE NEW CONSTITUTION AND UNDERSTANDING THE ROLE OF CHECKS AND BALANCES IN THE TURKISH CASE

The JDP's proposals for a new constitution do not include enough checks and balances. In fact, they substantially reduce them (Kuru 573). Turkey requires a greater separation of powers between the executive, legislature, and judiciary (Kuru 573). The absence of checks reflects the fact that the executive can always extend its power. This can significantly limit civil rights and participation in society (573).

There is skepticism that a system of checks and balances will work in Turkey (Kuru 574). The major fear is the increasing power of opposition parties and politicians. Thus, "most identity-based and ideological groups in Turkey aim to dominate the state structure entirely" (574). Turks also perceive that checks and balances have weakened politicians' bureaucratic tutelage in Turkey (574). However, civil-military relations must be improved by "empowering all three branches of government [,] and [the] executive must not be the only source." These sources would be "the executive in military appointments, the legislature in scrutinizing military spending, and the civilian supreme courts in reviewing the decisions of the military courts" (574). Also, the weakening of the army since the beginning of the 2000s has made this situation much less credible than it was before (574).

Overall, checks and balances increase the level of legitimacy in politics (574). Policies that are formulated "by multiple institutions would have more legitimacy, in terms of public acceptance" (574). The new constitution, which includes checks and balances between the executive, legislature, and the judiciary is likely to succeed. The Turkish parliament's role is also limited by the executive (579). Turkey's opposition parties also indicated the need for a new constitution; however, there are concerns about

the presidentialist goal of Erdogan (Solaker, “Turkey's top judge backs new constitution, calls for consensus”).

ATTEMPTS TO CREATE A PRESIDENTIAL SYSTEM

The presidential elections of August 2014 were the first direct elections in the history of the Republic of Turkey (Grigoriadis 105). Before the revisions of the JDP in 2007, “the president was elected by the Turkish Grand National Assembly with [a] qualified majority” (Grigoriadis 105). The president’s terms were reduced from seven to five years. However, overall his powers stayed largely the same (105).

The JDP’s aim to replace parliament with a form of presidentialism (Kuru 572) is an attempt to empower the executive (572). It proposes “authorizing the president to ... issue decree-laws ... to dissolve Parliament ... and to appoint Cabinet members without parliamentary approval” (572). Also, it also allows the President to “appoint more than a third of the members of the Supreme Board of Judges and Prosecutors (HYSK)” (572). Presidentialism has been discussed in Turkish politics before, especially among right-wing political party leaders in the 1980s (573).

The history of Turkey suggests that the process of establishing the judiciary is not an easy matter. The Turkish case presents a continuation of institutional and societal challenges to the independence of the judiciary and democratization efforts. The rule of law enables democratic consolidation. The agency responsible for the rule of law is the

judiciary. Actors impact the functioning of the judiciary, positively and negatively, by promoting or impeding the rule of law.

In the case of Turkey, a division of powers within the judiciary, the executive, and the legislature must be maintained. The Constitutional Court must only act within its framework to restrict the executive. A judicial check to ensure the rule of law is also necessary to retain the democratization process. However, the judiciary must not have unlimited power to restrict other actors. Nevertheless, it must constantly control any attempts by the executive and the legislature to exceed their powers.

There are forces in society and within the political system that shape and influence the degree to which an independent judiciary can operate. These actors are the parliament (historically under the prime minister's control), the military, and the executive. Two key forces are the military and the political elite. Within the political elite, it is possible to identify two institutional actors whose powers and influence vary depending on the functioning of the political system at any time. These are executive and legislative branches. Overall, the rule of law is absent in Turkish politics. In Turkey, currently, the executive controls the legislature, which indicates the need to balance power between the executive and the legislature.

It is necessary to understand the relationship between the evolution of the military's role in politics and the role of the executive and the legislature, including party structures to understand how the judiciary's role in Turkish politics has changed. A major issue within the judiciary is the validity of the changes within the legal system. The validity and implementation of reforms since the military coups have been

troublesome and anti-democratic. The “foundations of the current political and legal system in Turkey were laid down after the military coup d’état of 1960” (Coskun 45). The military’s interference was aimed at creating a dual power structure. In this regard, the state was represented by the army and the judiciary, whereas the other side of the equation was the government and parliamentary system. It has been argued that the Army continued to maintain the position even after the military coups of 1961, 1970, and 1980 (46). Thus, the military acted in the role of the executive when it perceived a threat (Coskun 47). In this regard, the legislature was weakened at the beginning of the 1980s, after the second military coup. Checks and balances have not been defined clearly, especially since the influence of military regimes. Overall, the judiciary has been accused of having ties with military since the 1980s.

In this context, The Republic of Turkey’s constitutional system is based “on institutions endowed with representative legitimization—Grand National Assembly *in primis*—and State structures and elites” (Benvenuti 311). The judiciary is organized within this constitutional origin. In this regard, a defining feature of the judiciary has been the centrality of the judiciary. It is argued that “the centrality of the judiciary is rooted in the Constitution of 1961 and then renewed to some extent by the Constitution of 1982” (313). The feature of centrality allowed the establishment of “the principle of the rule of law, formally considering the judiciary as a guardian of the Republic” (313). The guardianship role declares the judiciary as a transformative source within the society (313). One argument has been that the competition between the judiciary and elected politicians led the judiciary to maintain these values. However, it was “the will

of the military elite to carry out a programme of transformation of society” (Benvenuti 313). In this respect, it is claimed that the judiciary acted to advocate the executive and maintain “its constitutional duties” (313). Supporters of this view have claimed that the military can be regarded as acting in the role of the executive, especially following the constitution of 1982 (316).

The executive branch clearly undermines the independence and impartiality of the judiciary. These arguments maintain that there is a definite and continuous pattern in which separation of powers is violated. They reveal how the judicial, legislative, and executive branches interfere with each other, and their boundaries are even more blurred today. In the Turkish judiciary, “inconsistencies between normative acts and legal practice” (Asik 145) weakened public trust in the rule of law. The traditional top-down approach to implementing legal changes, apparent especially since the 1980s, continues to exist.

Judicial independence is worsening today. Thus, the separation of powers is becoming weaker. Human rights violations in recent years, a dysfunctional judiciary due to the role of the executive branch and the ruling party, and pressure on the media and any opposition by the government are the main causes of concern. The period after 2007 is also differentiated from previous periods in Turkish history by increasing tendencies towards authoritarianism. This has occurred due to the increased role of the executive and the restricted the role of the judiciary, civil society, and political society. The constitution does not guarantee the application of the law. Recent changes within the judiciary, starting in 2007, have resulted in a fear of the government’s rising

authoritarianism. Academics and media in international and domestic contexts have regarded changes within the judiciary as not comprehensive and as benefiting the government's authority. Reforms that were made as part of the EU accession process became questionable after 2007, the second term of the JDP.

The judiciary has been able to exercise power over the ruling party. However, the power of the judiciary has diminished since 2010. The objectivity of the changes to the judiciary was especially challenged after the proposed amendments to the constitution in 2010. Changes followed that indicated that the aim of the government was to augment the power of the executive over the judiciary. Furthermore, opposition parties and civil society were not consulted in the process regarding constitution making and changes within the judiciary. The increasing confrontation between the JDP and the military has resulted in extended power for the president. In this setting, the weakness of the legislative function is clearly visible, and it must be strengthened. This can be done by preventing majoritarian party politics and guaranteeing the independence of the judiciary.

The current state of affairs also indicates that presidentialism and the increasing role of the executive can be direct threats to the judiciary's independence and impartiality. Recently, Erdogan's increasing tendency towards authoritarianism has shown that increasing the power of the president and the executive threatens the legislature's independence. Furthermore, politically motivated trials since 2007 and targeting of the Constitutional Court by the government reveal the greater extent of concerns. The judiciary might continue to suffer from the executive and majoritarian

parliamentary forces in the near future. The control of the executive over judicial bodies clearly violates the checks and balances. In return, this will exacerbate the tensions between the executive and civil and political society, especially the opposition. Other urgent concerns are lengthy trials without evidence and the ongoing imprisonment of journalists, which have been criticized extensively by the international media.

Overall, democratization efforts must follow a pluralist approach, and need to be built on the rule of law and the consensus of society. Implementation of reforms must also be reviewed in terms of the independence of the judiciary and how they might affect the judiciary and civil society in the long run. The establishment of legal and political cultures is also necessary to guarantee the existence of this structure. Judicial review and the constitution must be revised based on a consensus of political and civil actors. Horizontal accountability, which guarantees a judicial check on the rule of law, must be established for democratic consolidation to be completed. An independent judiciary must guarantee the balance of power between political actors. The role of international actors, especially the EU, in legal reforms needs to be examined to improve the chances of democratization for the future. In addition to political support from all parties and views, public support and agreement for any changes in the judiciary are also necessary. The decline of Turkish democracy can also be improved by eliminating the ten percent election threshold, which strengthens the executive.

Furthermore, constitution-making efforts will also be very limited if any opposition groups are excluded from the process. The rule of law requires the existence of a legal culture in Turkey, and this must be embodied in the constitution. The

judiciary's primary role in maintaining freedom of association and freedom of expression indicate another urgent need to revise the judiciary in Turkey. This is essential due to recent pressures on the media and also due to increased numbers of politicized trials. In this regard, the separation of powers must be reestablished, and this process must be examined thoroughly.

SUMMARY AND CONCLUSION

The thesis opened with a general introduction to the concept of democratization, which was developed through a review of the literature in Chapter Two. In Chapter One, it was established that the theme of this case study is that ideal forms of democratization will take culturally constructed forms as they are adopted in any given society.

The analysis proper was divided into four periods of the Turkish Republic. The first period focused on the reforms from the foundation of the Turkish Republic to the beginning of the multiparty period in 1950. The constitution of 1924 remained mostly unchanged until the beginning of multiparty elections. The legal system of Turkey was introduced based on European legal systems. This section presents a general view of the Turkish legal system and explains how it can be used to understand the legal procedures and changes in other periods of the Republic. It is the first transition era of the judiciary in the Turkish Republic's history.

The second period signaled the start of multiparty elections in the 1950s to the 1980s. It covers the interference of actors such as the military and politicians with the

judiciary starting with changes made in the multiparty period and continuing with the military coup of 1960 caused by the increasingly authoritarian acts of politicians. This indicated a continuous struggle between the conservatives, their secular opponents, and the military. In 1961, the constitutional courts were established to guarantee the separation of powers and also as a mechanism to guarantee reviews of judicial decisions. These mechanisms, however, were not significantly independent from the military, which often interrupted the democratization of the political and the legal systems. The effect of these changes became apparent in the 1960s and continued after the military coup of the 1980s; the courts often acted as political actors in the political scene.

The third period extended from the 1980s to the beginning of 2000s. The military coup of the 1980s, in particular, was a massive setback in the democratization process and also a vital factor in weakening the legal system. It was also a reason for increasing ideological and political conflicts within the legal system. This division existed especially among secular politicians, conservatives, and those with ideological differences. This section also presents the continuous effort of the military to interfere in the legal system by claiming to maintain secular values, which also resulted in the development of political Islam and increasing polarization between the 1990s and the 2000s.

The fourth part focused on the period from 2002 to today. These years are divided between the first JDP era from 2002 to 2007, and the two following JDP eras from 2007-11, and from 2011 to today. The section on the JDP era from 2002 to 2007 explains the legal changes that took place during this period. The main priorities of the

party were to maintain the rule of law and to establish an independent judicial system by guaranteeing freedom of the media, allowing a more pluralistic and open society, and changing the legal system. The JDP claimed that it would end military tutelage. The JDP, however, was criticized severely for simply replacing military tutelage with its own tutelage and for polarizing Turkish society. The section on the JDP era from 2007 to today focuses on the period beginning with the general election of 2007, in which the JDP was re-elected for a second term. Significant legal changes had started during this era, with the presidential elections, and also with the controversial trials of Ergenekon and Sledgehammer. These trials were regarded as alleged coup attempts against the JDP government, and they are often associated with changes in the judiciary.

The main argument of this thesis is that Turkish government as it has developed over the last 60 years or so can best be understood as occupying a position on a continuum from authoritarian government to democratic constitutionalism. Specifically, this hybrid movement of the government is best observed through the development of the judiciary branch, and many examples of such have been provided throughout the text. Beginning from this background, Turkey has unquestionably set itself on the path of a constitutional democracy. Its history represents a blend within which the culture pushes continually for a blend of these styles of government.

Turkey may not be labelled a constitutional democracy or an authoritarian regime. Moreover, Turkey may not be called a failed state or an experimental state. Turkey is best understood as a vital and lively hybrid of authoritarian and constitutional governmental dynamics. Not only is it a work in progress, it is specifically the result of

the cultural construction of government as it has taken place uniquely in Turkey. The case of Turkey demonstrates that every government can only ever be a reflection of the prevailing cultural construction of authority and governance, which is continually upheld by its people.

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