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# Turkey's Judiciary and the Drift Toward Competitive Authoritarianism

Ergun Özbudun

Turkey has always been considered an “illiberal democracy”, or in Freedom House’s terms, a “partly-free” country. In recent years, however, there has been a downward trend toward “competitive authoritarianism”. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favour of incumbents. One of the methods employed by competitive authoritarian leaders is the use of informal mechanisms of repression. This, in turn, requires a dependent and cooperative judiciary. Thus, in Turkey the year 2014 can be described as a period when the governing AKP (Justice and Development Party) made a sustained and systematic effort to establish its control over the judiciary by means of a series of laws of dubious constitutionality.

**Keywords:** Turkish politics, illiberal democracies, competitive authoritarianism, independence of the judiciary

There is a broad grey area between institutionalised liberal democracies and full (or closed) authoritarian regimes. In the last few decades, such regimes have proliferated rapidly, and political scientists have devoted considerable time and effort to their analysis. The problem is that the grey area is indeed quite broad and includes many shades of grey. Thus, various authors have suggested a large number of terms for such regimes, such as “electoral democracies”, “semi-democracies”, “illiberal democracies”, “tutelary democracies”, “hybrid regimes”, “electoral authoritarianisms”, “quasi-democracies”, “defective democracies”, “partly free countries”, etc. It has been argued that such an “excessive proliferation of new terms and concepts” is likely to result in “conceptual confusion”.<sup>1</sup>

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<sup>1</sup>Collier and Levitsky, “Democracy with Adjectives”. Although the literature on such hybrid regimes is abundant, a few outstanding works may be cited: Schedler, *Electoral Authoritarianism* and “The Menu of the Manipulations”; Diamond, “Thinking about Hybrid Regimes”; Zakaria, *The Future of Freedom*.

Steven Levitsky and Lucan Way have made a rich contribution to this growing body of literature. Among the many merits of their book is the authors' effort to bring greater clarity to the concept they investigate. Thus, they define competitive authoritarian regimes as

civilian regimes in which formal democratic institutions exist and are widely used as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage *vis-à-vis* their opponents. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair.

This definition differentiates competitive authoritarian regimes both from democracies and full (or closed) authoritarian regimes. The critical element in this definition is the evenness of the "playing field", or to put it differently, the "fairness" of elections. The authors admit that

a degree of incumbent advantage – in the form of patronage jobs, pork-barrel spending, clientelist social policies, and privileged access to media and finance exists in all democracies. In democracies, however, these advantages do not seriously undermine the opposition's capacity to compete. When incumbent manipulation of state institutions and resources is so excessive and one-sided that it seriously limits political competition, it is incompatible with democracy.<sup>2</sup>

Indeed, an even playing field is implicit in most procedural definitions of democracy, usually expressed as "free and fair elections". Consequently, the authors criticise the classification of "hybrid regimes as subtypes of democracy. [...] [T]he value of such labels is questionable." They agree with Juan Linz that these regimes "are not democracies even using minimum standards". Thus, to avoid confusion, adjectives should be added to "authoritarianism" rather than to democracy (15).

In the authors' opinion,

three aspects of an uneven playing field are of particular importance: access to resources, media, and the law. [...] Access to resources is uneven when incumbents use the state to create and maintain resource disparities that seriously hinder the opposition's ability to compete. [...] Incumbents also may use the state to monopolize access to private-sector finance. Governing parties may use discretionary control over credit, licenses, state contracts, and other resources to enrich themselves". (10)

Access to media is particularly skewed in many competitive authoritarian regimes where "the state controls all television and most – if not all – radio broadcasting. Although independent newspapers and magazines may circulate freely, they generally reach only a small urban elite" (11). Finally, with regard to access to the law, "in many competitive authoritarian regimes, incumbents pack judiciaries, electoral

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<sup>2</sup>Levitsky and Way, *Competitive Authoritarianism*, 5-6.

commissions, and other nominally independent arbiters and manipulate them via blackmail, bribery and/or intimidation. As a result, legal and other state agencies that are designed to act as referees rule systematically in favor of incumbents” (12).

Thus, competitive authoritarianism is different both from electoral democracies and hegemonic electoral authoritarian regimes. Larry Diamond distinguishes between competitive and uncompetitive (hegemonic) authoritarianism.<sup>3</sup> Similarly, Andreas Schedler points out that

the relative strength of opposition forces varies substantially among electoral autocracies. In what I wish to call ‘competitive EA regimes’ authoritarian rulers are insecure; in ‘hegemonic EA regimes’ they are invincible. In the former, the electoral arena is a genuine battleground in the struggle for power; in the latter, it is little more than a theatrical setting for the self-representation and self-reproduction of power.<sup>4</sup>

Levitsky and Way also distinguish competitive authoritarian regimes from full authoritarian regimes where electoral competition is either completely nonexistent or merely a façade. Even though the electoral field is markedly uneven in competitive authoritarian regimes,

such unfairness does not preclude serious contestation – or even occasional opposition victories. Stated another way, whereas officials in full authoritarian regimes can rest easy on the eve of elections... incumbents in competitive authoritarian regimes cannot. Government officials fear a possible opposition victory (and must work hard to thwart it), and opposition leaders believe they have at least some chance of victory. In competitive authoritarian regimes, incumbents are forced to sweat.<sup>5</sup>

As Schedler demonstrates, the “menu of manipulation” available to authoritarian or semi-authoritarian leaders is quite rich and varied. “Rulers may choose a number of tactics to help them carve the democratic heart out of electoral contests.”<sup>6</sup> Among those cited by Levitsky and Way is the employment of

informal mechanisms of repression. For example, many of them use ‘legal’ repression, or the discretionary use of legal instruments – such as tax authorities and libel laws – to target opposition and the media. Although such repression is formal in the sense that it entails the (often technically correct) application of the law, it is an informal institution in that enforcement is widely known to be selective.”<sup>7</sup>

This, of course, requires a dependent and cooperative judiciary. This article focuses on the AKP government’s recent efforts to create such a judiciary, even though the “menu of manipulation” is in no way limited to the judiciary.

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<sup>3</sup>Diamond, “Thinking About Hybrid Regimes”, 29-33.

<sup>4</sup>Schedler, “The Menu of Manipulation”, 47.

<sup>5</sup>Levitsky and Way, *Competitive Authoritarianism*, 12.

<sup>6</sup>Schedler, “The Menu of Manipulation”, 41-2 and *passim*.

<sup>7</sup>Levitsky and Way, *Competitive Authoritarianism*, 28.

## The Constitution and the judiciary

The status and functions of the judiciary have always been among the most hotly debated issues in Turkish politics. At the centre of the debate are the composition and powers of the Constitutional Court and of the High Council Judges and Public Prosecutors (*Hâkimler ve Savcılar Yüksek Kurulu*, HSYK). Both were the subject of radical change in the constitutional amendment of 2010, adopted by the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) majority in parliament and approved by a mandatory referendum with a 58 percent majority.

The changes regarding the HSYK were among the most controversial points in the amendment package that involved changes in 24 articles. In general, these changes were welcomed not only by AKP supporters, but also a majority of independent liberal democrats and major European institutions such as the European Union (EU), the Council of Europe and the Venice Commission.

The thrust of the HSYK reform was to give it a more pluralistic and representative structure and to increase its autonomy vis-à-vis the government. Thus, while under the previous arrangement only the two high courts (Court of Cassation and Council of State) were represented in the Council, the Council now represents the entire judiciary. Indeed, close to half of its regular members (10 out of 22) are elected by all general and administrative courts judges and public prosecutors, in addition to five regular members elected by the two high courts, without any interference by the executive branch. Thus, the judges elected by their peers constitute an almost two-thirds majority of the Council. This is in conformity with the guidelines of the two expert bodies of the Council of Europe: the Venice Commission and the Consultative Council of European Judges.<sup>8</sup>

Another improvement brought about by the constitutional amendment opens the dismissal rulings of the Council to judicial review. Furthermore, the amendment responds to some of the criticism directed against the previous arrangement, in that it stipulates that the Council shall have its own secretariat and budget, justice inspectors shall be attached to the Council instead of the Ministry of Justice, and the Minister, while remaining as the President of the Council, shall not take part in the work of its chambers. Thus, his role has been made more symbolic and representative.<sup>9</sup>

Following the adoption of the constitutional amendment, a new law (Law No. 6087, dated 11 December 2010) was passed along the lines of the amended Article 159 of the Constitution. The draft law, together with some others concerning the judiciary, was submitted by the Turkish government to the advisory opinion of the Venice Commission, from which they received positive comments.<sup>10</sup>

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<sup>8</sup>Venice Commission, "Report on Independence of Judicial System", para. 32; Consultative Council of European Judges, *Opinion No. 10*.

<sup>9</sup>Özbudun, *The Judiciary*, 285-7.

<sup>10</sup>Venice Commission, "Interim Opinion on the Draft Law", and "Opinion on the Law".

### The crisis of December 2013

The crisis over the new HSYK erupted with the disclosure of major corruption charges involving four cabinet ministers, their relatives and certain bureaucrats on 17 and 25 December 2013. The government quickly described it as a sinister plot against it, and reacted by changing the “Regulation on the Judicial Police” on 21 December 2013. The changes obliged the members of the police force involved in criminal investigations under the authority of public prosecutors to inform the relevant administrative authorities immediately of the ongoing investigation (amended Article 5c). This enabled the government to be informed immediately of any ongoing (secret) investigations and to take necessary measures, such as changing the police officers involved accordingly.

Fifteen members of the HSYK protested against this change in a public declaration as being against the spirit of a “judicial police”, destroying the secrecy of investigations and weakening the independence of the judiciary. The government’s arrows now turned against the HSYK. Prime Minister Recep Tayyip Erdoğan accused the signatories of being guilty of violating the laws and stated that he would have put them on trial if he had had the power to do so. He also stated that the AKP had made a mistake in 2010 by strengthening the autonomy of the HSYK, and weakening the role of the Minister of Justice within the Council.<sup>11</sup> On the same days, the AKP spokesmen announced their intention to amend the Constitution to change the structure of the HSYK. According to this plan, all of its members would be directly or indirectly elected by parliament. However, since none of the opposition parties in parliament supported this idea, a constitutional amendment majority (a minimum of three-fifths of the entire membership of parliament) was not obtained.<sup>12</sup>

When it became clear that a constitutional amendment was impossible, a group of 78 AKP members of parliament (MPs) presented a bill to parliament designed to radically change Law no. 6087 on the HSYK. The bill was intended to limit the powers of the Plenary of the HSYK and to strengthen the role of the Minister of Justice as its president. The signatories’ argument was based on the last paragraph of Article 159 of the Constitution, according to which,

The method of selection of its members, the formation of its chambers and the division of labor among them, the duties of the Plenary and its chambers, their quorum for meeting and decisions, the procedures and principles of their work, appeals against the decisions of the chambers and the ways in which they shall be examined, and the structure and functions of the General Secretariat shall be regulated by law.

The AKP spokesmen argued that this provision granted the legislature authority to regulate all these matters by law, so long as it did not conflict with the other

<sup>11</sup>“Bir yanlışlık yaptık” [We made a mistake], *Taraf* (daily), 30 December 2013.

<sup>12</sup>“HSYK ameliyata yatırılıyor” [HSYK on the surgery table], *Taraf* (daily), 1 January 2014.

provisions of Article 159 of the Constitution. However, the unconstitutionality of many provisions in the bill was so obvious that the matter turned into a constitutional crisis with strong objections raised by all opposition parties and a great majority of lawyers and legal scholars. Even the President of the Republic, Abdullah Gül, stated that he found many of the bill's provisions unconstitutional.

I had the bill examined and saw that 15 points in 12 articles were clearly unconstitutional, and I warned the Minister of Justice. In the Justice Committee and the Plenary stages, these warnings were taken into consideration, and certain changes were made. I finally signed the law thinking that it would be more appropriate for the Constitutional Court to rule on the remaining controversial points.<sup>13</sup>

It should be remembered here that even if Gül had refused to promulgate, his veto could have been overridden by parliament with a simple majority. Thus the law (no. 6524) finally went into force on 27 February 2014.

As expected, a group of opposition MPs immediately challenged the law before the Constitutional Court, with a request for annulment and a stay order. However, before the Court reached a decision, two radical surgical operations took place. One involved changing the composition of the first chamber of the HSYK which, according to the law, had the power to appoint and transfer judges and public prosecutors. Under law no. 6087, the power to appoint members to one of the three chambers belonged to the Plenary of the Council. The new law gave this power to the Minister of Justice. Accordingly, he transferred two presumably anti-government members to the other chambers, and appointed two presumably pro-government members to the First Chamber. This was followed by a large-scale transfer operation removing judges and public prosecutors involved in corruption investigations to less sensitive posts, and replacing them with pro-government colleagues.

The second, and even more draconian operation was the automatic result of the new law. Under its provisional article 4, "with the entry into force of this Law, the positions of the Secretary General, Assistant Secretaries General, the Chairman of the Board of Inspectors and the Vice-Chairmen, Council inspectors, reporting judges, and the administrative personnel shall be terminated". This provision gave the Minister of Justice almost unlimited authority to reorganise the HSYK, with the exception of the elected members whose status is based on the Constitution, not on the HSYK law. Such purge laws are very rare in Turkish constitutional history, since they have dire consequences for the public personnel involved. Even if the Constitutional Court annuls the law (as it did in this case), they cannot return to their previous posts, since Constitutional Court decisions are not retroactive under Article 153 of the Constitution.

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<sup>13</sup>M. Yetkin, "Gül'den HSYK'ya 'yetmez ama evet'" [From Gül to HSYK: not enough but yes], *Radikal* (daily), 27 February 2014.

Behind the fight over the HSYK lies a deep conflict between the AKP government and the Gülen movement, a well-organised and active religious community. In the past, the members of this community generally voted for centre-right rather than Islamist parties, but since the establishment of the AKP they have strongly cooperated with it. The Gülen movement is believed to have a large number of supporters within the judiciary and the police force, and is very active in the fields of education, media and many other business sectors.<sup>14</sup>

Relations between the AKP and the Gülen movement started to cool off from 2012, for reasons still not very clear. Both sides were careful, however, to hide their differences from the public. With the disclosure of the corruption charges on 17 and 25 December 2013, the conflict came out into the open. Erdoğan and his supporters immediately accused the movement of being the sinister force behind what they termed a “conspiracy”. Erdoğan and other party spokesmen used unusually strong words in referring to the movement, such as “spies”, “agents”, “sub-contractors of foreign forces”, “traitors”, “members of a gang”, a “parallel state”, “assassins” (*başbaşiler*; a reference to a fanatic and murderous sect in the twelfth century Muslim world), etc.<sup>15</sup> Erdoğan also vowed that “they would enter into their lairs and destroy them”.<sup>16</sup> At the same time, the government engaged in a large-scale purge of suspected pro-Gülen officers from the police force. In July and August 2014, this was followed by the start of criminal proceedings against many of these officers.

### The Constitutional Court’s ruling

On 10 April 2014, the Constitutional Court rendered its ruling on the new HSYK Law no. 6524.<sup>17</sup> The Court, after careful examination, annulled 19 provisions of the law, while rejecting 35 claims of unconstitutionality. The Court’s basic reasoning was that while the last paragraph of Article 159 of the Constitution (as quoted above) entitles the legislature to regulate certain matters concerning the HSYK by law, the scope of its competence should be interpreted in the light of the first paragraph of the same article, which states that “The High Council of Judges and Public Prosecutors is established and shall function in accordance with the principles of the independence of the courts and the tenure guarantees for judges.” Thus, the Court argued,

<sup>14</sup>On the Gülen movement, see Yavuz and Esposito, *Turkish Islam and the Secular State*.

<sup>15</sup>“Erdoğan’a göre medya casus, herşey komplo” [According to Erdoğan, the media is a spy, everything is a conspiracy], *Taraf* (daily), 26 December 2014; “Yine vatana ihanetle suçladı” [Again accusations of treason], *Taraf* (daily), 30 December 2014.

<sup>16</sup>Özbudun, “AKP at the Crossroads”, 159.

<sup>17</sup>Constitutional Court decision, E. 2014/57, K. 2014/81, *Resmî Gazete (Official Gazette)*, 14 May 2014, No. 29000. For an analysis of this decision, see Gönenç, *Siyasi İktidarın Denetlenmesi-Dengelemesi ve Yargı* [Checks and Balances on Political Power and Judiciary], 178-215; Özbudun, “Anayasa Mahkemesi ve HSYK” [Constitutional Court and the HSYK].

While the HSYK is an administrative body, no hierarchical relation with the central public administration is established, and it is stipulated that it shall be established and function in accordance with the principles of the independence of the courts and the tenure guarantees for judges... This is not a privilege granted to the members of the HSYK, but a necessary and natural consequence of the principle that judges and public prosecutors, about whom the HSYK makes decisions, shall function in accordance with the principles of the independence of the courts and the tenure guarantees for judges.<sup>18</sup>

It was on the basis of this reasoning that the Court found the provisions that transferred the powers of the Plenary of the Council to the Minister of Justice or unduly restricted the powers of the Plenary unconstitutional. Particularly noteworthy among these are the following:

- (a) The provision that empowers the Minister of Justice to determine which members of the HSYK will serve in which chamber, and to change their chamber.
- (b) The provision that entitles the Minister of Justice to appoint the Chairman and the Vice-Chairmen of the Board of Inspectors.
- (c) The provision that gives the Minister total discretionary authority in fixing the agenda of the meetings of the Plenary.
- (d) The provision that empowers the Minister to start an investigation with regard to the alleged disciplinary and criminal offences of the elected members of the Council.
- (e) The provision which stipulates that the chairmen of the chambers shall be elected by the Plenary from among two candidates determined by the relevant chamber.
- (f) The provisions which stipulate that the reporting judges and the Council inspectors shall be chosen by the Plenary from among two candidates determined by the first chamber.
- (g) Finally, the provision that terminated the positions of all HSYK personnel, save the elected members. As pointed out above, however, this did not enable the involved persons to return to their posts, since Constitutional Court decisions are not retroactive. The Court argued that in cases of "legal or practical necessity", such as the abolition of a public department or its entire reorganisation, such purge laws may not be unconstitutional, but that this was not the case with respect to HSYK.

### **Law no. 6545: special criminal judges**

The AKP government's attempts to create a more pliant judiciary were not limited to the HSYK law. A law ("Law amending the Turkish Criminal Code and other

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<sup>18</sup>Constitutional Court decision, 147.

laws, No. 6545) adopted on 18 June 2014 introduced many changes, two of which seem particularly noteworthy. One seeks to reorganise the Court of Cassation. According to Article 37 of the law, the division of labour among the chambers of the Court will be redetermined by the Plenary upon the proposal of the newly elected First Council of Presidents. Apparently the aim was to secure the examination of appeals concerning politically sensitive (such as corruption) cases by chambers dominated by pro-government judges. This attempt failed, however, as the Plenary postponed the reorganisation of the chambers to an indefinite future.

The second change involved the creation of special criminal judges with extensive powers (Art. 48). They will be empowered to take all decisions related to the conduct of criminal investigations, such as detention, arrest, release and seizure of property. The appeal against their decisions can now only be made before another special criminal judge. Such powers used to belong to the criminal courts for petty crimes (*sulh ceza mahkemeleri*) that were abolished by the present law. Such posts are quite limited in number, normally only one in each province, but their numbers can be increased according to the needs and the population of the province. Thus, in İstanbul, the most populous province, there are only six of them out of a total of 93 criminal judges who were previously in a position to decide on the appeals against such measures.<sup>19</sup> What is more, these judges were appointed by the First Chamber of HSYK, now dominated by the pro-government members after the February 2014 operation, and are widely believed to have pro-government leanings. Their conduct in office has largely justified these fears, as will be spelled out below.

It has been convincingly argued<sup>20</sup> that the creation of such special judgeships is incompatible with the principle of natural (or legal) judge enshrined in Article 37 of the Constitution, which states that “no one shall be put to trial before a body other than the court he/she is legally subject to. No extraordinary judicial bodies shall be established that would lead to putting a person to trial before a body other than the court he/she is legally subject to.” Both Turkish legal doctrine and Constitutional Court rulings confirm that this clause prohibits the creation of courts with competence to try cases of violations of law that took place before their creation. It can be argued, of course, that the legislature has the competence to reorganise the judicial system, for instance by abolishing certain courts and creating new ones. However, it should not be done with the aim of violating the principle of natural judge. In the present case, the law was clearly politically motivated.

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<sup>19</sup>K. Gözler, “Sulh Ceza Hâkimlikleri ve Tabii Hâkim İlkesi” [Criminal Judgeships and the Principle of Natural Judge], *Türk Anayasa Hukuku Sitesi* [Turkish Constitutional Law website], 29 August 2014, <http://www.anayasa.gen.tr/tabii-hakim.htm>.

<sup>20</sup>*Ibid.*

### New HSYK elections

New elections for the HSYK were held in late September and early October 2014, as the four-year term of the original members came to an end. The elections were followed with vivid interest by public opinion, equal perhaps to that of a parliamentary election, since the results would determine whether the AKP government would be able to succeed in its plans to create a dependent judiciary. Indeed, during the election process, certain leading AKP spokesmen stated that if anti-government judges gained a majority, the government would consider this result “illegitimate”. Deputy Prime Minister Yalçın Akdoğan added that “the country’s fate will be determined not by 12 thousand (judges and public prosecutors), but by 55 million voters”.<sup>21</sup> Throughout 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). Even though this group was ostensibly a coalition of conservative, nationalist and social democrat judges, they publicly declared that, if elected, they would “work in harmony with the legislative and executive branches”.<sup>22</sup>

Although the five main and five substitute members elected by the two high courts (Court of Cassation and Council of State) were opposed to the government, the 12 October elections, in which more than 13,000 first-degree judges and public prosecutors voted for ten main and seven substitute members, ended with a clear victory of the pro-government YBP group. Thus, together with the *ex-officio* members and the four members appointed by the President of the Republic, the government clearly dominated the new HSYK and, through it, obtained the power to control the entire judiciary. Thus, in the last days of 2014, the new HSYK suspended four public prosecutors who had played a major role in the 17-25 December 2013 corruption investigations involving certain ministers.

### Law no. 6572: packing the High Courts

On 2 December 2014, a new law was adopted changing certain provisions of the Law on Judges and Public Prosecutors, and certain other laws. Among the highly objectionable provisions of the new law is the addition of new chambers and new members to the Court of Cassation and the Council of State. Thus, it stipulates

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<sup>21</sup>U. Çakırözler, “B Planı: Referandum” [B Plan: Referendum], *Cumhuriyet* (daily), 25 September 2014; “Kazananı Gayrimeşru Sayarız” [We will consider the winners as illegitimate], *Hürriyet* (daily), 25 September 2014.

<sup>22</sup>For the declarations of the competing pro- and anti-government groups, “HSYK Seçiminin Aktörleri Ne Diyor?” [What do the actors of the HSYK elections say?], *Hürriyet* (daily), 29 September 2014; İ. Okur, “HSYK Seçimi İçin Devlet İmkanları Kullanılıyor: Şık Değil” [State resources are being used for the HSYK elections: It is not elegant], *Hürriyet* (daily), 14 September 2014; T. Akyol, “Yeni HSYK” [The New HSYK], *Hürriyet* (daily), 16 October 2014, and “HSYK Seçimleri” [HSYK Elections], *Hürriyet* (daily), 24 September 2014.

that the Court of Cassation shall consist of 23 civil law and 23 criminal chambers (Art. 21), and a total of 129 new judges shall be appointed. Likewise, two new chambers shall be created in the Council of State with the addition of 39 new judges. The President of the Court of Cassation, Ali Alkan, strongly protested against the new law as undue interference in the functioning of the Court.<sup>23</sup> When the law entered into force, the new HSYK, now dominated by pro-government members, carried out the appointments with uncharacteristic speed in order to avoid a possible stay order by the Constitutional Court. Thus, the AKP's quest for a dependent judiciary reached its culmination, with the only exception being the Constitutional Court.

The law also contained other questionable provisions. One was the change in Article 116 of the Code of Criminal Procedure for searches of the body, personal articles, domicile and office. While such searches were previously justified only in cases of "strong doubt based on concrete evidence", now "reasonable doubt" suffices (Art. 40). More interesting than this change of words is the AKP government's sudden reversals. Indeed, the original text of the Code of Criminal Procedure dated 2004 used the term "reasonable doubt". A law dated 21 February 2014 changed it to "strong doubt based on concrete evidence". The present law returned to the original term. The political motivations behind such frequent turn-arounds are obvious. The February 2014 law was passed to make the investigation of corruption charges against ministers more difficult. The December 2014 law was passed when the government was engaged in an all-out war with the Gülen movement, and was anxious to speed up and facilitate criminal proceedings against its sympathizers. Thus, a leading Turkish columnist described these reversals as a "make and break game".<sup>24</sup> The Minister of Justice also announced that 3500 new judges will be appointed this year, and another 5000 next year. This is clearly designed to eliminate the influence of the pro-Gülen and other pro-opposition members in the judiciary.<sup>25</sup>

Other disquieting provisions of Law no. 6572 are Articles 41, 42 and 43, which amended Articles 128, 135 and 140 of the Code of Criminal Procedure, respectively. These articles make it possible to take such radical measures in the course of a criminal investigation as the seizure of allegedly crime-related property (Art. 128), communications eavesdropping (Art. 135), and inspection by technical means (Art. 140) for a category of heavy crimes listed in said articles. Crimes against the

<sup>23</sup>"Yargıtay'a daha ne kadar müdahale edeceksiniz" [How far will you continue to interfere with the Court of Cassation], *Hürriyet* (daily), 25 November 2014; "Yargı 'dik duracağız' dedi" [The judiciary said it will stand upright], *Taraf* (daily), 2 September 2014.

<sup>24</sup>T. Akyol, "Yine Yapboz" [Once again make and break], *Hürriyet* (daily), 7 November 2014, and by the same author in the same newspaper "Yapboz No. 3" [Make and break, no. 3], 14 November 2014; "Yapboz No.4" [Make and break, no. 4], 26 November 2014; nd "Güven Sorunu" [Problem of trust], 11 December 2014.

<sup>25</sup>"45 Günde Yeni Yargı" [New Judiciary in 45 Days], *Hürriyet* (daily), 1 November 2014.

constitutional order and its functioning (Articles 309, 311-316 of the Turkish Criminal Code) were added to these lists. Most of the provisions are rather ambiguous and open to different interpretations. Given that the AKP government describes many kinds of opposition activities, from the Gezi Park demonstrations to corruption investigations, as “coup attempts” against it, such severe measures may very well be used by pro-government judges and public prosecutors to intimidate and silence opposition. One particularly dramatic example of this took place on 14 December when the police raided the headquarters of a pro-Gülen newspaper (*Zaman*) and a TV network (*Samanyolu*) on the absurd allegation of establishing an “armed organization” (Turkish Criminal Code, Art. 314). Several people were detained, including the general directors of the two establishments, one of whom was later released and the other later arrested.

### **The Constitutional Court: the remaining bastion**

The year 2014 can be described as a period in which the AKP government made a sustained and systematic effort to establish its control over the judiciary. Through laws of dubious constitutionality, it seems largely to have accomplished this aim, as analysed above. In this dark picture, the Constitutional Court seems to be the only beacon of hope. Indeed, the Court has undergone a remarkable transformation after the constitutional reforms of 2010, which gave it a more pluralistic structure and introduced the procedure of individual application (constitutional complaint). Previously, the Court's approach had been described as “ideology-oriented” rather than “rights-oriented”.<sup>26</sup> In other words, the Court generally functioned as the ultimate guardian of the two principal pillars of the Kemalist “founding ideology” of the Republic, namely a militant and “assertive” understanding of secularism,<sup>27</sup> and an exclusionary and assimilationist notion of Turkish nationalism. This approach led to the closure of many ethnic and Islamic parties, as well as many other rulings incompatible with universal human rights standards.

Following the 2010 reforms, the Constitutional Court has gradually emerged as the principal defender of human rights and democratic standards. Its ruling on the HSYK law discussed above is a good case in point. The adoption of constitutional complaint has also served as an important instrument in the protection of individual rights and freedoms.<sup>28</sup> Particularly noteworthy are the Constitutional Court's rulings concerning long and undue detention periods and access to the internet.<sup>29</sup>

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<sup>26</sup>Arslan, “Conflicting Paradigms”, 9-25.

<sup>27</sup>On the “assertive” character of Turkish secularism, see Kuru, *Secularism and State Policies*.

<sup>28</sup>The procedure of constitutional complaint, adopted by the constitutional amendment of 2010, allows individuals whose constitutional rights and freedoms (as well as those recognised by the European Convention of Human Rights) are violated by a public authority to make an individual application to the Constitutional Court. The Court is authorised to take redressive action.

<sup>29</sup>Özbudun, “Bireysel Başvuru ve Anayasa Mahkemesi'ndeki Olumlu Değişim”, [Constitutional Complaint], in *Türkiye'de Demokratikleşme Süreci [Democratization in Turkey]*, 187-91.

As expected, those liberal rulings of the Constitutional Court were met by severe, critical comments by AKP spokesmen. Thus, in connection with the Court's rulings on access to YouTube and its decision on the HSYK, Prime Minister Erdoğan accused the Court of defending "the commercial rights of international companies instead of the rights of their own country and own nation", and invited the President and members of the Court "to take off their robes and engage in politics under the roof of political parties".<sup>30</sup> Similarly, the Court's ruling on the HSYK law was strongly attacked by leading AKP spokesmen.<sup>31</sup> More recently, the Court's President Haşım Kılıç complained about the undue pressure on the Court's judges concerning the cases pending before the Court.<sup>32</sup> Thus, at the moment, the Constitutional Court seems to be the only major obstacle on the AKP's drift toward authoritarianism. Indeed, the government did not hide its intention to change the composition of the Court, whereby its members would be elected partly by the legislature and partly by the President of the Republic. However, this requires a constitutional amendment and the AKP currently lacks the minimum constitutional amendment majority, that is three-fifths of the entire membership of the Grand National Assembly.

The forthcoming general parliamentary elections scheduled for June 2015 will be of critical importance for Turkey. If the AKP obtains a constitutional amendment majority, it will certainly attempt to change the system of government to a super-presidential one and to restructure the Constitutional Court. If that happens, Turkey will take a sure place among competitive authoritarian regimes.

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<sup>30</sup>"Cübbeni Çıkar Siyasete Gel" [Take off your robe and engage in politics], *Hürriyet* (daily), 13 April 2014.

<sup>31</sup>"Ak Parti'de tepki büyük" [Strong reaction by the AKP], *Hürriyet* (daily), 12 April 2014.

<sup>32</sup>Interview with Haşım Kılıç in *Sözcü* (daily), 30 December 2014.

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