

Judicial transformation in a competitive authoritarian regime: Evidence from the Turkish case

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Abstract

What accounts for the variation in the judiciary's ability to serve as a democratic guardrail under populist rule? This article contends that populist governments use judicial activism against their political agenda to portray courts as institutions that curtail popular sovereignty and subsequently adopt a democratizing discourse to conceal their assault on the judiciary. Based on the Turkish case under the rule of the AKP (Justice and Development Party), it explores how the judiciary's democratic deficits provided a legitimization strategy for the ruling party's gradual capture of the courts. During its initial term, the right-wing populist AKP government faced staunch opposition from high courts aligned with the secular establishment. In response, it strategically used the Turkish Constitutional Court's counter-majoritarian decisions to legitimize its actions, paving the way for court-packing and other forms of judicial manipulation through a series of constitutional amendments. These changes set a dangerous precedent for future clashes with the judiciary, hastening the erosion of Turkish democracy and the subsequent shift toward a competitive authoritarian regime.

1 | INTRODUCTION

The electoral rise of populism has contributed to the erosion of democratic regimes around the globe, including in some advanced industrial democracies (Diamond, 2015; Esen & Yardimci-Geyikçi, 2019; Levitsky & Loxton, 2013). Unlike previous autocratization episodes (Boese et al., 2022), democracies nowadays tend to collapse at the hands of popularly elected leaders

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who instrumentalize their electoral victories to colonize the state bureaucracy, erode institutional checks and balances, and tilt the playing field in their favor (Bermeo, 2016; Haggard & Kaufman, 2021; Waldner & Lust, 2018). Although elections are held regularly in these cases, opposition parties increasingly face an uphill battle at the polls in no small part due to the incumbent's uneven access to public and private resources and growing control over the national media and civil society (Levitsky & Way, 2002; Schedler, 2002). Widely described as competitive authoritarian, these hybrid regimes exhibit authoritarian practices under the façade of democratic institutions (Diamond, 2002; Levitsky & Way, 2010).

The effort by populist leaders to consolidate these regimes has placed courts at the center of this fight between aspiring autocrats and their opponents (Aguiar Aguilar, 2023; Landau & Dixon, 2019). Based on their parliamentary majority, these leaders have gradually undermined democratic institutions and aggrandized executive power within the formal constitutional framework instead of seizing power through sheer force (Corrales, 2015; Scheppele, 2018). Accordingly, they have adopted various strategies to erode horizontal accountability and capture judicial institutions (Huq & Ginsburg, 2018; Kosař & Šipulová, 2023; Landau, 2013).

Courts have played a varied role against this populist onslaught. While extant scholarship has documented this assault on the judiciary, much less attention is paid to the political context in which the executive and judicial branches clash and the dissimilar outcomes of their interaction. In consolidated democracies with a strong tradition of the rule of law, independent and powerful judiciaries will likely constrain incumbents before these attacks run their course (Ginsburg & Huq, 2018; Weyland, 2024). By contrast, populists who come to power in defective democracies have an easier time adopting court-curbing strategies and packing the courts. In these cases, the judiciary may lack sufficient popular support, political allies, and institutional resources to insulate them against these populist assaults (Landau & Dixon, 2019). In countries like Venezuela, Hungary, and Turkey, for instance, populist autocrats captured the judiciary and turned courts into partisan instruments for expanding their executive authority and targeting their critics, albeit at different time intervals (Corrales, 2015; Kadioğlu, 2021; Scheppele, 2018; Soyaltin-Colella, 2022; Urribarri, 2011). In others like Colombia, the Czech Republic, Argentina, Brazil, and Israel, constitutional balancing by high courts and judicial resistance slowed democratic erosion (Gibler & Randazzo, 2011; Roznai & Cohen, 2023). But what accounts for this remarkable variation?

In addressing this question, this article highlights a legitimizing factor facilitating court packing under populist rule. Specifically, it argues that populist leaders take advantage of the judiciary's democratic deficits when they initially come to power to use, capture, and expand pre-existing authoritarian enclaves within the high courts in their favor. Although judicial independence is necessary for courts to serve as democratic guardrails against executive aggrandizement (Helmke & Rosenbluth, 2009), high courts can also side with the political establishment when faced with the rapid electoral rise of populist movements. Opposition leaders who fail to defeat their populist rivals may turn to the judiciary to preserve the status quo (Hirsch, 2009; O'Donohue, 2023). This defensive strategy is likely to curb majoritarian tendencies of populist governments temporarily, but only at the cost of harming democratic competition and accountability. In this scenario, the ensuing deadlock turns the judiciary into a battleground site of conflict between political actors. Such judicial activism weakens the popular support and impartiality of the high courts and reduces their ability to prevent and punish populist attacks in the long run. Populist leaders can then react to the declining legitimacy of high courts by adopting a democratizing discourse that conceals their majoritarian aims and draws popular consent and elite support for their assault on the judiciary.

This article employs a single case study approach (Gerring, 2006) to explore the political impact of the judiciary's democratic deficit in a hybrid regime. Under the rule of the Justice and Development Party (Adalet ve Kalkınma Partisi, hereafter AKP), Turkey offers an ideal case to study this phenomenon at length to lay the foundations for building a middle-range theory

(Kaidesoja, 2019; Ziblatt, 2006). Having transitioned to multi-party parliamentary rule in 1950, Turkey was part of the second wave of democratization but has hitherto failed to consolidate its democratic regime (Özbudun, 2000). Despite its strong tradition of free and fair elections, Turkish democracy was frequently interrupted by military coups and also experienced breakdown at the hands of right-wing governments with majoritarian tendencies (Esen & Gumuscu, 2016; Özbudun, 2000; Turan, 2023). Following these interventions, the secular military and bureaucratic elites strengthened high courts before handing power over to popularly elected governments to keep their majoritarian tendencies in check.¹ In particular, the Constitutional Court emerged as a “counter-majoritarian institution” with vast powers to review the constitutionality of legislative bills and party programs (Aydin-Çakir, 2014; Belge, 2006; Hazama, 2012; Kogacioglu, 2004).

Due to its conservative agenda, the AKP’s rise to power in 2002 as a single-party government challenged this judicial model. In the subsequent years, the opposition’s strategy of turning to high courts to obstruct the government’s agenda judicialized Turkish politics. While high courts relied on their extra-judicial allies (i.e., military, mainstream media, and secular opposition parties) and engaged in off-bench mobilization (Bakiner, 2016; Bâli, 2013), the AKP government used the court’s limited democratic accountability as a pretext to restructure the judiciary and pack high courts through a series of constitutional amendments and legislative changes. Against the backdrop of accession talks, the AKP conveniently exploited the EU-led demands for judicial reform to make cosmetic changes in the legal system while capturing the high courts (Soyaltin-Colella, 2022).

However, the subjugation of the judiciary took a long time and occurred in a piecemeal fashion that reflected the shifting political alliances of the ruling elites. During the first period (2002–2013), the ruling party neutralized resistance from Turkey’s secular judiciary with support from a broad coalition of conservative groups, liberal judges, and international allies. In the next period, as he monopolized power, the AKP leader Recep Tayyip Erdogan undermined even those judicial institutions established by his own government and undertook a new cycle of court packing. These changes placed high courts at the center of partisan politics (Bâli, 2016; Kadioğlu, 2021; Özpolat, 2023; Soyaltin-Colella, 2022), accelerated the erosion of Turkish democracy and the subsequent shift toward a competitive authoritarian regime (Esen & Gumuscu, 2016; Esen & Gumuscu, 2021; Özbudun, 2015; Esen et al., 2023).

The article proceeds as follows. First, it introduces the theoretical and conceptual framework of the study, exploring how populist governments undermine judicial institutions and capture the courts through normal constitutional means. Subsequently, the historical background of the Turkish judiciary is provided to offer insights into how the high courts exercised judicial activism to hinder the rise of the AKP. The following section discusses the AKP government’s contentious relationship with high courts to specify how the ruling party enacted constitutional amendments and parliamentary bills to enact court-curbing and court-capturing strategies in several successive cycles. Finally, the article discusses lessons from the Turkish case and the study’s implications for other contexts.

2 | COURTS AND DEMOCRATIC BACKSLIDING

Scholars widely consider the judiciary a strong bulwark against power grabs and abuse of power by political leaders (Ginsburg & Huq, 2018; Landau & Dixon, 2019; North & Weingast, 1989). Strong and independent courts are seen as necessary for building an open society and ensuring citizen rights (Huq & Ginsburg, 2018: 84). In recent years, however, courts have increasingly become an instrument in the toolkit of aspiring populist autocrats to undermine democratic institutions, expand their executive power, and target opposition groups. Instead of destroying democracies overnight, these leaders relied on their parliamentary

majorities to tilt the playing field in their favor and gain control over state institutions and the judiciary through constitutional amendments and legislative changes (Huq & Ginsburg, 2018; Landau, 2013; Landau & Dixon, 2019; Schepppele, 2018). Accordingly, the populist capture of power was accompanied by a constitutional project that sought to restructure the state apparatus and introduce an executive-centered regime. In what Landau (2013) defines as “abusive constitutionalism,” populist governments have enacted constitutional amendments and legislation to amass significant power and influence over the political arena. For instance, Hugo Chavez used his parliamentary majority in Venezuela to enact laws that expanded his presidential powers, abused them through selective and partisan implementation, and misused their functions to favor his supporters (Corrales, 2022). In Nicaragua, Bolivia, and Honduras, populist presidents loosened or completely abolished presidential term limits to serve for more extended periods.

While abusive constitutionalism has taken many forms, this article focuses on attacks against the judiciary and their outcomes. Unlike their predecessors, populist leaders are more controlled in their attacks against the opposition, adopt a discourse of strategic legality (Yilmaz, 2020), and undermine judicial institutions to pack courts. Portraying courts as unelected and elitist institutions, populist leaders bemoaned the “judicialization of politics” (Ferejohn, 2002) due to the shift of power toward courts and other judicial institutions that limit popular sovereignty. Naturally, they saw courts as obstacles that stood in their way and attacked the judiciary as a way to seize control of state institutions and expand their executive authority (Blokker, 2019; Kosar & Sipulova, 2020). Such attacks have taken various forms, from direct political pressure, intimidation tactics, and targeted media campaigns to jurisdiction stripping and court packing (Kosař & Šipulová, 2023). In 2020, for instance, Polish state TV ran a documentary series on the most controversial cases of judicial conduct with negative depictions.

Not surprisingly, political attacks to weaken, pack, and dismantle courts met with resistance from the judiciary and opposition actors. Katarina Sipulova (2021: 159) defines judicial resistance as “a set of techniques, tools, and practices which courts or individual judges can use to prevent, avert, stay or punish imminent attacks on judicial independence.” These strategies are conditioned by the type of attack on courts and their ability to draw extra-judicial support and jurisdictional resources within the political arena. Scholars distinguish between on-bench and off-bench resistance to categorize the type of behavior by judicial actors. Specifically, courts can seek to avert a political attack by raising the costs of such a course or engage in pushback by invalidating the government’s agenda. While the latter requires direct action—a constitutional review of legislation or an appeal to a supra-national court—the former includes strategic behavior by courts for self-preservation. In these contexts, judicial actors can strategically time their decisions to gain popular support, engage in strategic restraint, and pivot to appease the governments.

Meanwhile, courts can mobilize off-bench resistance against judicial attacks with support from opposition parties, civil society, media, and international actors (Trochev & Ellett, 2014). Judges and prosecutors can counteract government attacks through individual action by issuing public statements, talking to the media, writing op-eds, forming interest groups, and demonstrating on the streets. Judicial actors can seek extra-judicial alliances with political parties and civil societal groups to challenge the political status quo (Bakiner, 2016; Tezcür, 2009) and side with other powerful political actors or the military to expand their influence (Belge, 2006). Like civil societal groups, judicial actors can rely on transnational support networks to seek international allies against their government. Pressure from international actors such as the European Union may slow down and even hinder government efforts to reconfigure the judiciary.

Despite the growing interest in autocratic legalism and abusive constitutionalism, limited attention is paid to the diverse set of strategies for judicial resistance in hybrid regimes with a weak tradition of the rule of law and their varied political outcomes (Bogéa, 2024; Gamboa et al., 2024; Kosar & Sipulova, 2020). While leaders in hybrid regimes seek to place the

judiciary under executive control, the type and duration of government assault and their outcomes differ significantly. Moreover, the extant scholarship has neglected the political context in which the judiciary and its opposition allies adopt specific strategies to counteract these government attacks. Scholars consider judges as strategically constrained actors (Ginsburg, 2003; Tezcür, 2009) who take note of the political context before delivering judicial decisions (Helmke & Ríos-Figueroa, 2011; Hilbink, 2012). According to these studies, judges are less likely to rule against unified governments to protect themselves against incumbent attacks. At the same time, fragmentation among the political elites offers more opportunities for the judiciary to act independently. Others, however, mention those cases of judicial assertiveness under unfavorable political contexts to claim that partisan identity and the ideological position of judges also drive their behavior. Few studies have linked these two approaches to offer an interactive model that accounts for judicial behavior under hybrid and competitive authoritarian regimes (Aydin-Cakir, 2014).

To fill this gap, this article focuses on judicial behavior embedded within the context of oppositional politics in hybrid regimes. In recent years, scholars of democratic erosion have highlighted the importance of opposition strategies in shaping regime outcomes in decaying democracies. Based on a paired comparison of Colombia and Venezuela, for instance, Gamboa (2017) argues that the opposition's goals and strategies affect its success in resisting autocratization. In cases where it pursued radical goals with extra-institutional strategies, the opposition lost popular support and legitimacy domestically and abroad, a process that, in the end, accelerated democratic erosion. This argument can be extended to judicial politics in hybrid regimes under populist rule. While strong and independent courts are seen as guardrails against executive aggrandizement, their excessive use by opposition actors to counteract populist governments leads to the judicialization of politics and triggers government pushback against the judiciary.

This article contends that the existing level of judicial independence before populist rule and the nature of opposition strategies play a critical role in influencing the outcome of governments' court-packing and court-curbing techniques. Co-opting the judiciary may prove relatively easy in those cases with no tradition of judicial independence since courts lack institutional resources and allies to counteract government pressure (Landau & Dixon, 2019). Other cases with higher levels of judicial independence are more difficult to capture and thus offer alternative platforms for opposition politicians to resist executive aggrandizement by populist leaders. However, judicial independence is necessary but not sufficient to attain democratic outcomes. Strong judiciaries with democratic deficits can protect the interests of political elites or allow opposition groups to promote illiberal agendas against elected leaders. Specifically, opposition leaders with limited electoral prospects against populist governments may rely heavily on the judiciary to preserve the status quo (O'Donohue, 2023). This defensive strategy will likely hinder populist governments temporarily, albeit at a significant long-term cost to democratic competition. In Thailand, for instance, the judiciary that has enjoyed high support from the monarchy, bureaucratic and military elites annulled two parliamentary elections, removed several prime ministers from power, and closed the former ruling party led by the deposed leader Thaksin Shinawatra (Dressel, 2010; McCargo, 2014; Tonsakulrungruang, 2016). These decisions came against the backdrop of the 2006 and 2014 military coups that used the ensuing power vacuum to seize power. Similarly, Turkey's Constitutional Court dissolved the largest party in parliament in 1998, employed an aggressive strategy of judicial review, and annulled the 2007 presidential vote to prevent the ruling party's candidate from getting elected into the country's highest office (Belge, 2006; Kogacioglu, 2003; Köker, 2010).

Attacks against courts intensify in those cases where opposition elites seek to balance populist control over legislative and executive branches with favorable court rulings. Support from unelected allies such as heads of state, upper echelons of the military, and bureaucracy may empower the judiciary to rule against governments and withstand the resulting pushback. Even

when such decisions are taken to stop the electoral rise of a populist or anti-system party, they insulate the judiciary from popular demands, create accountability gaps, and strengthen tutelage over elected actors. The ensuing judicialization of politics reduces the public support for political institutions, in general, and courts, in particular. Similarly, the judiciary's ties to democratic actors in domestic politics and the international arena weaken. While the latter delimits the judiciary's ability to establish broad support networks, a decline in popular support lowers the cost of court-capturing and court-curbing strategies for governments. Faced with judicial activism, populist leaders tend to portray courts as institutions that limit popular sovereignty and seek more political control over the judiciary. Thus, the judiciary's democratic deficit legitimizes populist leaders who conceal their court-packing goals with a democratizing discourse.

3 | HISTORICAL BACKGROUND—THE TURKISH JUDICIARY AS A TUTELARY ACTOR

The judiciary has historically played a vital role in upholding the founding secularist and nationalist principles of the Turkish Republic. In the early decades of the republican era, there was limited separation of power between the three branches of government, and judicial independence remained weak (Çalı & Durmuş, 2018: 1675). The 1924 Constitution did not provide for judicial review (Isiksel, 2013: 711), nor did it envision the creation of a constitutional court. Most importantly, the judicial system did not protect the tenure of judges and allowed for their dismissal by ordinary laws. This did not result in any significant friction between the founding political elites and the judiciary during the single-party rule of the Republican People's Party (Cumhuriyet Halk Partisi, CHP) established by Mustafa Kemal Atatürk (Belge, 2006). The institutional weakness of the judicial branch became apparent after Turkey transitioned to democratic rule in 1950, when a new party, the Democrat Party (DP), came to power through elections. The new DP government used ordinary laws to purge senior judges linked with the old regime and passed legislation forcing judicial members to retire early (Çalı & Durmuş, 2018: 1676). Due to its majoritarian tendencies, the DP government eventually met with growing resistance among opposition groups and was toppled by a military coup in 1960.

The 1960 coup turned the military into a political actor and altered its relationship with civilian governments (Sarigil, 2014). In the following decades, the country would experience pendulum swings between right-wing populist single-party governments that exhibited majoritarian tendencies (1950–1960, 1965–1971, 1983–1991, and 2002–) and military administrations (1960–1961, 1971–1973, and 1980–1983) and evolve into an electoral democracy with strong tutelary actors, such as the armed forces and judiciary (Akkoyunlu, 2017; Bâli, 2013). Although the top military brass refrained from staying in power for extended periods, unlike their Latin American counterparts (Pion-Berlin, 2011), Turkish armed forces with they maintained autonomy vis-a-vis elected officials (Cizre-Sakallıoğlu, 1997) and restructured the judiciary to introduce strong institutional checks on majoritarian rule. Drafted after the coup, the 1961 Constitution had a relatively liberal content that introduced extensive civil liberties and political rights, guaranteed separation of powers, and delegated power to autonomous state institutions. Specifically, the Constitutional Court and the High Council of the Judges emerged as powerful “counter-majoritarian institutions” that set the boundaries of the political arena for decades (Belge, 2006: 663; Çalı & Durmuş, 2018: 1676). The president picked its judges to insulate the appointment process from partisan influence and popular pressure, and the candidate pool was limited to senior members of the high courts (Bâli, 2013; Hazama, 2023: 572). Thanks to its extensive powers, the Constitutional Court functioned as an instrument to preserve the secular, unitary nature of the Turkish nation-state against political parties that draw support from peripheral groups and enjoyed influence over the legislative process with the abstract review procedure (Aydin-Cakir, 2014; Hazama, 2012). Accordingly, the Constitutional Court has

regulated the party system by its function to dissolve political parties—hitherto used against a series of (26 in total!) Kurdish nationalist, Islamist, and far-left parties (Kogacioglu, 2003).

Scholars employ the hegemonic preservation thesis (Hirschl, 2004) to highlight the “strategic alliance” between the high courts and upper echelons of the military and bureaucracy (Bâli, 2013; Belge, 2006; Shambayati & Kirdiç, 2009; Tezcür, 2009). According to this view, the military delegated power to the judiciary to limit the boundaries of the political arena (for a critique of this literature, see Seven & Vinx, 2017). However, there are times when the rulings of the high courts clashed with the wishes of top military brass on critical political matters, such as secularism, civil liberties, and separation of powers (Özdemir, 2024).² Not surprisingly, the military restricted the political rights and individual freedoms in the constitution and eroded judicial independence to regain some of its control after the 1971 and 1980 interventions. In the aftermath of the 1980 coups, Turkey’s high courts have therefore exhibited the dilemma of judicial autonomy in hybrid contexts (Helmke & Rosenbluth, 2009: 356): its positive effects were neutralized by the unwillingness or inability of judges to challenge the regime’s powerholders at times, particularly the military and bureaucratic elites.

4 | JUDICIAL ACTIVISM AGAINST THE AKP GOVERNMENT

Due to this legacy, the 2002 election victory of the moderate Islamist AKP challenged the limits of Turkey’s judicial system, thereby altering the uneasy balance between the executive branch and high courts.³ In the aftermath of the 2001 economic crisis, the AKP won a clear parliamentary majority by mobilizing the popular masses with an electoral platform centered on good governance, economic development, and a conservative cultural agenda. Many scholars welcomed the AKP’s 2002 electoral victory as an opportunity to break this strategic alliance between the military and judiciary and strengthen the rule of law (Hale & Ozbudun, 2009; Insel, 2003). The AKP’s electoral success against centrist secular parties, they argued, would help incorporate conservative masses into the political system, expand levels of political participation, and increase democratic accountability by weakening tutelary actors such as the military and high courts (Alpay, 2008; Bâli, 2013). Instead, as will be described below, the AKP’s rise to power triggered a political standoff with the secular establishment that fueled the judicialization of politics.

Unlike Hungary and Poland, where populist governments faced weak opposition in their first term, the AKP did not and could not engage in court packing during its first term (Hazama, 2023: 576–578) since the high courts had strong support among upper echelons of the military, the secular president and main opposition party.⁴ Instead, the AKP government was kept in check by a secular alliance of the military, high courts, and President Ahmet Necdet Sezer, who acted in concert with the main opposition, CHP. Therefore, the ruling party refrained from direct judicial interventions and focused instead on political and economic transformation (Akdoğan, 2004; Hale, 2005). Specifically, the government maintained macroeconomic stability and pro-Western foreign policy (Öniş, 2007) and accelerated democratizing reforms in line with Turkey’s attempts to start accession talks with the European Union (Özbudun, 2007). As part of this agenda, the parliament enacted civil code and penal code reforms that harmonized Turkish laws with the EU acquis and recognized the supremacy of the European Court of Human Rights over domestic courts. In sharp contrast with the turbulent 1990s, these steps brought much-needed economic growth and political stability and drew strong support from various domestic (Ersoy & Üstüner, 2016) and international actors (Hintz, 2016), as evidenced by the start of accession talks with the EU.

Despite its moderate agenda, secular opposition actors remained suspicious of the AKP’s hidden Islamist program. Although the AKP defined itself as a conservative democrat party (Akdoğan, 2004), many of its founders came from the Islamist movement and had conservative

lifestyles. This was a marked contrast to the secular mainstream Turkish politicians. As a single-party government, the AKP focused on appointing conservative members to the upper echelons of the state bureaucracy. Worried about the ensuing political transformation, the opposition actors failed to formulate a joint strategy against the AKP government, resorting to the self-defeating track of implementing simultaneously institutional and extra-institutional strategies (Gamboa, 2017) with increasingly radical goals (Esen, 2021). Specifically, the main opposition CHP sought to slow down the AKP's legislative agenda (i.e., neoliberal reforms, pro-Western foreign policy in Iraq and Cyprus) through obstructionist tactics and increasingly relied on the Constitutional Court for annulment. Aydin-Cakir (2014: 495) calculates that the main opposition party sent an average of 12 to 15 percent of laws to the Constitutional Court during the AKP's first two terms in office, with its applications peaking in election years.

As part of this judicialization strategy, President Ahmet Necdet Sezer (2000–2007), a retired chief jurist of the constitutional court, wielded his constitutional powers with great skill to veto the government's bureaucratic appointments and legislative agenda. Sezer referred more cases to the Constitutional Court during his term (2000–2007) than in the previous two decades (O'Donohue, 2023: 30). This confrontational strategy reduced the widespread support for Turkey's high courts and deprived them of democratic allies in the domestic and international arena. These "constitutional hardball tactics" remained within the contours of Turkey's "tutelary democracy" (Taş, 2015) but produced "electoral ghettoization" by widening the wedge with conservative voters (Ciddi & Esen, 2014). O'Donohue (2023) rightly suggests that the CHP's decision to judicialize its political strategy hurt the main opposition party in the long run since it felt no need to appeal to median voters and focused on getting results through judicial action.

Aligned with these political actors, the upper echelons of the armed forces pressured the AKP government and made thinly veiled threats behind closed doors to reverse its policy positions (Ciddi & Esen, 2014). Instead, the military leadership cultivated links with the secular opposition parties, civil society, media, and judiciary to limit the government's room for maneuver and reduce its popular legitimacy. Aware of the danger posed by an interventionist military, then Prime Minister Erdoğan sought to assuage the military while enacting democratic reforms in the parliament designed to curb its powers (Kars Kaynar, 2017; Özbudun, 2007; Sarigil, 2007).

This protracted conflict between the government and secular opposition became a major political crisis in the spring of 2007, just before the election of a new president to replace Ahmet Necdet Sezer, who was barred from reelection. The president enjoyed strong veto powers over the government's bureaucratic appointments and legislative bills. Since the AKP already enjoyed a clear parliamentary majority at the time, its control of the presidency would have tilted the political balance completely. Therefore, the AKP's nomination of then Foreign Minister Abdullah Gül, an Islamist politician whose wife wears a headscarf, triggered strong resistance among the secular opposition groups that preferred a moderate figure to be picked. Gül's candidacy produced strong opposition from the CHP, massive anti-government demonstrations in major metropolitan areas (Borovalı & Boyraz, 2015: 438), and an e-memorandum penned by the Chief of the General Staff, which was posted on the website of the armed forces on the day of the first ballot. However, the ruling party stood firm against these challenges and pushed for Gül's election as president in the parliament.

Against this backdrop, the Constitutional Court emerged as the battleground of this conflict between the AKP government and the secular establishment over presidential succession. Realizing that Gül's candidacy could not be blocked in the parliament, the main opposition party boycotted the first round of parliamentary voting and turned to the Constitutional Court for its annulment due to the absence of a quorum of two-thirds of the deputies (Bâli, 2013: 675–677). Although there was no precedent for this practice, the Constitutional Court still ruled by a clear majority (8 to 3) to annul the results of the first round of voting after the CHP's appeal (Köker, 2010). This decision, which was supported at the time by large portions of the secular

media, opposition parties, and military elites, triggered a constitutional crisis and blocked the election of Güл as president since the CHP parliamentary caucus included slightly more than one-third of the MPs. In response, the AKP government called for early elections and placed the court's decision at the center of its populist campaign. In their campaign speeches, the AKP elites claimed that the crisis stemmed from the opposition's distrust of the people and portrayed the CHP leadership as secularist elites who unjustly treated Güл and defied the national will.⁵

Thanks to strong economic performance and political stability, which was a sharp contrast to the frequent economic crises and weak coalition governments of the past decade, the AKP easily won this election with 46.6 percent (Balkir, 2007) and had Abdullah Güл elected as president by its parliamentary caucus. Following its victory, the AKP-controlled parliament introduced direct presidential elections via a constitutional amendment to prevent future crises, which the Constitutional Court did not annul. Unlike other populist governments in Hungary and Venezuela, the AKP had not at the time pushed for a new constitution to overhaul the state apparatus and introduce a more centralized regime. The lack of a super-majority in parliament must have precluded this option for the ruling party. Although several leading constitutional law scholars were invited to prepare a draft constitution, the AKP elites shelved this proposal and moved instead to lifting the ban on the use of headscarves in universities with support obtained from the ultra-nationalist National Action Party (Milliyetçi Hareket Partisi, hereafter MHP) (Bâli, 2013: 680–682). Following a challenge raised by the CHP, the Constitutional Court annulled the headscarf bill on the grounds of Turkey's secular regime (for a critique of this decision, Bâli, 2013: 681–88).

This controversial bill was the primary legal basis for initiating a party closure case against the AKP. Citing this issue, the chief prosecutor of the Court of Cassation accused the AKP of becoming the focal point for anti-secular activities and asked for its dissolution and the political ban of many prominent AKP politicians. The news of the closure case sent out shock waves since two other Islamist parties had already been banned during the last decade (Kogacioglu, 2004).⁶ However, the Constitutional Court demonstrated "strategic defection" (Helmke, 2002), this time to avert a major constitutional crisis and strong resistance from the government with a clear parliamentary majority. Although six (out of 11) judges found the ruling party to be a focal point of anti-secular activities, the three-fifths majority required to close it was not met (Bâli, 2013: 689). Had there been one more justice to vote in favor of the ban, the AKP would have been banned (Özdemir, 2024: 1). Instead of banning the party, the court decided to cut off its public funding for 1 year. Despite the strategic behavior of the Constitutional Court in the closure case, the ruling party continued to see the judiciary as a significant block for its agenda and responded with a concerted attack against its unelected opponents in the military and judiciary. As part of this strategy, the AKP resorted to partisan measures to pack the high courts and use friendly courts and pro-government media to target its political rivals. In these efforts, the government was assisted by members of a religious movement led by Fethullah Gülen, a retired Islamic preacher living in exile in the United States since 1999.⁷ To counter the secular establishment, the AKP government appointed Gülenist members to high positions within the Turkish bureaucracy, military, and judiciary (Gumuscu, 2016).

During the summer of 2007, pro-government prosecutors initiated a series of criminal investigations to uncover alleged conspiracies to destabilize the political arena and topple the AKP government (Kars Kaynar, 2022). Accordingly, they charged scores of military officers and their civilian accomplices in academia, media, and civil society with membership in a clandestine ultra-nationalist organization called the Ergenekon terror organization, which was accused of being responsible for bombings, assassinations, and coup plots (Rodrik, 2011). After these legal proceedings were expanded to include a military simulation workshop called Sledgehammer, which was portrayed as a rehearsal for a coup plot, the upper echelons of the military came under critical scrutiny as well (Jenkins, 2011). In the next couple of years, police investigations turned into a political witch-hunt that implicated many AKP opponents and set the stage

for massive purges, particularly in the upper echelons of the military. The pro-government media widely relaid these show-case trials to tarnish the military's prestige, reduce its popularity, and gain control over its officer ranks. For some, these trials represented a rare opportunity to hold state officials accountable for their illicit activities and challenge the military tutelage over Turkish politics (Aydinli, 2009; Gürsoy, 2012). In its 2010 progress report, for instance, the European Union Commission (2010) described the Ergenekon and Sledgehammer trials as "an opportunity for Turkey to strengthen confidence in the proper functioning of its democratic institutions and the rule of law."⁸

In reality, though, these investigations violated the principles of fair trial and produced no concrete results after a lengthy legal process. Specifically, there were gross violations of the defendants' rights, including long pretrial detention periods, the use of secret witnesses, illegal wiretappings, and anonymous and fabricated evidence (Rodrik, 2011). Furthermore, evidence was shared selectively to manipulate media coverage. Defendants were taken into custody through early morning police raids whose performative purpose was to intimidate and humiliate the suspects and shift public opinion in favor of the government (Kars Kaynar, 2022). Eventually, the *Ergenekon* and *Sledgehammer* defendants were acquitted, and in 2014, the Constitutional Court ruled that the Sledgehammer defendants' right to a fair trial was violated.

High-profile rulings in political cases during this period triggered "off-bench mobilization" (Bakiner, 2016) by judges, prosecutors, and lawyers who came out in support or opposition against the controversial rulings. The Judges and Prosecutors Association (YARSAV), linked with the secular republican old guard, saw judicial independence in direct opposition to the AKP government and advocated the unitary and secular nation-state model as guiding principles of the Turkish judiciary. Others grouped in an uneasy alliance between liberals and pro-government conservatives, Judges and Prosecutors for Democracy and Freedom (Demokrat Yargı), challenged what they considered as military tutelage and judicial activism that are products of the military-designed 1982 Constitution (*Ibid.* 140).

5 | JUDICIAL REFORM AS A COURT-PACKING STRATEGY

The judicial activism of Turkey's high courts and the military's frequent political interventions harmed the opposition's impartiality and international reputation. In an attempt to break the deadlock in its second term, the AKP introduced a drastic judicial reform, which sought to change the composition and election procedures for the Constitutional Court and the High Council of Judges and Prosecutors (HSYK) within a broader constitutional package that includes several democratizing measures designed to generate popular support (Bâli, 2013: 694–696). These democratizing measures include expanding rights for the elderly, veterans, and the disabled, reducing the jurisdiction of military courts, adopting privacy rights and access to government records, and removing immunity for retired generals responsible for the 1980 coup. However, the more essential changes addressed the composition of Turkey's high courts. Specifically, the amended articles sought to curb the power of military courts, increase the number of Constitutional Court members from 11 to 17 (the parliament would appoint 3) but limit their term to 12 years, allow individual applications to the Constitutional Court, and expand the HSYK from 7 to 22 members, who were to be elected by first-degree judges, public prosecutors and members of the Justice Academy.⁹ These changes were designed to alter the hierarchical model within the Council by opening seats for the first category judges and prosecutors, who would have majority control over members of the high judiciary (Çali & Durmuş, 2018: 1680).

While the pro-government actors argued that these changes would increase the judiciary's democratic accountability, the opposition saw this move as a sinister plot by the ruling party to capture the judiciary and increase the influence of conservative jurists in high courts. The amendments were ratified by approximately 58 percent after a polarizing campaign

(Ciddi, 2011; Kalaycıoğlu, 2012). In the first judicial elections held after the referendum, all seats in the Supreme Board of Judges and Prosecutors were won by pro-government candidates. At the same time, ironically, both YARSAV and Demokrat Yargı failed to have any of its members get elected. At the time, this impressive victory was attributed to an alliance forged between the government and Gülen movement.¹⁰ Some argued that the judiciary was hijacked during the early AKP years by members of the Gülen movement who obtained the questions and answers for the entrance exams and got organized during the pre-service training period at the Justice Academy (Çali & Durmuş, 2018: 2018). Indeed, there were rumors that an official list of candidates, endorsed by the Ministry of Justice, was circulated among the judges and prosecutors (Bakiner, 2016: 150–151). By contrast, members of the old secular republican guard and liberal groups were sidelined in the newly designed judicial body, thus leaving the appointment process to high courts under the control of the ruling party and its allies.

The AKP's constitutional package had all the features of court packing, according to Kosar and Spilova's taxonomy (Kosař & Šipulová, 2023: 4–5). First, the 2010 amendments expanded the size of these judicial institutions, revised their selection criteria, and enlarged the pool of candidates to alter the existing judicial hierarchy. Second, this was an irregular and deliberate change that diverged from the rules of the past (Çali & Durmuş, 2018). Third, these changes were actively enacted by the ruling party, which combined these judicial provisions with several democratic measures to generate mass popular support in the public referendum. Fourth, Erdoğan targeted the existing institutions and saw his control of HSYK as necessary to wield substantial influence over appointments to high courts. For instance, in 2011, 160 new judges replaced outgoing members in the High Court of Appeals (Bakiner, 2016: 151). Fifth, the new HSYK members elected after the 2010 referendum had direct ties to the AKP government or the Gülen movement.¹¹

6 | DECLINING JUDICIAL POWER IN AN AUTOCRATIZING REGIME

Liberal scholars initially welcomed the 2010 amendments as necessary changes to introduce democratic accountability to the judiciary and civilianize the military-designed constitution (Bâli, 2013; Özbudun, 2015). A detailed study of the Constitutional Court's rulings in the post-2010 period offers a nuanced picture. Most notably, the court's composition shifted to the right, most likely due to the conservative appointments of President Abdullah Gül and his successor Tayyip Erdoğan (Varol et al., 2017: 22). However, this ideological change only gradually translated into favorable judicial rulings for the government, albeit with some significant exceptions as will be discussed in the next section. The judicialization strategy declined sharply in this period, as neither the president nor the opposition parliamentarians were incentivized to appeal frequently to the Constitutional Court for annulment. Adopting the individual application clause allowed citizens and civil societal groups to bring human rights violations to the Constitutional Court's attention (Oder, 2021). Oden and Esen (2016) found that the Court rulings have defended fundamental rights and freedoms but that the court's ability to play this role effectively declined over time due to political pressure and partisan appointments. At the same time, the Court decisions were considered conservative in sociocultural and economic issues, including gender equality and trade union rights (Oden & Esen, 2016; Varol et al., 2017).

The court's changed behavior came against the backdrop of democratic erosion in Turkish politics. Following its third victory in the 2011 general elections, the ruling party began to weaken ties with its former allies and demonstrated majoritarian tendencies directed by Erdoğan himself (Cengiz, 2020; Muftuler-Bac & Keyman, 2012; Yardımcı-Geyikçi & Yavuzyılmaz, 2022). The government relied on its parliamentary majority to pass omnibus bills and enacted decrees in law—35 in 2011 alone—to reorganize the state institutions and redefine

bureaucratic ranks (Özcan & Kimya, 2023; Yılmaz, 2020: 269). In line with its assertive and revisionist foreign policy during the Arab Spring protests, the government launched a process of stealth Islamization of the country to increase the role of religion both in political and social life (Gumuscu, 2023, 2024).

The growing popular discontent against the AKP's majoritarian style of government turned into mass protests in the spring of 2013 when the government tried to raze Gezi Park to make room for a shopping mall (Özen, 2015; Yardimci-Geyikci, 2014). The government responded by launching a massive crackdown on the protestors, whom Erdoğan accused of staging a coup against the democratically elected government. Subsequently, the police repressed the Gezi protestors with excessive force. In line with the hypothesis that judges tend to refrain from voting against a unified government, the lower courts refused to investigate police brutality and instead investigated tens of thousands of activists, journalists, lawyers, and even fans of a football club on anti-terror charges (Esen & Gumuscu, 2016: 1594). To prevent the reoccurrence of another protest wave, the government later enacted the "Internal Security Package" to expand police jurisdiction during protests, extend detention periods, and make surveillance easier.

Executive aggrandizement shifted to the judiciary in December 2013, when a major corruption probe—led by a group of Gülenist police officers and prosecutors—implicated Erdoğan's son for of his cabinet ministers and their close relatives, along with prominent businesspeople and civil servants (Onbaşı, 2020). After the story broke out, all four ministers resigned, and Erdoğan, who characterized the corruption probe as a "judicial coup" and "sinister plot by a parallel state" led by Fethullah Gülen, subsequently replaced ten cabinet members in the most significant shuffle of his rule (Özbudun, 2014: 159). Accordingly, the government tried to cover up the investigations by purging the responsible police officers, including the Chief of the Police in Istanbul. The Ministry of Interior and Ministry of Justice changed their regulations to force police officers to inform their superiors of their ongoing criminal investigations (Soyaltin-Colla, 2022: 451), which met with the HSYK's protest and overturned by the Turkish Council of State (Çali & Durmuş, 2018: 1682). Meanwhile, the pro-government media disputed the probe's findings and attacked the reputations of the prosecutors and police officers involved in the case.

For Erdoğan, the corruption probe demonstrated the importance of increasing the executive's control over the police and judiciary. The growing wedge between the AKP and Gülen movement, once close allies against the secular establishment, risked Erdoğan's control over the judiciary since Gülenist members were overrepresented in the HSYK and high courts.¹² For instance, the HSYK's statement against the government's move against the Gülenist police officers measure was treated as its support for the Gülenist probe (*Hurriyet Daily News* 2013).¹³ In response, the AKP caucus passed an omnibus bill to enhance the Minister of Justice's control of the said Council and reorganize the composition of its chambers by appointing pro-government members. The new HSYK dismissed the four prosecutors involved with the investigation from their positions and quashed the corruption probe. The Minister of Justice subsequently initiated criminal proceedings against them (Özbudun, 2015: 46–48). Although the TCC later annulled several provisions of this bill, this judicial reorganization could not be reversed retroactively.

Due to the polarized nature of Turkish politics, voters responded to the corruption allegations along partisan lines. Not surprisingly, Erdoğan took the fight to the electoral arena. While the AKP remained the largest party in the 2014 local and the 2015 twin elections, Erdoğan won the first popular presidential elections held in 2014 (Carkoglu, 2014; Grigoriadis, 2015). High electoral support ratified the AKP's hegemony over the political arena and allowed the ruling party to create a more subservient judiciary. Conversely, the Turkish opposition parties could not draw sufficient popular support to diffuse Erdoğan's pressure on courts and failed to build a strong extra-judicial alliance. This failure can partly be attributed to the abuse of authority by the Gülenist judges and prosecutors in previous politically charged cases, such as the Ergenekon and Balyoz trials.

Emboldened by its election victories, the AKP introduced a series of inducements and coercive measures to roll back its legal reforms (Bâli, 2016) and recapture the judiciary, this time from its former ally, the Gülenists. Just as the 2010 referendum signified the demise of the secularist judicial elite, Erdogan's rise to the presidency in 2014 marked a turning point in the government's relations with the judiciary. The presidency offered Erdogan new opportunities to appoint loyalist judges and prosecutors and to increase his direct control over the judiciary. Through a series of omnibus bills, the government restructured the courts by establishing new judicial organs, such as the regional appeal courts and the Criminal Judgeships and Peace, and changing the size of the high courts to fill new positions with loyalists (Özcan & Kimya, 2023: 16). In 2014 alone, 3500 new judges were appointed to courts (Soyaltin-Colella, 2022: 455). According to Yilmaz (2020: 271), the newly established Criminal Judgeship and Peace, enjoying vast powers to issue search and seizure warrants, arrest and detention warrants, and close down websites, became a "proxy sovereign" that set the threshold for normal and exceptional, case by case, on political grounds. The government frequently used such liminal judicial venues to securitize dissent, criminalize opposition, and construct a surveillance state that expanded the AKP's political hegemony. Due to a law that restructured the administrative and civil supreme courts in 2016, the Court of Cassation and Council of State members were halved, resulting in the purge of many senior judges (Soyaltin-Colella, 2022: 453). The same year, the government substantially raised the salaries of judges and prosecutors (Ashhan Çelenk, 2016: 244).

Aside from political appointments, the government also increased its control over the training of new judges by reducing the Justice Academy's autonomy. Besides the written format, the introduction of oral examination provided another mechanism of control for the pro-government members in the judiciary. Furthermore, the ruling party cobbled together a diverse coalition of judges and prosecutors around *Platform for Unity in the Judiciary* (Yargıda Birlik Platformu—YBP) to defeat the Gülenist list in the election for the HSYK (Özbudun, 2015: 51). Subsequently, the YBP-supported candidates won 8 of the 10 seats in the HSYK elections in October 2014 and gained a clear majority in this body. The newly elected HSYK members redesigned the ranks of the high courts according to the government's agenda. Specifically, the HSYK investigated those judges who ruled against the government's agenda and changed the places of employment of thousands of judges and prosecutors against their will.¹⁴ Transferring judicial officials to economically underdeveloped districts away from their families is considered a punishment in the Turkish context (Çalış & Durmuş, 2018: 1694). For instance, between 2017 and 2019 alone, the HSYK transferred nearly 10,000 judges and prosecutors to other positions (Soyaltin-Colella, 2022: 446). These intimidation tactics raised the cost of resistance against the government and forced many judges and prosecutors into submission, particularly in politically sensitive cases.

During this period, personalization of power became especially apparent in how Article 299 of the criminal code, which covers insults against the president, was used. After Erdogan's rise to the presidency, insult cases have risen dramatically (Esen & Gumuscu, 2016). As documented by Over and Tuncer-Ebeturk (2022: 779), the number of insult cases increased from 682 (2014) to 38,254 (2016). Erdogan assembled a team of 20 lawyers to deal specifically with insult cases. Moreover, the fear of penalization led police officers and prosecutors to investigate criticisms against Erdogan under this article (*ibid.*).

The judiciary's capture accelerated after the 2016 failed coup that was presumably orchestrated by Gülenist officers in the armed forces (Esen & Gumuscu, 2017a). Specifically, Erdogan used the failed coup as a pretext to seek emergency powers and purge tens of thousands of public officials from the state apparatus, military, and judiciary. The state of emergency declaration was buttressed by a series of presidential decrees that regulated every aspect of public life, including the dissolution of institutions, forceful takeover of companies, massive purges from the bureaucracy and academia, and changes to legislation (Yilmaz, 2020: 268). Due to its

alleged links to the coup attempt, the government classified the Gülen movement as a terror organization and relied on anti-terror laws to shut down hundreds of schools, companies, radio and TV stations, and non-governmental organizations affiliated with this group.¹⁵ Under the state emergency, which remained in effect for 2 years, approximately 100,000 civil servants, 5000 judges and prosecutors, and thousands of officers on active duty were purged due to their suspected links with the Gülen movement (Daly, 2022: 1087; Özcan & Kimya, 2023: 13).

These purges reached the highest levels of the Turkish judiciary, as evidenced by the dismissals of two Constitutional Court judges and five HSYK members, and led to the dismissal or removal of thousands of judges and prosecutors, nearly one-third of the total cohort (Soyaltin-Colella, 2022: 455). The Council issued dismissal decisions with the exact wording for each case and did not otherwise provide individualized evidence against the judicial members (Çali & Durmuş, 2018: 1696). This massive purge allowed the ruling party to fill these judicial ranks with thousands of inexperienced but partisan loyalists. Meanwhile, the threat of removal compelled many remaining judges and prosecutors to increasingly side with the government in their decisions. After the failed coup, the ruling AKP joined the ultra-nationalist MHP to amend the constitution by introducing a hyper-presidential system with limited institutional checks (Esen & Gümüşü, 2018; Esen & Gümüşü, 2017b). These amendments offered broad judicial powers to the president and introduced sweeping changes to the structure and composition of judicial bodies (Kadioğlu, 2021; Soyaltin-Colella, 2022: 454).¹⁶

The political capture of Turkey's high courts became especially apparent after the transition to the presidential system in 2018. For instance, upper echelons of the judiciary started joining President Erdoğan on domestic trips and declared their political support for his policies. After the HSYK's alignment with the government in 2014, which led to significant changes in the ranks of the Council of State and Court of Cassation, the Constitutional Court was left as the only judicial institution with some level of autonomy from the government. Due to the procedure of individual application, the court turned into the principal defender of human rights and democratic standards, particularly in its rulings against the government on matters of long detention periods and restriction of access to the Internet (Özbudun, 2015: 53). As some of its members were appointed by Erdoğan's predecessors and enjoyed tenure security, the court could retain some judicial independence against the executive.

At the same time, the Constitutional Court demonstrated self-restraint and strategic defection on core issues central to the government's agenda for preserving its status. For instance, in the immediate aftermath of the 2016 coup attempt, when the government turned against the Gülen movement, the court expelled two of its allegedly Gülenist members without due process.¹⁷ This decision was taken amidst a massive purge in the judicial ranks, affecting thousands of judges and prosecutors. The judges also refrained from reviewing the state of emergency executive decrees enacted by the president but not voted into law by the parliament, despite the opposition's application to the Constitutional Court for their annulment (Özcan & Kimya, 2023: 12). With this decision the Constitutional Court, in effect, gave its tacit approval to Erdoğan's de facto monopolization of power and the massive purges in the state ranks during the 2-year extended state of emergency. The court also postponed a review of their cases and thus passed the opportunity to challenge the government's crackdown against Kurdish politicians despite clear precedents to warrant the release of pro-Kurdish MPs (Özpolat, 2023).

However, the government continued to target the Constitutional Court with open criticism and direct attacks and relied on intimidation tactics against its judges. Accordingly, it enacted a series of court-curbing strategies to circumvent unfavorable decisions by the Constitutional Court taken to uphold freedom of expression and individual rights. In various politically significant cases wherein the constitutional court ruled that imprisoned anti-government figures' freedom of expression and liberty had been violated, lower courts refused to implement these decisions. For instance, when the court ruled that the freedom of expression and liberty of two journalists, Mehmet Altan and Şahin Alpay, had been violated under the European Convention on Human Rights, six different courts in Istanbul refused to implement this decision. Basak

Çali (2018) described this behavior as the “first legalistic defense of anti-constitutionalism furnished by a first instance court in Turkey.”

These legal standoffs were usually resolved after a protracted battle, sometimes with the intervention of the European Court of Human Rights. In other cases, lower courts would prolong the legal process as long as possible. In more politically significant cases, such as the philanthropist Osman Kavala and Selahattin Demirtaş, accused of inciting revolt against the government, even a clear ruling by the European Court of Human Rights did not lead to their release. On various occasions, Erdoğan and other AKP elites have expressed their disdain for some of the rulings of the Constitutional Court, accusing it of overstepping its judicial boundaries. The MHP leader Bahçeli went even further by repeatedly calling for the closure of the Constitutional Court.¹⁸

This tug of war between Turkey’s highest court and the government recently produced a significant judicial crisis, only several months after Erdoğan’s and his ruling bloc’s victory in the May 2023 twin elections (Esen & Gümüşcu, 2023), when the Constitutional Court and Court of Cassation clashed over the appeal case of an imprisoned MP and public rights lawyer Can Atalay (Balamir Coşkun & Tombuş, 2023). In 2022, Atalay was sentenced to 18 years in prison for allegedly “attempting to overthrow the government” due to his involvement in the 2013 Gezi Park protests. Nominated as a candidate by the Workers Party of Turkey, Atalay was elected as a member of parliament in the May 2023 general elections and subsequently appealed to the Constitutional Court for his release on the grounds of parliamentary immunity. The court ruled for his immediate release in line with the existing jurisprudence (Erhan, 2023). Instead of releasing Atalay, the Istanbul 13th Heavy Penal Court, which initially sentenced Atalay, referred the case to the Court of Cassation, which subsequently ruled against the Constitutional Court decision, asked the penal court not to release Atalay, and called for a criminal investigation into the CC judges, an unprecedented development in the constitutional history of Turkey. As Balamir Coşkun and Tombuş (2023) note, lower courts in Turkey have refused to implement CC decisions before, but this is the first time the court’s constitutional functions and authority have been directly challenged. Deeply worrisome, this recent incident summarizes the dramatic shift in the Constitutional Court’s status within the Turkish judicial system and the demise of judicial independence during the last two decades against the backdrop of growing autocratization.

7 | CONCLUSION

In light of the Turkish case during the AKP rule, this article explored how populist leaders have exploited the judiciary’s democratic deficit to capture the courts gradually. When the AKP first came to power in late 2002, Turkey’s high courts were allied with the secular military and political establishment. Consequently, they enjoyed some judicial independence, albeit without strong channels for democratic accountability. Faced with the rapid electoral rise of a moderate Islamist party with populist tendencies, the secular opposition turned to the judiciary to block the government’s agenda. The willingness of Turkish high courts to adjudicate on salient political matters in this period judicialized Turkish politics, eroded public confidence in the judiciary, and triggered off-bench mobilization against court decisions. Specifically, the AKP used the controversial rulings by the Constitutional Court (i.e., the 2007 presidential vote and 2008 headscarf law) as a legitimizing factor to draw popular support and elite assistance for its assault on the judiciary. Starting from the AKP’s second term, the AKP and its allies employed a series of court-curbing and court-capturing strategies to increase control over the judiciary. Accordingly, with support from liberal judicial circles and their international allies, the AKP government amended the constitution in 2010 to change the composition and appointment process of high courts. However, this move set a dangerous precedent that the ruling party later used in the last decade to erode judicial independence further.

This argument has implications for other countries with populist governments. The Turkish case demonstrates the perils of relying excessively on the judicial branch to block the rise of a populist autocrat. This self-defeatist course can lead to two alternative scenarios that potentially harm the democratic regime. As demonstrated in the Turkish case, the first scenario led to court-packing by a populist government that managed to curb unfavorable court decisions and defeat the opposition parties repeatedly at the polls. Populist capture of the judiciary in Venezuela, where the Supreme Court maintained some independence until 2004 but was swiftly packed by supporters of President Hugo Chavez in the aftermath of the 2002 failed coup, is another example of this scenario (Urribarri, 2011). In the second scenario wherein judicial assertiveness succeeds, the populist agenda may get blocked, but at the cost of stifling dissent against the establishment and curtailing democratic space. In Thailand, for instance, the Constitutional Court invalidated the 2006 and 2014 general elections to prevent Thaksin Shinawatra and his supporters from winning office and dissolved several parties aligned with him (Tonsakulrungruang, 2016). This aggressive style undermined free and fair elections and weakened democratic politics, ultimately paving the way for the 2006 and 2014 coups.

We can draw several lessons from the Turkish case. As Bâli (2013) already argued, conventional prescriptions linked to judicial independence need more critical scrutiny. Judicial independence is necessary but not sufficient for democratic consolidation. Though essential for maintaining the separation of powers, judicial independence can also insulate high courts from democratic accountability and turn them into veto players that side with the political establishment. At the same time, democratic actors should exercise extreme caution before assisting populist leaders who challenge the judiciary on political grounds. In these contexts, their goal should instead be to break the self-defeatist cycle of populist majoritarianism and judicial counter-majoritarianism by strengthening judicial institutions rather than offering blank checks to populist leaders, as was the case during the 2010 constitutional amendments.

Another important lesson is that the judiciary can slow state capture by an aspiring autocrat but cannot stop democratic erosion completely. Opposition parties should not delegate this political task to the judiciary. Otherwise, they risk turning courts into immediate targets for populist leaders. Courts will likely succeed when they are strong and independent and receive widespread support from opposition parties and civil society (Landau & Dixon, 2019). Unless backed up by strong popular support, judicial resistance is not likely to succeed, and this failure may intensify court-capturing and court-curbing strategies by a government. Therefore, courts need to refrain from using judicial review in an activist way that places strict limits on parliamentary activity. Faced with a resurgent populist government, the judiciary should engage in strategic decision-making and exercise self-restraint and judicial deference. At all costs, it should avoid becoming the center of partisan fights to seek political goals.

ACKNOWLEDGEMENTS

The author would like to thank Igor Logvinenko, Michael Dichio, Andrew O'Donohue, three anonymous reviewers and the participants of the Courts and Authoritarian Populism Workshop held in December 2022 at Occidental College for their helpful comments and suggestions on an earlier draft of this article.

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ENDNOTES

¹ These judicial institutions include the Constitutional Court and five other high courts: the Court of Cassation, the Court of Accounts, the Council of State, the Military High Court of Administration, and the Military Court of Cassation (Bâli, 2013: 694).

- ² We would like to thank one of the reviewers for raising this point.
- ³ For a history of the Islamist movement and rise of the AKP, see Hale and Ozbudun (2009), Eligür (2010) and Gumuscu (2023).
- ⁴ In Hungary, the Fidesz government expanded the Constitutional Court's size to appoint its members, limited its jurisdiction, and passed a new constitution during its first term (Scheppele, 2018). Meanwhile, in Poland, the newly elected government refused to seat judges appointed by the outgoing parliament and instead elected its own members in 2015 (Sadurski, 2018).
- ⁵ For more on the 2007 general election campaign, see <https://library.fes.de/pdf-files/bueros/tuerkei/05726.pdf>.
- ⁶ Some jurists defend these party bans in the Turkish context as a measure of "militant democracy." This theory is based on the premise that a democratic regime can enact prohibitive policies to defend itself from those who seek to destroy it: the paradox of democracy (for more on this concept, see Accetti & Zuckerman, 2017; Rummens & Abts, 2010; Wagrandl, 2018).
- ⁷ Under AKP rule, the Gülenist movement had overseen a large network of schools in more than 80 countries and achieved a strong following within bureaucracy, business, media, and the judiciary. These appointments began to eclipse the predominance of the secular establishment in the upper echelons of the state apparatus and judiciary, especially after the AKP's second term. For more on the history of the Gülen movement and its relations with the AKP government, see Gumuscu (2016).
- ⁸ European Commission, "Turkey 2010 Progress Report," Commission Staff Working Document SEC (2010) 1327, Brussels, 9 November 2010, https://neighbourhood-enlargement.ec.europa.eu/turkey-progress-report-2010_en.
- ⁹ Initially, the constitutional package met with strong support among some legal scholars who viewed these amendments as an opportunity to curb Turkey's "secular juristocracy" (Erozden et al., 2010; Hirschl, 2009). For instance, Aslı Bali argued that these changes would "introduce a greater measure of democratic accountability in the appointments procedure" (Bali, 2013: 691) and provide the judiciary with a more pluralistic and representative structure (Özbudun, 2015: 45). Osman Can referred to the 2010 constitutional amendments as Turkey's 1789 moment (Bakiner, 2016: 150). They were critical of the main opposition CHP due to its strong support for the tutelary actors—namely, the upper echelons of the military and judiciary—against the democratically elected AKP government (Köker, 2010) and called for the adoption of a new constitution (Ersoy & Üstüner, 2016: 415–416). Others saw the amendments as window dressing by the AKP to conceal its goal of restructuring the judiciary (Ciddi, 2011; Özcan & Kimya, 2023). For instance, Arato (2010: 346), who acknowledged the TCC's democratic deficit, nevertheless took issue with the majoritarian nature of these amendments and warned that the AKP elites were following the style of other populist and authoritarian leaders while seeking constitutional change.
- ¹⁰ The same tactics were used to infiltrate other state agencies, including the military, bureaucracy, and police, with the AKP politicians being complicit in balancing the influence of secular members of these bureaucratic organizations.
- ¹¹ While many scholars initially saw the Turkish case as an example of "good" packing to strengthen the democratic system, some later decided that their implementation ultimately canceled any potential impact they had (Bali, 2016; Daly, 2022).
- ¹² For a history of the conflict between the AKP government and Gülen movement, see Gumuscu (2016).
- ¹³ "I would judge the Supreme Council of Judges and Prosecutors if I had the authority: Turkish PM." 29 December, 2013. Hurriyet Daily News. <https://www.hurriyedailynews.com/i-would-judge-the-supreme-council-of-judges-and-prosecutors-if-i-had-authority-turkish-pm-60233>.
- ¹⁴ Turkey's judicial administration is divided into five regions which are ranked based on financial and geographical conditions and opportunities for transportation, education, health, and entertainment (Çali & Durmuş, 2018: 1694).
- ¹⁵ Aside from Gülenists, leftist and Kurdish groups were also targeted by the government after the failed coup. For instance, many Kurdish mayors were replaced by state-appointed administrators, while the legal immunity for several Kurdish MPs, including the HDP's former co-chairman Selahattin Demirtaş, was lifted to allow their prosecution (Gurses, 2020; Jongerden, 2019).
- ¹⁶ Due to the abolition of the military courts—namely, the High Military Court of Appeals and the High Military Administrative Court—the number of judges for the Constitutional Court declined from 17 to 15. Similarly, the number of Council of Judges and Prosecutors (the word high was dropped) members decreased from 22 to 13. While the size of both organs was reduced, the president gained the authority to appoint new members.
- ¹⁷ For the Court's decision on its two members, see <https://www.anayasa.gov.tr/tr/duyurular/anayasa-mahkemesi-uyeleri-alparslan-altan-ve-erdal-tercan-in-meslekten-cikarilmasina-iliskin-gerekceli-kararin-basin-duyurusu/>.
- ¹⁸ "Turkish far right leader Bahçeli once again calls for closure of Constitutional Court." 14 November 2023, Gazete Duvar. <https://www.duvarenglish.com/turkish-far-right-leader-bahceli-once-again-calls-for-closure-of-constitutional-court-news-63319>.

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How to cite this article: Esen, Berk. 2025. "Judicial Transformation in a Competitive Authoritarian Regime: Evidence from the Turkish Case." *Law & Policy* 47(1): e12250.

<https://doi.org/10.1111/lapo.12250>