

GLOBAL TURKEY  IN EUROPE

# Pending Challenges in Turkey's Judiciary

Ergun Özbudun

January 2015

POLICY BRIEF 20



Stiftung  
Mercator



IPC

ISTANBUL POLICY CENTER  
SABANCI UNIVERSITY  
STIFTUNG MERCATOR INITIATIVE

# Pending Challenges in Turkey's Judiciary

Ergun Özbudun\*

## Abstract

This paper deals with the status of the judiciary in Turkey, specifically the composition and powers of the Constitutional Court and of the High Council Judges and Public Prosecutors (HSYK) and the measures pursued by the AKP government in changing these since the December 2013 crisis. It argues that the AKP government's establishment of its control over the judiciary will certainly lead to a wider use of a selective application of the law. Turkey now stands on the borderline between illiberal (or electoral) democracies and "competitive authoritarian" regimes. If the AKP obtains a constitutional amendment majority in the forthcoming general parliamentary elections, it will certainly attempt to change the system of government to a super-presidential one and to restructure the Constitutional Court.

## Constitutional Background

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 the High Council Judges and Public Prosecutors (HSYK in Turkish abbreviation). Both were the subject of radical change in the constitutional amendment of 2010, adopted by the AKP (Justice and Development Party) majority in parliament and approved by a mandatory referendum with a 58 percent majority.

The changes with regard to the HSYK were among the most controversial points in the amendment package that involved changes to 24 articles. In general, these changes were welcomed not only by the AKP supporters, but also by a majority of independent liberal democrats

\* Ergun Özbudun is Professor of Political Science and Constitutional Law at Istanbul Şehir University.

and major European institutions such as the 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 the Council of State) were represented in the Council, now the Council 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 from the executive branch. Thus, the judge members 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, Venice Commission and the Consultative Council of European Judges.<sup>1</sup>

Another improvement brought about by the constitutional amendment opens the dismissal rulings of the Council to judicial review. Furthermore, the amendment meets some of the criticism directed against the previous arrangement, such as stipulating that the Council shall have its own secretariat and budget, that justice inspectors shall be attached to the Council instead of the Ministry of Justice, and that 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 reduced to a more symbolic and representative one.<sup>2</sup>

1 Venice Commission, *Draft Report on the Independence of the Judicial System: Part I: The Independence of Judges* (CDL(2010)006), 5 March 2010, para. 32, <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282010%29006-e>; Consultative Council of European Judges, *Opinion No. 10 (2007)*, 23 November 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1224031>.

2 Ergun Özbudun, "The Judiciary", in Carmen Rodríguez et al. (eds.), *Turkey's Democratization Process*, London and New York, Routledge, 2014, p. 285-287.

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, and they received positive comments.<sup>3</sup>

## 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. 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 immediately inform the relevant administrative authorities of the ongoing investigation (amended Article 5c). This enabled the government to be immediately informed of the ongoing (secret) investigations and to take necessary measures, such as changing the involved police officers, accordingly.

Fifteen members of the HSYK protested 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. This time, the government’s arrows were turned against the HSYK. Prime Minister Erdoğan accused the signatories as being guilty of violating the constitution and stated that he would have put them to trial if he had the power to do so. He also stated that they 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>4</sup> On the same days, the AKP representatives announced intentions 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>5</sup>



When it became clear that a constitutional amendment was impossible, a group of 78 AKP deputies presented a bill to parliament designed to radically change the 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 labour 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 representatives argued that this provision granted the legislature authority to regulate by law all these matters, so long as it did not conflict with the other 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 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 provisions of the bill unconstitutional. Thus, he said, “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>6</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.

3 Venice Commission, *Interim Opinion on the Draft Law on the High Council for Judges and Public Prosecutors of Turkey* (CDL-AD(2010)042), 20 December 2010, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282010%29042-e>; *Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey* (CDL-AD(2011)040), 18 October 2011, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29040-e>.

4 “Bir yanlışlık yaptık” (We made a mistake), in *Taraf*, 30 December 2013.

5 “HSYK ameliyata yatırılıyor” (HSYK on the surgery table), in *Taraf*, 1 January 2014.

6 Murat Yetkin, “Gül’den HSYK’ya ‘yetmez ama evet” (From Gül to HSYK: not enough but yes), in *Radikal*, 27 February 2014.

As expected, a group of opposition deputies immediately challenged the law before the Constitutional Court, with a request of 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 the 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 reorganize 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 the Constitutional Court decisions are not retroactive under Article 153 of the Constitution.

Behind the fight over the HSYK lies a deep conflict between the AKP government and the Gülen movement, a well-organized 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>7</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 public eyes. With the disclosure of the corruption charges on 17 and 25 December, the conflict came out into the open. Erdoğan and his supporters immediately

blamed the movement as the sinister force behind what they termed a “conspiracy”. Erdoğan and other party representatives used unusually strong words about the movement, such as “spies,” “agents,” “sub-contractors of foreign forces,” “traitors,” “members of a gang,” a “parallel state,” “assassins” (*haşhaşiler*; a reference to a fanatic and murderous sect in the twelfth-century Muslim world) etc. Erdoğan also vowed that they would “enter into their lairs and destroy them.”<sup>8</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. Such action is generally viewed as revengeful and designed to interfere with the ongoing judicial process in order to cover up the corruption charges.

## Constitutional Court’s Ruling

On 10 April 2014, the Constitutional Court rendered its ruling on the new HSYK Law No. 6524.<sup>9</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) entitled the legislature to regulate by law certain matters concerning the HSYK, 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, “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 it is 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.”

8 Ergun Özbudun, “AKP at the Crossroads: Erdoğan’s Majoritarian Drift”, in *South European Society and Politics*, Vol. 19, No. 2 (June 2014), p. 159, <http://dx.doi.org/10.1080/13608746.2014.920571>.

9 Constitutional Court decision E. 2014/57, K. 2014/81 dated 14 April 2014, in *Resmî Gazete (Official Gazette)*, No. 29000 (14 May 2014), <http://www.resmigazete.gov.tr/eskiler/2014/05/20140514-21.pdf>. For an analysis of this decision, see Levent Gönenç, *Siyasi İktidarın Denetlenmesi-Dengelenmesi ve Yargı* (The Checks and Balances on Political Power and the Judiciary), Ankara, Adalet, 2014, p. 178-215; Ergun Özbudun, “Anayasa Mahkemesi ve HSYK” (Constitutional Court and the HSYK), in *Haşim Kılıç’a Armağan* (Essays in Honor of Haşim Kılıç), forthcoming.

7 On the Gülen movement, see M. Hakan Yavuz and John L. Esposito (eds.), *Turkish Islam and the Secular State. The Gülen Movement*, Syracuse, Syracuse University Press, 2003.

Based on this reasoning, the Court found many provisions of the Law unconstitutional, particularly those that transferred the powers of the Plenary of the Council to the Minister of Justice or unduly restricted the powers of the Plenary. 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 investigation with regard to the alleged disciplinary and criminal offences of the elected members of the Council.
- e) The provision which stipulates that the chairpersons 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.

Finally, the Court found unconstitutional the provision that terminated the positions of all HSYK personnel, save the elected members. As pointed out above, however, this will not enable the involved persons to return to their posts, since the 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 reorganization, such purge laws may not be unconstitutional, but that this was not the case with respect to HSYK.

## The 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 (No. 6545, “Law amending the Turkish Criminal Code and other laws”) adopted on 18 June 2014 introduced many changes, two of which seem particularly noteworthy. One seeks to reorganize the Court of Cassation. According to Article 37 of the Law, division of labour among the chambers of the Court will be re-determined 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 reorganization of the chambers to an indefinite future date.

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. Posts of this kind are few, normally only one in each province, but their numbers can be increased according to the needs and the population of the province. Thus, in Istanbul, the most populous province, there are only six of them among a total of 93 criminal judges who previously were in a position to decide on the appeals against such measures.<sup>10</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>11</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 the Turkish legal doctrine and the 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 reorganize the judicial system, such as 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.

## 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 succeed in its plans to create a dependent judiciary. Indeed, during the election process, certain leading AKP representatives stated that if anti-government judges gain a majority, the government would consider this result as

10 Kemal Gözler, “Sulh Ceza Hâkimlikleri ve Tabii Hâkim İlkesi” (Criminal Judgeships and the Principle of Natural Judge), in *Türk Anayasa Hukuku Sitesi* (Turkish Constitutional Law Website), 29 August 2014, <http://www.anayasa.gen.tr/tabii-hakim.htm>.

11 Ibid.

“illegitimate”. The 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>12</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 the executive branches.”<sup>13</sup>

Although the five main and five substitute members elected by the two high courts (Court of Cassation and the Council of State) are not pro-government, the 12 October election of ten main and seven substitute members by more than 13,000 first-degree judges and public prosecutors ended with the clear victory of the pro-government YBP group. Thus, together with the *ex-officio* members and the four members appointed by the President of the Republic, the government clearly dominates 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.

## The 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 is stipulated 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, Mr. Ali Alkan, strongly protested against the new law as an undue interference in the functioning of the Court.<sup>14</sup> When the law entered into force, the new HSYK, now

12 Utku Çakırözer, “B Planı: Referandum” (B Plan: Referendum), in *Cumhuriyet*, 25 September 2014; “Kazananı Gayrimeşru Sayarız” (We will consider the winners as illegitimate), in *Hürriyet*, 25 September 2014.

13 For the declarations of the three competing groups, see “HSYK Seçiminin Aktörleri Ne Diyor?” (What do the actors of the HSYK elections say?), in *Hürriyet*, 29 September 2014; İbrahim Okur, “HSYK Seçimi İçin Devlet İmkânları Kullanılıyor: Şık Değil” (State resources are being used for the HSYK elections: It is not elegant), in *Hürriyet*, 14 September 2014; Taha Akyol, “Yeni HSYK” (The New HSYK), in *Hürriyet*, 16 October 2014; Taha Akyol, “HSYK Seçimleri” (HSYK Elections), in *Hürriyet*, 24 September 2014.

14 “Yargıtay’a daha ne kadar müdahale edeceksiniz” (How far you will continue to interfere with the Court of Cassation), in *Hürriyet*, 25 November 2014; “Yargı ‘dik duracağız’ dedi” (The judiciary said it will stand upright), in *Taraf*, 2 September 2014.

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 point, with the exception of the Constitutional Court.

The law also contained other questionable provisions. One was the change in Article 116 of the Code of Criminal Procedure about searches of 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” would suffice (Art. 40). More interesting than this change of words is the sudden reversals of the AKP government. Indeed, the original text of the Code of Criminal Procedure dated 2004 had 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 motivation behind such frequent turnabouts are obvious. The February 2014 law was passed in order 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>15</sup> The Minister of Justice also announced that 3,500 new judges will be appointed this year, and another 5,000 next year. This is clearly designed to eliminate the influence of the pro-Gülen and other pro-opposition members in the judiciary.<sup>16</sup>

Other disquieting provisions of the Law No. 6572 are Articles 41, 42, and 43 that amended Articles 128, 135, and 140 of the Code of Criminal Procedure, respectively. These articles allow for taking such radical measures in the course of a criminal investigation as the seizure of allegedly crime-related property (Art. 128), eavesdropping of communications (Art. 135), and inspection by technical means (Art. 140) for a category of heavy crimes listed in the said articles. The amendments added to these lists crimes against the constitutional order and its functioning (Articles 309, 311-316 of the Turkish Criminal Code). Most of these provisions are rather ambiguous and open to different interpretations. Given the fact 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

15 Taha Akyol, “Yine Yapboz” (Once again make and break), in *Hürriyet*, 7 November 2014; Taha Akyol, “Yapboz No. 3” (Make and break, No. 3), in *Hürriyet*, 14 November 2014; Taha Akyol, “Yapboz No. 4” (Make and break, No. 4), in *Hürriyet*, 26 November 2014; Taha Akyol, “Güven Sorunu” (Problem of trust), in *Hürriyet*, 11 December 2014.

16 “45 Günde Yeni Yargı” (New Judiciary in 45 Days), in *Hürriyet*, 1 November 2014.

measures may very well be used by pro-government judges and public prosecutors to intimidate and silence the 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 one arrested.

## The Constitutional Court: The Remaining Bastion

The year 2014 can be described as a period when the AKP government made a sustained and systematic effort to establish its control over the judiciary. Through the laws of dubious constitutionality analysed above, it seems to have largely accomplished this aim. In this dark picture, the Constitutional Court seems 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>17</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>18</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. Particularly noteworthy are the Constitutional Court’s rulings concerning long and undue detention periods and access to the internet.<sup>19</sup>

---

17 Zühtü Arslan, “Conflicting Paradigms: Political Rights in the Turkish Constitutional Court”, in *Critique: Critical Middle Eastern Studies*, Vol. 11, No. 1 (Spring 2002), p. 9-25.

18 On the “assertive” character of Turkish secularism, see Ahmet T. Kuru, *Secularism and State Policies toward Religion. The United States, France, and Turkey*, Cambridge, Cambridge University Press, 2009.

19 Ergun Özbudun, “Bireysel Başvuru ve Anayasa Mahkemesi’ndeki Olumlu Değişim” (Constitutional Complaint and the Positive Developments in the Constitutional Court), in Ergun Özbudun, *Türkiye’de Demokratikleşme Süreci: Anayasa Yapımı ve Anayasa Yargısı* (Democratization in Turkey: Constitution Making and Judicial Review), İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2014, p. 187-191.

As expected, those liberal rulings of the Constitutional Court were met by severe critical comments by the AKP representatives. 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>20</sup> Similarly, the Court’s ruling on the HSYK law was strongly attacked by leading AKP representatives.<sup>21</sup> More recently, the Court’s President Haşim Kılıç complained about the undue pressure on the court’s judges concerning the cases pending before the Court.<sup>22</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, i.e. the three-fifths of the entire membership of the Grand National Assembly.

## Conclusion

Many Turkish and foreign observers have commented upon the recent drift toward authoritarianism in Turkish politics, so much so that Turkey can be described as being on the borderline between illiberal (or electoral) democracies and “competitive authoritarian” regimes, increasingly approaching the latter. Steven Levitsky and Lucan A. Way define such regimes as “civilian regimes in which formal democratic institutions exist and are widely viewed 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 favour of incumbents. Competition is thus real but unfair.”<sup>23</sup> The authors cite among the characteristics of such regimes “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

---

20 “Cübbeni Çıkar Siyasete Gel” (Take off your robe and engage in politics), in *Hürriyet*, 13 April 2014.

21 “Ak Parti’de tepki büyük” (Strong reaction by the AKP), in *Hürriyet*, 12 April 2014.

22 Interview with Haşim Kılıç in *Sözcü*, 30 December 2014.

23 Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism. Hybrid Regimes after the Cold War*, Cambridge, Cambridge University Press, 2010, p. 5.

selective.”<sup>24</sup> The AKP government’s establishment of its control over the judiciary will certainly lead to a wider use of such selective application of the law.

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 its sure place among competitive authoritarian regimes.

---

24 Ibid, p. 28.

## References

Zühtü Arslan, “Conflicting Paradigms: Political Rights in the Turkish Constitutional Court”, in *Critique: Critical Middle Eastern Studies*, Vol. 11, No. 1 (Spring 2002), p. 9-25

Consultative Council of European Judges, *Opinion No. 10 (2007)*, 23 November 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1224031>

Levent Gönenç, *Siyasi İktidarın Denetlenmesi-Dengelenmesi ve Yargı* (The Checks and Balances on Political Power and the Judiciary), Ankara, Adalet, 2014

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

Ahmet T. Kuru, *Secularism and State Policies toward Religion. The United States, France, and Turkey*, Cambridge, Cambridge University Press, 2009

Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism. Hybrid Regimes after the Cold War*, Cambridge, Cambridge University Press, 2010

Ergun Özbudun, “AKP at the Crossroads: Erdoğan’s Majoritarian Drift”, in *South European Society and Politics*, Vol. 19, No. 2 (June 2014), p. 155-167, <http://dx.doi.org/10.1080/13608746.2014.920571>

Ergun Özbudun, “The Judiciary”, in Carmen Rodríguez et al. (eds.), *Turkey’s Democratization Process*, London and New York, Routledge, 2014, p. 285-287

Ergun Özbudun, *Türkiye’de Demokratikleşme Süreci: Anayasa Yapımı ve Anayasa Yargısı* (Democratization in Turkey: Constitution Making and Judicial Review), İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2014

Turkish Constitutional Court, Decision E. 2014/57, K. 2014/81 dated 14 April 2014, in *Resmi Gazete* (Official Gazette), No. 29000 (14 May 2014), <http://www.resmigazete.gov.tr/eskiler/2014/05/20140514-21.pdf>

Venice Commission, *Draft Report on the Independence of the Judicial System: Part I: The Independence of Judges* (CDL(2010)006), 5 March 2010, para. 32, <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282010%29006-e>

Venice Commission, *Interim Opinion on the Draft Law on the High Council for Judges and Public Prosecutors of Turkey* (CDL-AD(2010)042), 20 December 2010, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282010%29042-e>

Venice Commission, *Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey* (CDL-AD(2011)040), 18 October 2011, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29040-e>

M. Hakan Yavuz and John L. Esposito (eds.), *Turkish Islam and the Secular State. The Gülen Movement*, Syracuse, Syracuse University Press, 2003