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# Turkish Judicial and Constitutional Reforms

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Open Source, Foreign Perspective, Underconsidered/Understudied Topics

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### **Author Background**

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*Cover image: Logo of Turkish Parliament (Türkiye Büyük Millet Meclisi).  
source: Wikipedia*

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# Turkish Judicial and Constitutional Reforms

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## Introduction

Since Turkey became a Republic in 1923, maintaining a secular government has been an ongoing struggle. The military, historically a guardian of secular government, has essentially acted as a self-appointed fourth branch of checks and balances. Any perceived attempt to reduce secularism in the government led to the 1960 and 1980 military coups, and resulted in the execution of the government officials and the adoption of new and more secular constitutions. Since the Justice and Development Party (AKP), a socially conservative party with Islamist roots<sup>1</sup> came to power in 2002, the question regarding another possible military intervention reemerged. The recent reforms weakened the military, however, and left little chance for military intervention.



*The Turkish Parliament building. Source: [http://de.wikipedia.org/wiki/Clemens\\_Holzmeister](http://de.wikipedia.org/wiki/Clemens_Holzmeister)*

The 2010 reforms removed provisional Article 15, which banned the impeachment of those who were responsible for the 1980 military coup and allowed military personnel to be prosecuted in civil courts. Shortly after the reforms, over 500 military personnel were taken into custody and more than 200 of them were imprisoned over an alleged coup plot (Ergenekon Trials).<sup>2</sup> This weakening of the military decreased the government's fear of another military intervention, while enabling the executive branch to keep increasing its power. In addition, the increased executive power over the Supreme Board of Judges and Prosecutors (HSYK) raised concerns about the possibility of terminating the positions of those who do not agree with the AKP policies. Moreover, the reformed presidential election terms enabled then-Prime Minister Recep Tayyip Erdoğan to potentially maintain his power for an additional 10 years (by running for and becoming President, which he did, in August 2014). All of these changes indicate that the executive branch has acted to establish increasing power over the military and judiciary.

### **The 2007 and 2010 Constitutional Reforms**

The 2007 and 2010 constitutional reforms present uncertainty regarding Turkey's future stability in terms of secular governance and checks and balances. These reforms reregulated the structure of the presidential elections, constitutional court, and Supreme Board of Judges and Prosecutors (HSYK), giving more authority to the executive branch over the judiciary. Furthermore, the 2010 reforms, which allowed military personnel to be prosecuted in civil courts, resulted in the imprisoning of over 200 of them. These reforms have given power to the current executive branch over the military and judiciary, the independent guardians of the secular state, while weakening checks and balances.<sup>3</sup> In addition, a decline in secularism is observed in the laws.

### *Presidential Terms*

The 2007 and 2010 constitutional reforms allowed Erdoğan to extend his period in power as well as presenting uncertainty regarding Turkey's future stability in terms of secular governance. In terms of empowering the current executive branch, the 2007 reforms called for the president to be popularly elected for the first time and able to serve two consecutive five-year terms, a change from the pre-2007 rule of a single, seven year term.<sup>4</sup> In other words, any president could potentially hold office for 10 as opposed to 7 years. Consequently, Erdoğan's victory in the presidential elections of August 2014 means that he could potentially have another ten years of consecutive power.<sup>5</sup>

### *Weakening the Military*

Although legislative, executive, and judiciary are the standard branches of the checks and balances in a functioning system; the military has unofficially been the fourth branch in Turkey since it became a Republic in 1923. Both the 1960 and 1980 military coups were the result of perceived threats to secularism in the government, and were followed by new constitutions being adopted for the purpose of strengthening democracy. The 2010 Reforms enabled the government to prosecute military personnel in civil courts. The amended Article 145 dictates "the military personnel who are involved in crimes against the security of State will be prosecuted in civil courts."<sup>6</sup> Another reform was the removal of provisional Article 15. Part of the reform package repealed the article barring prosecution of members of the National Security Council and technocrats who had legislative and executive power following the 1980 military coup.<sup>7</sup> For Sedat Ergin, who is a columnist at one of the leading newspapers in Turkey, "[t]he suggested changes are nothing more than the ruling party trying to convert institutions that do not favor their government, closer to their side." Similarly, Sebnem Arsu, a New York Times reporter, argued that "...After these changes, all we would be left with would be a system lacking checks and balances."<sup>8</sup> Henri Barkey, professor at Lehigh University in Pennsylvania, gave another interesting comment regarding these reforms. Prof. Barkley claimed that "...At the moment, Turkey is one

of the most centralized states in the world. Every decision has to be taken in Ankara. A teacher in the smallest village has to be appointed by Ankara, by the center.”<sup>9</sup>

In 2011, nearly 500 military personnel were taken into custody, and 262 noncommissioned officers (as well as academics and journalists) were charged with membership of what prosecutors described as “the Ergenekon terrorist organization,” an organization allegedly trying to overthrow the AKP; and sentenced to various prison sentences.<sup>10, 11</sup> In other words, the Ergenekon allegations allowed most of the military personnel to be convicted and imprisoned for allegedly plotting a coup against the government. As a result, it allowed Erdoğan to enact crucial reforms without the fear of military intervention by effectively and preemptively eliminating the military check on power.

*The title of the photo from the source: “The Turkish military is governed by unwritten laws and Pashas now.”  
Source: <http://www.habername.com/haber-yuksekeri-suraya-damga-vuran-fotograf-90977.htm>*



### *Executive Branch's Power over Legislative and Judiciary*

The legislative branch is also being affected. With the amended Article 146, the constitutional court now has 17 justices, increasing the pre-2010 rule of 14 members, and subtly changing the parliamentary selection of the additional three. Traditionally, these three justices would be chosen exclusively and freely by the Parliament. However, a closer look at the new regulations of the parliament's election process reveals that the parliament is limited to appoint two candidates from the Audit Court and one from the Presidents of the Bar Association. In fact, those justices are selected by the party or political faction that holds the majority seats in the parliament. The Turkish constitution, on the other hand, gives the President a right to select 14 remaining justices. Since Erdoğan became the President while AKP government is still holding the majority of the seats in Parliament, the parliament's role in the election of the Constitutional court justices is only symbolic, and the President has the ultimate power in the elections. In other words, as the sole leader of the AKP government and the President, Erdoğan has the power of appointing all of the Constitutional Court Justices. Thus, one can foresee that the justices selected by Erdoğan will be highly likely AKP partisans.

Secondly, the 2010 reforms give substantially more power to the justice minister (a member of the cabinet) over the HSYK, which is in charge of appointments and disciplinary procedures in the Turkish judicial system. The purpose of this reform was ostensibly to elevate the independence of the judiciary to European Union (EU) standards, due to Turkey's desire to join the union. However, the EU explicitly stated that the justice minister, an elected politician, should not be a member of the HSYK. The reform, on the other hand, not only allowed the minister to retain his position in the HSYK, but also gave him power to chair all of its meetings, in addition to having veto power over any disciplinary proceedings against a judge or prosecutor.<sup>12</sup> The amended article also changed the HSYK structure and the way its members are selected.<sup>13</sup> It created 22 regular and 12 substitute members on the board. The changes would also overhaul the Constitutional Court to consist of 17 justices, instead of the current 14 each chosen for a 12-year term.<sup>14, 15</sup>

A month after the reform, the 16 preferred candidates by the justice minister, a member of the AKP, filled the seats. All candidates appear to have reputations of being loyal to the AKP. Moreover, in 2014, by the president's approval, the amended provisional article 4 removed HYSK's secretary-general and his aides, the head of the committee of inspectors and his aides, and all inspectors and administrative staff working for the HYSK, leaving only the members who were elected by the justice minister in 2010. Subsequently, the remaining seats were filled by the Justice Minister himself, Bekir Bozdağ. Another change was that "Bozdağ dismissed active judges and replaced them with more than a 100 AKP loyalists, many of whom have not served as judges previously, which is an unprecedented step.<sup>16</sup> Usually, these positions are filled with judges who have at least 15 years of experience. Finally, the HYSK's orders and rulings for the past 4 years have been voided, and the full authority to enact legislation has been given to the justice minister. It is important to note that these appointments came shortly after the 2013 AKP corruption scandal, as the newly elected judges will try these criminal cases.<sup>17</sup> The 2013 corruption scandal refers to a criminal investigation in which several AKP's key politicians and some of their family members are involved.

*Prime Minister Erdoğan spoke in Konya: "The checks and balances are an obstacle to us"*  
*Source: <http://www.halkinhabercisi.com/basbakani-kaygiyla-izliyoruz>*





After the 2010 reforms, the HSYK stated that these reforms were unconstitutional and that they disrupted the checks and balances while giving more power to the AKP over the judiciary.<sup>18, 19</sup> Additionally, other reforms, notably the February 2014 MIT (The Turkish National Intelligence Agency) reform, provide unprecedented powers to the president, making him the direct supervisor of the MIT Undersecretary.<sup>20</sup>

### *Declining Secularism in the Laws*

In 2012, the parliament (the Turkish Grand National Assembly, or TBMM) passed the bill that restructured the Turkish educational system. According to this reform, school children are now able to obtain education at vocational religious high schools (imam-hatip), which trains them to become government employed imams (Islamic religious leader), after completing four years of primary education or pursuing main home-school courses. Prior to this reform, eight years of education was mandatory before being able to attend the imam-hatip schools. Many education specialists claim that the new educational reforms would actually undermine educational standards and deepen social inequalities. For example, the fifth grade, the specialists argue, is just too early for children to be steered away from a basic curriculum and be asked to make vocational choices about how to spend the rest of their life.<sup>21</sup> Moreover, in rural areas, particularly in the east and southeast, it is common for uneducated parents not to send their girls to schools. This reform lowers the education standards by allowing parents, most of who are incapable of providing a quality education, to “home-school” their kids.<sup>22</sup> Some even argue that it will generate more “child brides”.<sup>23</sup> Currently, there are 128,866 married girls below 18 years of age in Turkey.<sup>24</sup> Consequently, on June 13, 2014, Hurriyet News reported that the 2013 teachers’ instruction manual mandates that teachers teach girls the “mehndi ceremony” which is a very traditional pre-wedding and marriage ritual. The book instructs teachers to explain this ceremony as the symbolization of the bride taking a loyalty oath to her husband, and if necessary, that the bride even be sacrificed for her husband. The mehndi ceremony is a common practice in Turkey, taking place the day before a wedding.<sup>25</sup>

As previously mentioned, the 2010 reforms changed the structure of the Constitutional Court. Below are some of the definitions of a “secular state” by the Constitutional Court of Turkey in 2008 and 2013<sup>26, 27</sup> (prior to and after the 2010 Constitutional Reforms):

2008	2013
“In a secular state, only national will can lead the political order and no dogma is tolerated in the government. Legal rules are derived from reason and science instead of religious orders.”	“According to secularism’s liberal interpretation, religion is an important element of individual and collective identity, and is a reflection of society. The constitution holds the state responsible for fulfilling citizens’ religious needs.”
“A secular state is equal and unprejudiced towards all religions and beliefs.”	“The equality principle requires treating people from the same background equally and treating those from different backgrounds differently.”
“Legal regulations cannot be based on religious orders.”	“Our holy prophet’s life” statement in the statute articulates respect for the believers of that religion.”

*Erdoğan is visiting Mahmut Efendi, the leader of a religious sect called Ismail Ağa.*

*Source: <http://www.ensonhaber.com/basbakan-erdogan-mahmut-efendiyi-ziyaret-etti-2014-08-10.html>*



Based on the comparison of the Constitutional Court statements prior to and after the 2010 constitutional reforms, it appears that the rule of religion is being incorporated in the rule of law.

### **Legal and Public Opinion Regarding the Reforms**

#### *Legal Community*

The majority of the legal community appears to oppose the 2007 and 2010 reforms. A summary of the Turkish Legal Institute Constitutional Reforms Report is as follows:

The main purpose of these constitutional reforms is not achieving democracy. It appears that the purpose of these reforms is accepting referendum as a main method of passing proposed bills. The reforms seem political and strategic, for the purpose of achieving an independent and objective judiciary. With these reforms, the public accord that the constitution demands has not been sought or provided. The reforms solely provide willpower to the party in power. As a symbolic move, the temporary 15th Article in the constitution has been removed; however, the institutions that were created by Sept 12, 1980 military coup have been kept and protected. The so-called ‘democratic initiatives’ in the package are limited to being used for propaganda purposes. The regulations as to human rights and freedom under this package are not sufficient and in some cases even more backwards than the previous version.<sup>28</sup>

Furthermore, some legal scholars stated that the 2010 HSYK reforms are unconstitutional and that they polarize the executive branch while damaging check and balances.<sup>29</sup>

#### *Public opinion*

In regard to public opinion, while the secular, pro-Atatürk group is opposed to these reforms, AKP supporters, who represent approximately half of Turkey, are showing full support for the reforms. Both the 2007 and 2010 reforms have been accepted by public referendum. The 2007 reforms received 68% yes-votes, and the 2010 reform received 57%.

## CONCLUSION:

The rising power of Erdoğan and the AKP over both the judiciary and military indicates that Turkey is heading toward being a less secular regime. The AKP bylaws dictate that the party members can only serve as prime minister for three consecutive terms. As such, following three terms as prime minister, Erdoğan ran for the presidency in order to stay in power. However, in the current Turkish parliamentary system, the president's powers are mostly symbolic while the prime minister supervises the implementation of government policy.<sup>30</sup> Consequently, in 2012, Erdoğan stated that he is planning to change the parliamentary system to a presidential system, which would grossly expand the president's powers. Under this plan, the president would have power to dissolve parliament and issue presidential decrees.

Now that Erdoğan is president, he is trying to convert Turkey's parliamentary--prime ministerial system to a presidential system, which would allow him expanded powers. In order to pass this constitutional amendment, he needs the approval of three-fifth parliamentary majority (328), and then the amendment is subject to a public referendum.

When Erdoğan came to power in 2003, his pro-West and progressive attitude garnered him support from both conservative and secular groups. However, the recent corruption scandals, the government's response to the Gezi Park protests, and aggressive and dismissive attitudes toward the public have significantly lowered his rate of approval. When Erdoğan was elected as prime minister for the first time, the vast majority of the public was supporting him. He had claimed to be seeking "Anglo-Saxon" secularism saying, "I am not an Islamist—I am just an observant Muslim and that is my own business."<sup>31</sup> Contrary to his prior statements when he was the mayor of Istanbul, Erdoğan stated that it was necessary to join the EU and that Turkey would sustain "mutually profitable" relations with Israel.<sup>32</sup> After a decade of strict governing, however, his public approval has notably decreased. AKP's approval rate in 2014 local elections was 45%.

The protests against the administration, which began in 2013, show the public's dissatisfaction with Erdoğan's style of governance.<sup>33</sup> The main reason for these protests is a series of AKP

reforms, which the protesters argue are against the ideals of Atatürk, the founder of the Republic of Turkey. Furthermore, Erdoğan's ongoing divisive and provocative "us against them" attitude towards the protesters and other minorities is slowly but steadily dividing the public into two groups, as AKP supporters and opponents.

What has been observed in the social media is that the majority of the AKP opponents see Erdoğan as a threat to secularism; while AKP voters support the Islamic style of governance. Furthermore, Erdoğan's 2015 proposal of changing the current parliament system to presidential system are interpreted by the AKP opponents as an effort to increase his political power as President.<sup>34,35</sup> An increasing tension between the AKP supporters and opponents can also be observed in social media outlets such as the popular Turkish forum Eksisozluk, Facebook, and Twitter. The conflict between the government and the protesters, as well as the tension between the AKP supporters and opponents, suggest that the unrest will continue to grow.

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