Democracy Protecting Itself from Itself?

Judicial Intervention and Political Islam in Egypt and Turkey

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The paper studies how the judiciary and the judicial processes have been used to control Islamist movements and organizations in the Muslim world. Through case studies of Egypt and Turkey, we observe that judiciaries are by no means insignificant political institutions in the Muslim world, as the rarity of scholarly work on the topic would suggest. We argue that the secular incumbents attempt to use the judicial process to suppress Islamist movements or close Islamist parties when a military action (e.g. a coup) becomes an unfavorable strategy due to domestic “audience costs,” and the success of the attempt depends on the level of independence of the judiciary. It is significant that these regimes, even those which are labeled authoritarian by well established criteria, do worry about public opinion and choose strategies which will not turn public opinion against themselves.

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I. Introduction:

Studies on government in Muslim societies and in the Middle East in particular have mostly focused on authoritarianism. They sought to answer why authoritarianism is the most often observed regime type, and why it persists. Recent work has looked at the role of elections and elected bodies under authoritarianism, explaining why they exist and what purposes they serve (Blaydes 2008; Lust-Okar 2006). The goal of this paper is to shift the spotlight onto the judiciary, and to the political role of high courts in Muslim societies with different levels of authoritarianism.

Judiciaries and the judicial processes in Muslim societies have not caught much scholarly attention. Much of the work in this area has revolved around Shari’a. Shari’a law, incorporation of the Shari’a into western style judicial systems and legal codes, conflicts between western and Shari’a inspired codes of family law, and especially the impact of the latter on women’s rights are some of the extensively studied topics concerning the judicial processes in these societies. On the other hand, work on judiciary as a political institution in the Muslim world is scarce, notable exceptions being Moustafa (2003) and Hirschl (2004). Judiciaries may take different institutional forms, be based on different legal traditions, or vary in the level of independence they enjoy, but they are still a political institutions.

Why study the judiciary in the Muslim World? Is a focus on the judiciary meaningful given the dominance of the executives in countries with authoritarian regimes? The justification for a focus on the judiciary has different dimensions. From a rational choice-institutionalist perspective: if an institution exists, there must be a reason for it, and we think that investigating the raison d’être of the judiciaries will provide interesting insights about political processes and executive strategies. From an institutional-design perspective, the shape that an institution takes
is related to the strategies of the actors negotiating over that institution, and we would like to use the observed variance in judicial institutions and powers across countries and time periods to learn about different aspects of political bargains that scholars have studied in other political realms. From a democratic development perspective, the establishment of the checks and balances is central to a functioning and sustainable democracy, and we would argue that studying the judiciary is central to understanding the prospects towards establishment of rule of law and a credible commitment to democracy (Weingast 1997).

In this paper, we compare the increasingly active political role of the high-courts in Egypt and Turkey; especially as their decisions shape and even define the “rules of the game” in the competition between dominant incumbents and the challenging Islamist movements or political parties.¹ We observe that:

1. Both countries have established a judicial system with high courts
2. In both countries, the political role and the level of independence of the high-courts have varied over time
3. The high-courts in Turkey have been more active in effecting political outcomes; whereas, the high-courts in Egypt have had limited impact on political outcomes

We seek to explain these observations, by placing the judiciaries in their respective political context and exploring the political actors, constraints and strategies that led to these observed outcomes. Based on the observation that the establishment of high courts and the expansion of their powers have taken place within the context of a larger transition or constitutional change, we argue that high courts are established as a response to a political crisis, in order to alleviate or take under control the conditions that led to the crisis. Once established, the high courts act in such a way that they ensure their survival first, and attain increased powers
and independence second. The rise of Islamist movements and the incapability of the incumbent regimes to control these movements provide an opportunity for the judiciaries to expand their powers, because the incumbent regimes prefer to delegate this unpopular task to the judiciary.

One important conclusion to be drawn from the interaction between the executive and the courts is these regimes, even authoritarian, do worry about public opinion and choose strategies which will not turn public opinion against themselves as much as they worry about keeping a lid on things, maintaining their control and political power.

This paper compares the increasingly active political role of the high-courts in Egypt and Turkey, and explains the role of political Islam in this process. In the rest of the paper, we first elaborate on the theoretical argument centered on the executive-judiciary negotiations in the context of a political system challenged by Islamist parties or movements. Then, we use the cases of Egypt and Turkey to demonstrate how the proposed causal mechanism worked in these two cases across time. Through a comparison across the cases, we discuss the role of differing levels of democracy, and we conclude.

II. Constitutions, Judiciaries, and the State

Constitutions are often taken for granted. All countries in the world today have codified constitutions, with the exceptions of Israel, New Zealand, and United Kingdom whose constitutions are uncodified. We do not even stop and ask why all countries have felt the need to enact constitutions. For democratic countries, existence of constitutions is not at all puzzling, because they emerge as a necessity through the historical process that leads to democracy. They are written by political actors as the “rules of the game.” They define institutional boundaries, guarantee the rights, freedoms and duties of citizens, and state the procedures for changing the rules of the game in the future. What about non-democratic regimes? Why would they need to
have a constitution if the “rules of the game” are practically defined, sometimes purely whimsically, by those in power?

One might argue, like Giovanni Sartori, that the constitutions in non-democratic regimes are either nominal or façade constitutions (Sartori 1962). This argument would have merit, but it does not provide an answer to the puzzle: Why did they even bother to write a constitution, even if it is a nominal or a fake one? The key to understanding the existence and role of constitutional courts in non-democratic systems is understanding why these systems have constitutions in the first place. The introduction of a constitution is an important milestone in the political history of a country. Even if that constitution is not democratic, even if it is a nominal constitution which is basically the state’s organizational chart in words, even if it is a façade constitution with ideal wording but no possibility or intention of being implemented, that there is a physical, written document which defines the rules of the game is not trivial.

Constitutions may be adopted for a variety of reasons. A possible reason is that having a constitution is an international norm for nation-states (Boli 1987).² Domestically, a constitution may be necessary in order to ensure the legitimacy of the regime in the eyes of the people; it is introduced as either a quick fix to dwindling silent support for the regime, a concession to the discontent, or an imposition by revolutionaries. The critical point is: constitutions are almost always introduced because the ruling powers have to introduce them and almost never because the ruling powers willingly constrain their powers (See also: Hirschl 2000). The first constitution-like document which restrains the power of the ruler, Magna Carta of 1215, was imposed on King John of England by barons, because his rule was not strong enough to defeat the rebellious barons in battle. Likewise, the earliest constitutional experiences in the Middle East, Ottoman Empire in 1876 and 1908 and Iran in 1906 illustrate the point (Zarinebaf 2008).
Constitutional courts (and other accompanying high courts), like constitutions themselves, are introduced out of necessity or obligation. Our theoretical framework rests on the premise that a stable authoritarian regime does not establish high courts which may come to restrain the power it enjoys. Constitutional courts are generally by-products of a systemic change, and often are innovations introduced by a new constitution. The transition that leads to these changes is a response to different kinds of manifestations of discontent, unrest and turmoil. Public protests, military coups, insurgencies, independence movements, wars and revolutions are a few examples of discontent and unrest in question. These are also signs of state weakness, showing that the incumbent regime is not fully capable of controlling the political sphere in the country.

Literature on the state identifies two primary methods of political control: co-optation and coercion. Through co-optation, those who are in power “buy out” the possible challenges, or in other words they give the challengers positive incentives such that challenging becomes a sub-optimal strategy. These incentives may be bureaucratic positions, money, or any kind of patronage (favors, *wasta*, *iltimos*, etc.). The use of coercion requires use of force and sometimes violence to subdue the challengers. In other words, those in power impose or credibly threaten to impose negative incentives on the challengers, such that challenging becomes too costly and any possible benefit of challenging is overcome by the negative incentives. The means of coercion can be exemplified with loss of possessions including one’s life and basic rights, physical violence, removal from office, loss of existing patronage, and denial of access to resources. However, not all states have the capacity to use co-optation and coercion effectively.

Existence of a persistent authoritarian regime does not necessarily mean that the state in question is strong and has full capacity to employ co-optation or coercion in order to establish
total control over the political sphere. \textsuperscript{4} Authoritarian regimes, which do not have sustainable bases for their control mechanisms, often find themselves in a vulnerable position. For example, an economic crisis may upset the patronage distribution, which may lead to discontent among and challenge from the important political actors which were kept under control through monetary co-optation. In fact, many authoritarian regimes are spread thin in terms of their resources and maintenance of their control mechanisms. Sometimes, they just fail, and they face a crisis of political control; which practically means they are challenged. In those situations, either they find creative ways and innovations to weather the crisis and maintain control, or the challengers take over resulting in a regime change. New constitutions, allowing for Constitutional courts or expanding the powers and independence of the Constitutional courts, are products of and responses to the crises of political control experienced by the incumbent regime. If the incumbent stays in power, a Constitutional court is a counter-attack to the challengers; if the challengers take over, it is a guarantee against a come-back by the previous incumbent.

Once the high courts are introduced as formal political institutions; the political game changes. There is now, another political actor, which is commonly a veto player, in the game. \textsuperscript{5} Just like in the case of constitutions, Constitutional courts may be nominal or façade; they may exist in order to rubber-stamp the incumbents’ legal actions or they may pose as democratic institutions while they are defenders of the status quo. However, unlike constitutions, courts are actors with political interests and strategies of their own. They want to ensure, first and foremost, their survival. Secondly, they want to expand their power and independence.

The conventional wisdom is that in authoritarian regimes, judiciaries are fully dependent on those in power and they are merely rubber-stamping institutions legitimizing the authoritarian rule. Recent studies on judiciaries under authoritarianism provide ample evidence to show that
this is not always true.\textsuperscript{6} In some instances, such as in Egypt, Constitutional courts have made decisions against the incumbents in defense of democratic rights and freedoms. In some instances, as in current Pakistan, the judiciary has become a pioneer in the movement against authoritarian rule. However, this does not mean that the judiciary has always been and will be the progressive vanguards towards democratic rule. The conventional wisdom has some merit. The important question here is: Under what conditions do Constitutional courts decide against the authoritarian rule defending the rights? In the absence of what conditions, do the courts choose to limit their role to a conformist, rubber-stamping institution?

We argue that these conditions derive from the interests of the judiciary: Survival first, expand powers and independence, to the largest possible extent, later. Based on these interests, the Constitutional Courts will be willing to decide against the authoritarian rule if its existence is not threatened by this action. Likewise, the lengths to which the courts will be willing to go in support of democratic rights will be determined by how much the incumbent regime allows them to go. The important factor here is obviously the balance of power between the incumbent regime and the courts. If the incumbents can credibly threaten to close the court or limit its powers, then the incumbents have the upper hand. If the threats of the incumbents are not credible, then the courts will be able to push for more power and independence.

Is not each and every threat by an authoritarian regime a credible threat? Not necessarily. Then, what does a credible threat by the incumbent against the courts entail? A threat against the Constitutional court may be framed in terms of actions like removing one, a few or all of the judges from their posts (e.g. Musharraf’s 2007 removal of judges including Supreme Court Chief Justice Chaudry from office in Pakistan; Nasser’s 1969 “massacre of the judiciary” in Egypt), limiting the jurisdiction of the court, limiting the independence of the court, and closing the court
altogether. For such threats to be credible, it should be common knowledge that the incumbent has the capacity to carry out the threat. Why would an authoritarian regime not be able to or lack the capacity to carry out these threats?

Even authoritarian systems need a support base (Geddes 2004). They need to establish continued control over the factions within the ruling elite, be it a military junta, a single party or a coalition of clans, ensure their primacy within the network of institutions making up the state, and prevent any kind of popular challenge to their rule. In short, they need to ensure the support of factions, significant organs of the state and a critical part of the masses through coercion or co-optation. There is no guarantee that they will be able to do so successfully and continually. There may be various reasons why an authoritarian regime is not able to carry out a threat against the courts. (1) The regime cannot co-opt or coerce the courts (judges) into dependency due to reasons like insufficient resources, lacking the support of armed forces, etc. (2) The regime would face significant opposition to this action, which may come from factions within the regime or the public. (3) There would be international repercussions, such as sanctions from the allies or investors. In this paper, we will focus on domestic factors only, assuming that a state which subjects policy making on Constitutional courts to international pressures is a weak one, and domestic challenges to the weak state are more immediate and threatening. We elaborate on the two domestic factors which decrease the bargaining power of the incumbents against the courts next.

Under authoritarianism, the relationship between the incumbent regime and the judiciary is, in essence, a principal-agent relationship and is subject to principal-agent problems. For the incumbents, the ideal role of the judiciary is legitimization through approving the constitutionality of their rule. The existence of the judiciary would signal that the regime
respects the rule of law and principles of justice; while, in fact, the judiciary is heavily constrained. Just like the agents whose interests are different from the principal’s goal of maximum efficiency and profit, the judiciary has interests of its own and they may not be aligned with the principal’s interest. When they see an opportunity, judiciaries will seize it and shirk and the incumbent knows this. Then, how can the incumbent prevent shirking by the judiciary? 

Studies which approach political institutions, especially bureaucracies, from a principal-agent perspective have proposed a variety of solutions that the principals can employ to prevent agent shirking. Contracts, screening and selection, monitoring and reporting, and institutional checks are four major categories of solutions (Kiewiet and McCubbins 1991, 28). We observe that the incumbents rely on two of these methods in order to establish control over the high courts. Authoritarian incumbents often reserve the right to appoint judges and chief judges to the Constitutional court, which gives them the opportunity to select the judges who are “close” to them either ideologically or through personal connections. Authoritarian incumbents, who practically write the constitutions, use these documents as their contract with the Constitutional courts. They legally limit the powers and independence of the courts as much as they can de jure. They also resort to changing this contract, by establishing other courts such as State Security Courts, expanding the role of military courts or declaring state of emergency or martial law in parts or all of the country. These actions, by all practical purposes, curb the jurisdiction of the Constitutional court and allow the incumbents to circumvent the court. Needless to say, these methods are not without costs and may not succeed in preventing shirking.

The other important domestic factor involves other actors in the political system, whose support is essential for the implementation of the incumbents’ actions. The most important of these actors is the public, including organizations which represent public interest such as interest
groups and organized movements. Other significant actors may include the military, other security forces or intelligence organizations, opposition parties, business associations, labor groups, etc. We name this factor “domestic audience cost” although the original use of the term applies for democratic settings (Fearon 1994). Fearon’s version of audience costs rests on the idea that elected officials pay a cost in terms of votes in the next elections if their policies and actions are not popular with the constituency. In authoritarian systems, the public cannot punish the incumbents directly by simply not voting for them. However, they can still express their discontent and inflict a cost in terms of legitimacy of the authoritarian rulers.9

The methods of inflicting domestic audience costs on the incumbents in authoritarian regimes require collective action, which is directly affected by the political control mechanisms available to the incumbents. If the incumbents are able to employ positive and/or negative incentives to prevent collective action against them; the domestic audience costs of unpopular actions are going to be negligible. However, in such a setting, the Constitutional court would be concerned about its survival and conform to the rule of the incumbents; any opposition would be an off the path equilibrium. We are primarily interested in periods where incumbents’ political control is shaky enough for the Constitutional court to see an opportunity and attempt to force its hand in the bargain, which may lead to an unpopular reaction by the incumbents. In such settings, we can talk about possible domestic audience costs, which will be much higher as the level of democracy increases.

Public discontent about authoritarian policies leads to regime unpopularity and to a decline in legitimacy. If collective action is possible, the discontent may even lead to active political challenge such as protests, riots and revolutions. The last two years in Pakistani political history, between November 2007 and March 2009, perfectly illustrate how an
Authoritarian action against the Constitutional court may cause significant domestic audience costs to the incumbent. If an authoritarian regime is laden with uncertainty about its capacity to ensure political control, it will probably be cautious about taking risks, and this strengthens the hand of the courts.

In many Muslim societies, there is a common challenger to incumbents’ rule: the growing Islamist movements and parties, and the popular support they enjoy. These movements increase possible domestic audience costs, because they alleviate collective action problems. With their religious discourse that emphasizes social justice and through their extensive organizational structures which penetrate deep into the society and provide social services, Islamist movements have the ability to mobilize people, especially in the urban setting. Incumbents in democratic or authoritarian systems rightly see these movements as credible challengers and try to prevent these movements become major political actors. They have to do this intricately, though; because the audience costs of any action that pushes too far will likely be high.

Delegation to the bureaucracy is a way of avoiding the repercussions of potentially unpopular and controversial decisions such as economic austerity and reform programs or rulings over abortion rights. Incumbents who face a challenge from the Islamists often delegate the job of controlling these movements on to the judiciary to avoid the audience costs. However, this delegation means that the incumbents are obliged to rely on the judiciary to prevent the challengers’ political power increase. This obligation and dependency on the judiciary changes the balance of power in the judiciary-incumbent relationship, giving the judiciary a better bargaining position. As the capacity of the incumbents to control the challenge diminishes and as strong measures such as a military action, a coup d’etat, become unfavorable strategies due to domestic audience costs, the reliance on the judiciary and consequently judiciary’s bargaining
power increases. The incumbent’s dilemma is that if the judiciary gains enough independence through the increased bargaining power, they may just shirk and defy the incumbents. Incumbents try to avert potential defiance using the mechanisms of control at their disposal, which brings us back to the principal-agent nature of the relationship.

We next discuss the bargains between the incumbents and the high-courts in Egypt and Turkey. We show how the mechanisms above explain the variations in the powers of the Constitutional courts in the two countries since the introduction of the courts. We then compare the two cases, investigating the effect of differing levels of democracy in the strategies employed by the political actors.

III. The Judiciary, the Executive, and the Potential for Democracy in Egypt

*The country was under pressure for years and years, and when you open the gate for freedom, you will find many terrible things taking place. If you have a dam and keep the water until it begins to overflow, and then you open the gates, it will drown many people. We have to give a gradual dose so people can swallow it and understand it. The Egyptians are not Americans.*

— Hosni Mubarak, President of Egypt, 1993 (Palmer 2007)

In examining the development of the role of the judiciary (particularly, the Supreme Constitutional Court) in Egypt, one can see a struggle between the executive and the judicial branches of government. In particular, there have been an on-going series of fights in determining the exact role of the judiciary within Egyptian electoral politics. Since the Free Officers’ Revolt in 1952, three Egyptian presidents have addressed this struggle in differing ways. This is particularly true when looking at the role the judiciary has played in allowing or barring Islamist parties from running for office. Additionally, consistent with the above discussions, each of these executives has recreated the Egyptian constitution and redefined the judiciary’s powers. Each of these changes has resulted from a political crisis (e.g., the changes
to the Egyptian constitution following Sadat’s assassination in 1981) or an economic crisis (e.g., the rise of food prices in Egypt in recent years). In the beginning, it was evident that the judiciary was hindered by the executive from playing any role in the electoral process of the state. During the Sadat years, the judiciary’s role became greater and morphed into a different system. Since the assassination of Sadat in October 1981, Mubarak has allowed the judiciary to play a more independent role at times and has barred their independent nature at other times. Most recently, Mubarak indirectly took back control over the judiciary through the appointment of Maher ‘Abd al-Wahed as the Chief Justice of the Supreme Constitutional Court (SCC).¹⁰ This particular appointment is seen by many as an attempt to influence the SCC in a manner that is beneficial to the executive’s wishes (Brownlee 2002). This is particularly true in Mubarak’s attempts to control the opposition – particularly, the Muslim Brotherhood. If the statement made by Mubarak in 1993 is any indication, he will continue to contain the SCC and its oversight of the Egyptian electoral system so that it does not “drown many people” by Islamist waters.

**The pre-Arab Republic of Egypt’s Judicial System**

One of the first semi-independent judicial systems to be created by a national Arab government was in Egypt. From this foundation, the Egyptians began a move towards the development of an independent judiciary. In 1876, a Mixed Courts system was established in Egypt. This resulted from an 1867 proposal made to the Khedive by Prime Minister and Foreign Minister of Egypt Nubar Pasha. This new judicial system was a system developed based on cooperation between the Egyptian government and foreign powers (Wilner 1975). The establishment of the Mixed Courts was a reaction to problems with nationals of other countries not having standing in Egyptian courts. Often, these individuals were tried in their own state’s courts. This created a *de facto* dual system of laws. In establishing the Mixed Courts system and
the Mixed Codes, the Egyptian attempted to address this problem through cooperation instead of creating an independent judiciary based on Egyptian norms and principles (Wilner 1975). This system remained an institution in Egypt until 1949, being renewed multiple times by the Khedive. Remarking on the longevity of the judicial system in Egypt, Sir Maurice Amos said in 1925: “I have often taken occasion to remark that next to the Church, the Mixed Courts are the most successful institution in history” (Brinton 1950, 303). This was the system in place as the new dawn of Egypt arrived in 1952.

Nasser and the Early Years of Consolidation of Power

On July 22, 1952, the Free Officers – led by Gamal Abdel Nasser – overthrew the existing monarchical system in Egypt. In this action, Egyptians regained control over their own country for the first time since the Assyrians had conquered the Egyptian Empire. As noted by Palmer, “the revolution of 1952 ushered in a new era of optimism” (Palmer 2007). With this new era optimism, major opposition movements to the monarchy, including the Muslims Brotherhood also known as the Ikhwan or the MB, desired having greater accessibility to the political system. Yet, just as quickly, as the Free Officers overthrew the existing regime, another system was in place that also barred political parties. On December 10, 1952, the Egyptian Constitution was annulled and on January 17, 1953, another decree dissolved all political parties.

Prior to the Free Officer’s revolt in Egypt, the country’s political organization and the rule of law in Egypt were established by the 1923 Egyptian constitution. This constitution created a system of separation of powers within Egypt. It was replaced in 1930 with another constitution giving absolute executive powers to the monarch and the 1923 constitution was then reinstated in 1934 following civil strife in Egypt. It was this document and the system set up under it that was destroyed in the wake of the 1952 Free Officer’s Revolt.
In the subsequent action by Nasser’s regime in 1953, political accessibility was cancelled and the judicial system was dismantled piece-by-piece. Moustafa notes that ‘Abd al-Raziq al-Sanhuri – the “architect of the Egyptian civil code” – was battered by Nasser supporters and he was forced to resign from his position (Moustafa 2007). Additionally, the Majlis al-Dawla [State Council] was purged of twenty of its members. By 1955, the executive stripped the Majlis al-Dawla of its power that included cancelling administrative acts. This was a result of a split amongst the new regime concerning whether the system should go back to a parliamentary system or the new regime should be directed by the Revolutionary Command Council (RCC), lead by Nasser (Brown 1997). Prior to this split, the State Council had made a deal with the Free Officers whereby the State Council would legally support the actions of the Free Officers. Among these actions was circumventing the need to present new decrees for passage by the parliament.

In the aftermath of the split, Nasser and the RCC eliminated the legal institution that could prevent the Free Officer’s centralization of power (Brown 1997). Along with the disbanding of the strongest components of the established judicial system in Egypt, Nasser’s regime circumvented the established judicial system through the creation of new exceptional courts. These included the establishment of the Court of Treason (Mahkamat al-Ghadr) in 1952, the Court of Revolution (Mahkamat al-Thawra) in 1953 and the People’s Court (Mahakim al-Sha’b) in 1954 (Moustafa 2003). These new courts allowed for unchecked control of the political system by the regime (’Ubayad 1991).\(^{11}\) With the decree prohibiting political parties and through staffing these new courts with Nasser supporters, the possibility of political accessibility was eliminated. This executive hold on the government continued into the 1960s.
Towards the end of the Nasser regime, some slight shifts involving the judiciary could be seen. Some of these changes were to lead to the eventual creation of the Supreme Constitutional Court of Egypt. Yet, before these changes occurred, Nasser largely decimated the Egyptian judiciary in the 1960s. Out of fear that the judiciary would diminish the executive’s power, Nasser eliminated 200 judicial officials. This included dissolution of the board of the Judges’ Association, and eliminating some judges from the Court of Cassation. To gain greater control over the judicial bodies and judges not eliminated during this period, Nasser created the Supreme Council of Judicial Organizations. This body allowed the Nasser regime “[…] greater control over judicial appointments, promotions and disciplinary action” (Moustafa 2007).

Furthermore, to centralize control over the existing judicial system, in 1969, via Decree 81, Nasser created the Supreme Court (al-Makhama al-Ulia’). This centralized judicial review in one body, which was controlled by pro-Nasser justices (who were appointed by the President) (Moustafa 2007). This new judicial body allowed Nasser to maintain control over the judiciary through appointments of pro-regime judges. The President appointed the justices for the Supreme Court for three-year terms. As noted by Rutherford, the pro-regime leanings of the Supreme Court are evident in the decisions made on over 300 rulings from 1969 to 1979. In all of these cases, not one went against the Nasser regime. Following Nasser’s death, the opening of the regime’s grasp on the judiciary occurred.

In the aftermath of Nasser’s death, Anwar Sadat rose to leadership. With this change of power, there came a different perspective concerning the role of the judiciary. The Supreme Constitutional Court (SCC) was established through the implementation of the 1971 Egyptian Constitution. According to the Legal Guide to Investment in Egypt, the role of SCC was to rule
on “[...] the constitutionality of laws and regulations [...]” (Legal Guide to Investment in Egypt1977). Yet, even though the legal foundation of this judicial body existed in the constitution, its implementation did not occur until 1979 (via Law 48). Law 48 outlined the specifics concerning the operation of the SCC. With the establishment of the SCC as an operating body, the Supreme Court – introduced by Nasser and relied upon by the Sadat regime to a lesser degree – was eliminated (Boyle and Sherif 1996). 12 The transition from the SC to the SCC brought a new hope for an independent judicial body that would be free from the executive’s interference. Yet, the SCC’s overall power was constrained by the president’s emergency powers and his power to move certain issues to the “other,” “parallel” judicial system, the military courts, a tactic similar to Mubarak’s response to the growing electoral successes and popular support for the MB. The constraints on the SCC were threatening the greater liberalization of the Egyptian government as Egypt’s security was endangered by the assassination of Anwar Sadat in 1981.13 With the rise to power of Hosni Mubarak, there became a new era in the development of the judiciary – in particular, the SCC.

**Mubarak’s Early Years and the SCC**

In regards to the SCC, Mubarak has had the greatest impact on the role of the Court within the Egyptian political system. First, this is due to the number of justices and chief justices that Mubarak appointed to the SCC versus Sadat (a reflection of timing) and second, Mubarak’s regime has attempted to limit the role of the SCC – particularly, with regards to the electoral system – more than Sadat’s regime did. As can be seen in Table 1, Sadat was only able to appoint 12 justices to the SCC before his premature death. On the other hand, Mubarak has been able to appoint 33 justices to the SCC. These numbers would suggest that Mubarak has had a greater impact on the decision-making of the SCC given he can appoint individuals more
sympathetic to the executive. Similar to the statistics concerning justices, Mubarak also had a
greater impact than any Egyptian president did on the SCC due to the number of Chief Justices
he has appointed. As illustrated in Table 1, Sadat was only able to appoint one Chief Justice to
the SCC, Ahmed Mamduh ‘Atiya. On the other hand, Mubarak was able to appoint ten Chief
Justices to the SCC.

Table 1: Total Number of Justices and Chief Justices Appointed to Supreme
Constitutional Court by Each Egyptian President (1979-2006)

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<th>Justices</th>
<th>Chief Justices</th>
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<tbody>
<tr>
<td>Sadat</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>Mubarak</td>
<td>33</td>
<td>10</td>
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The high number of appointments by Mubarak has led to great debate in Egyptian
society concerning whether Mubarak appoints only justices and chief justices who will favor the
regime’s policies. This was most evident in the appointment of Maher ‘Abd al-Wahed to the
position of Chief Justice of the SCC in July 2006. In an August 2006 article in EgyptToday,
suspicion concerning the appointment of al-Wahed was raised. The suspicion was that this
appointment was to allow the Mubarak regime and the NDP, the President’s party, to gain
support from the SCC on a series of constitutional amendments the NDP and Mubarak wanted to
make. Additionally, it was speculated that “[…] Abdel Wahed would be fine-tuning the electoral
system prior to his scheduled retirement next year”(El-Hennawy 2009). Regardless of these
numbers and allegations, the SCC during the early years of Mubarak’s rule did cultivate a more
independent status. This is particularly true when compared to the Nasser years of the judiciary
and the Supreme Court.

In looking at the number of laws ruled unconstitutional by the SCC in the 1980s and
1990s, the independent nature of the Court is apparent. Yet, this independent nature grew more
during the 1990s. Moustafa documents that there was a dramatic shift in the number of SCC
rulings of laws unconstitutional from 1981 to 2000. For example, in 1980s, the SCC ruled approximately 4 to 8 out of 30 cases unconstitutional. This shows a slightly independent nature. However, in the 1990s, the independence of the SCC dramatically increased. This was particularly true in the mid-1990s when more of the cases that the SCC heard were ruled unconstitutional rather than constitutional (Moustafa 2003). In the context of the judiciary’s impact on the electoral system, the most significant decision made was in 2000.

**Mubarak, the SCC and a Move towards Greater Democracy?**

In 2000, the Supreme Constitutional Court ruled that the judiciary would monitor parliamentary elections. This occurred because of the SCC ruling on Sections 3 and 4 of Article 2 of Law 38/1972. This law allowed civil servants to supervise the balloting process at sub-polling places and judges to supervise the balloting process at principal polling places. The SCC ruled this was contradictory to Article 88 of the Egyptian Constitutions that gave supervisory roles over elections to the judiciary (Thabet 2006). Mubarak initially did not try to bar the supervision of elections by the Court. These elections are seen to have been cleaner and less corrupt than when compared to the 1990 and 1995 parliament elections. Mubarak’s regime did try alternative measures to limit electoral participation. For example, Muslim Brotherhood (MB) candidates and campaign workers were arrested, and voters were intimidated outside of polling places (Dunne 2006).

Even with these blockades of the electoral system, independent candidates (many that were affiliated with the MB) won a significant number of seats in the People’s Assembly. The National Democratic Party (NDP – the party of the President) only secured 38 percent of the seats in the 2000 election and independents associated with the MB won 17 seats or 3 percent of the seats (Alanani 2008). This may not seem like a significant number, but it should be
remembered that religious political parties are banned in Egypt. Therefore, the success of the independents who are affiliated with the MB is very significant. The parliamentary elections of 2005 again yielded similar results. As can be seen in Table 2, the MB independents gained even more seats during the 2005 parliamentary elections. MB independents were still largely outnumbered by the NDP, yet more gains were made ("Arab Political Systems: Baseline Information and Reforms -- Egypt" 2008). During the 2005 elections, the role of the SCC in monitoring the electoral system was diminished through the creation of an electoral commission. Hamzawy and Brown (2005) note this new body was created because of international pressure and Egyptian domestic pressure. If this premise is correct, then one has to recognize the importance of audience cost both internally and externally and its impact of institutional development. Mubarak regime could not abolish the SCC or have unmonitored elections due to audience costs, so it created a new institution over which it ensured to have more control.

Table 2: Results for the 2005 People’s Assembly (Parliamentary) Elections

<table>
<thead>
<tr>
<th>POLITICAL PARTY NAMES</th>
<th>NUMBER OF SEATS EARNED IN ELECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Democratic Party</td>
<td>311 Seats</td>
</tr>
<tr>
<td>Muslim Brotherhood Independents</td>
<td>88 Seats</td>
</tr>
<tr>
<td>Unaffiliated Independents</td>
<td>22 Seats</td>
</tr>
<tr>
<td>Karama Party</td>
<td>2 Seats</td>
</tr>
<tr>
<td>Ghad Party</td>
<td>1 Seat</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>424 Seats</strong></td>
</tr>
</tbody>
</table>

*Note: There are 446 seats in the People’s Assembly. There are 30 seats not listed in the chart. This includes the following: 12 seats (postponed races) and 10 seats (appointed seats).*

As Egypt edged towards greater political accessibility in 2005 in its parliamentary elections, Mubarak, also, pushed for opening the presidency to multiparty elections. With the introduction of competitive presidential elections, opposition parties saw the potential for greater change in the Egyptian system (Hamzawy and Brown 2005). Yet, even with the opening of the system, religious parties were still considered illegal and were not allowed to participate in the
new presidential elections. Regardless, as noted above, independents associated with the MB had gained a greater number of seats than in previous parliamentary elections.

In the case of the presidential elections, 2005 was supposed to present the world a watershed moment in Egyptian politics. In previous years, the presidency of Egypt was selected through an indirect process. The presidential candidate was nominated and confirmed by the People’s Assembly, which is dominated by the incumbent president’s party – the National Democratic Party. Following this first step, this candidate was confirmed through a nationwide referendum. Prior to 2005, this resulted in Mubarak being re-elected to office by a 93% to 98% “yes” vote margin (Sharp 2006).

The amendment to Article 76 of the Egyptian constitution had positive and negative consequences. It presented Egypt as a state moving towards greater democratization through allowing multiparty presidential elections. Yet, it also helped to entrench further the barriers in place that limit independent participation in Egyptian presidential politics – in particular, the participation of the MB in presidential politics. As noted by Sharp, independents had to secure support from “[…] 250 elected politicians drawn from the People’s Assembly, the Shura Council or upper house, and the provincial councils” in order to have a credible bid (Sharp 2006). All three of these bodies are dominated by the NDP.

In addition to these constitutional barriers to bar opposition to Mubarak, the new amendment also created the Presidential Electoral Commission (PEC). This took supervisory powers away from the SCC and created another barrier against the rise of Islamist political parties. This body consists of ten members who are current and former judges, and other public figures. This body approves candidates’ nominations, supervises elections, and counts the votes. More importantly, this body has the final judgment on all issues arising from the elections (Sharp
2006). This body – in effect – replaced the judicial supervision by the Supreme Constitutional Court (SCC). In promoting this amendment, Mubarak gave the appearance of greater openings in the electoral system, yet also took power away from the SCC. This amendment began to limit the independence of the SCC in its role as the administrator of the Egyptian electoral system.

Even with these constitutional barriers, the MB and other independents fared well in the 2005 parliament elections. Mubarak was contested in his bid for the office of Egyptian president, but still won re-election decisively. As the MB gained more ground in the elections, “[…] the gloves came off […] [f]ar more thuggery and manipulation were necessary” (Hamzawy and Brown 2005). In the aftermath of the 2005 successes of the MB independents and other opposition parties, Mubarak began to take another track to prevent MB participation in the politics of the state.

**A Shift in Tactics and Restraining the Power of the SCC in Egyptian Electoral Politics**

Given the independent nature of the SCC throughout the late 1990s and early 2000s and the electoral successes of the MB in 2005, Mubarak reacted by instituting a new set of barriers to the rise of Islamic power in Egypt. Partly as a reaction to these newer barriers, during the 2008 local elections in Egypt, the Muslim Brotherhood boycotted the elections. As a result, the NDP won decisively in these elections in securing 95% of the local seats. This election cycle was rife with political unrest and violence, including strikes organized by “[…] independent unions, syndicates, and networks of young activists – some of whom belong to political parties […]” (Hamzawy and Herzallah 2008). This was dissimilar to street-level protest that occurred between 2004 and 2005, which were led by the MB and Kifaya. In this context, Mubarak’s regime began to address the results of political reforms they had made in the early 2000s.
One of these political reforms intended to curtail the growing independent power of the Egyptian judiciary. In particular, the supervisory role over the electoral process, which was first under the control of the SCC and then placed under control of the PEC, was put under the control of a new supreme supervisory committee. The President of Egypt appoints this committee’s members (Hamzawy and Herzallah 2008). This shift in electoral supervision was similar to movements made by Nasser, as noted earlier in this study. To prevent future electoral successes by the MB, the Egyptian government adopted a mixed election system that would make it harder for independents (particularly, MB independents) to make additional electoral gains or retain those previous acquired. Additionally, the MB was targeted in a round of arrests and detentions by the Egyptian government. Along with these arrests, the Mubarak regime created a new judicial system that would run parallel to the SCC and its sub-bodies. Through the development of the parallel security courts, Mubarak could bar MB member’ activities and not be overturned by the SCC (as had previously occurred).

Egypt’s superficial experimentation with political openness has diminished with the prevention of judicial independence, in particular, as far as the electoral process is concerned. As was the case in the Nasser era, Mubarak has limited the growing role of the judiciary over the Egyptian electoral process. Through the development of newer bodies in the last few years, he has been able to create a system which favors his decisions concerning the role opposition will play in the state. This is particularly true when looking at how the MB has been prevented from gaining any more political seats at the Egyptian government table.

As evident from the above discussion of the Egyptian judiciary, the Egyptian regime has attempted to show to its internal and external audiences that it is moving towards democracy. Yet, as can be seen, when the move towards democracy and the establishment of a more
independent judiciary actually materialized, the executive has been careful to limit its powers. This is most evident when looking at the role of the judiciary in monitoring and ensuring freer elections in Egypt. When the incumbents (Nasser, Sadat, and today, Mubarak) felt threatened by the judicial decisions, they have been quick to take action. This action has come in either the form of coercion (the massacre of the judicial branch by Nasser) or credible threats of limiting the courts authority. The latter can be seen most clearly in the post-2005 parliamentary elections period as Mubarak moved to create new bodies that would take electoral supervision away from the SCC. This can be seen as an action of coercion and threat as it allowed Mubarak to control the current justices and this action sent a signal that further actions against the incumbent would not be tolerated. Future actions were highly probable.

We now turn to the political role of the judiciary in Turkey, where the democratic and electoral experience has a longer history than Egypt, but where the military has always retained its involvement in politics. We will see that the judiciary has had greater impact on political developments in the country, and methods of controlling the judiciary have differed when compared to Egypt.

IV. Judiciary, Democracy and Political Islam in Turkey:

Democracy can be endangered by political parties, the executive, the legislative, even the judiciary. Democracy must attain and put into action the mechanisms and legal tools to protect the foundational philosophy and basic characteristics of the republic. A defense mechanism is needed in order to protect the unitary structure and secularism. Freedoms are not unlimited in liberal-libertarian democracies either. The idea of no limits is a dangerous idea.

—Sabih Kanadoğlu, Former Chief Prosecutor of the Supreme Court of Cassation, 2006

Turkey is a parliamentary republic which has held competitive multi-party general elections since 1945, and multi-party municipal elections since 1987. The elections have been
considered to be free and fair, with no serious allegations of rigging. However, the period of multiparty politics have been interrupted by military interventions of different kinds: military coup d’états in 1960 and 1980, a “coup by memorandum” in 1971, and a “postmodern” coup in 1997. Some argue that the last few years witnessed an “e-coup” in 2007 and a judicial coup\textsuperscript{17} in 2008. In the Turkish setting, the military is the centerpiece of a Kemalist alliance, which corresponds to the political actor referred to as “incumbent” above.

The founder of the republic, Mustafa Kemal Atatürk, envisioned a secular state. The secularism Mustafa Kemal introduced, which is still the operating definition of secularism by the Kemalist alliance, is based on the French principle of laïcité. The principle of secularism and reforms on religious life were not fully internalized by the populace, however. Since the earlier years of the republic, challenge to secularism has been one of the main pillars of the opposition. Even in the earliest experiments with multi-partyism in 1924 and 1930, the conservatives rallied behind the new parties to challenge Atatürk led Republican People’s Party(RPP)’s approach to religion (Zürcher 1991). At certain times, the conservative opposition became strong and gained electoral victories, established the government with parliamentary majorities, the first example being Democrat Party (DP) led by Adnan Menderes.\textsuperscript{18} When the conservatives came to power, and especially if they expressed interest in challenging secularist principles, their actions were constrained by the military-bureaucratic alliance. What we observe in Turkey in recent years can be considered as another repetition of a power struggle between the Kemalist alliance and the conservatives, at the heart of which secularism lies. In this power struggle, the conservatives gain the upper hand through electoral victories, the military-led Kemalist alliance through coups.

When the Turkish military intervenes in politics, they rarely hold on to power. The tendency of the military has always been to rewrite the rules of the game, and to let the political
players on the field again. The 1961 constitution and the current 1982 constitution are products of the military coups in 1960 and 1980 respectively. The military acts as the ultimate veto player in the Turkish political setting; however the domestic and international audience costs of a military coup have made a coup like the 1980 coup highly infeasible. Accordingly, the military has been trying to adopt new methods of keeping the conservative influence in politics under control and the Islamists out of power.

A year after the 1960 coup, a new constitution was introduced, setting the new rules of the game. This constitution was a direct response to the political events that culminated in the coup. The target of the coup was DP, which had grown more confident and more authoritarian, suppressed opposition including the RPP, restricted freedoms, and did not refrain from yielding to the demands of its religious and conservative constituency. Thus, the new constitution was designed to prevent a political party from what DP was able to do even if that party came to power by a majority and to create an extra-legislative ally for the RPP if it remained in the minority in the parliament again.

The constitution considerably expanded the rights and freedoms. This was done not in the name of creating a more democratic polity, but rather to prevent the repetition of what happened under the DP rule. The constitution aimed at expanding political freedoms so that a political party, backed by the masses, could not dominate the political sphere and suppress opposition voices. Non-governmental organizations like labor unions were given a larger political role not so that they could voice their demands and interests, but rather so that they could oppose the dominant party and its abuses of political power.

The 1961 constitution also established institutional checks on the parliament. It introduced a second chamber to the assembly, the Republican Senate (Cumhuriyet Senatosu)
and elevated the independent judiciary to be a pillar of the checks and balances system. The Constitutional Court of Turkey (CCT) was established in 1962, with the purpose of judging the constitutionality of the laws passed by the parliamentary system; it was another check on the parliament in case the Senate failed. The purpose of these institutional checks was to curb the authority of political parties, especially populist ones which were backed by the masses and had the legitimacy gained by the “vote”. Both the Senate and the CCT were effectively designed to be veto points the governing political party had to pass bills through before the bills could be laws.

The 1961 constitution intended to prevent accumulation of political power in the hands of a single party, but the new rules of the game laid out by this constitution yielded unintended consequences. The most important was the ideological fractionalization of political spectrum and the reflection of this fractionalization among the public as ideological polarization and violence. The conservative opposition to the RPP, Atatürk’s party, had always been a coalition of different interests and goals, united under the banner of opposing RPP. After 1960, each of these different interests established separate political parties that represented their specific goals, rather than being a part of a conservative coalition. Among the many new political parties the conservative coalition produced was an explicitly Islamist party, Milli Nizam Partisi (National Order Party, NOP). The Islamists, those who were not only conservative but also called for a less secular, more Islamic state, united under the leadership of Necmettin Erbakan. They established NOP in 1970 and later Milli Selamet Partisi (National Salvation Party, NSP) in 1973. Unsurprisingly, NOP, the first “Islamist” party, was closed by the CCT in May 1971, a fate its successors also faced in later decades.21
In the post 1960 coup period, Adalet Partisi (Justice Party, JP) has been a major party, with significant electoral support and parliamentary presence. Erbakan’s NSP was no less significant in politics; because it became the minor coalition partner to JP and RPP, and thus had government positions, bargaining power, and access to political patronage.

In this period, we observe an ascendance of political Islam. JP was a conservative party, which used the advantages of being the governing party and referred to Islamic symbols where necessary. The real locomotives of the ascendance were Erbakan, his parties, and connections to the religious organizations (tarikats). Although they did not have a constituency as big as JP did, they maintained a core constituency and more importantly, they used an explicitly Islamist, explicitly anti-secularist discourse. These two parties served the cadres in the bureaucracy to like-minded people while in government. The bureaucracy, long considered to be the castle of Kemalist ideology, a limb of the RPP and the implementer of the reforms, was being “conquered” from the inside.

With rightist parties, including the Islamists, controlling the bureaucracy, the academia and the intellectuals withdrawing their support, the military was losing its grip on politics by 1970s. The leftists and the Islamists had become serious challenges to the Kemalist alliance and both were unacceptable to the military. The memorandum of 1971 was an attempt to strengthen the grip, but failed. In the 1970s, there were many viable contenders for political power, each with their own passionate constituencies and there was abundant uncertainty about who would win. While the military had difficulties in maintaining its political control, it relied on the judiciary to come to its aid. Through an examination of court rulings between 1962 and 1982, Belge (2006) discusses how the CCT’s selective activism in this period effectively attempted curbing the liberalism brought by the constitution. She finds that “when liberty was demanded
by socialists, communists, and DP members in the 1960s and 1970s […]], the justices almost always came down on the side of ‘public order and security,’ consolidating the status of Kemalism as the only permissible political ideology” (Belge 2006, 671).

The fractionalization of politics led to deadlocks in the parliament and the polarization in the society led to increasing violence through the 1970s. Political and indiscriminate violence by leftist and rightist groups ensued. Major factions on either side associated with a political party; and thus, the violence in the streets and the deadlocks and bargains in the parliament were not independent. New elections, changes in government, or martial law did not improve the situation and the turmoil in politics and within the society led to another coup in 1980.

The 1980 coup was similar to the 1960 coup in the way that it transformed politics and political institutions. A new constitution was written in 1982, which is the current constitution in Turkey. Just as the 1960 constitution aimed at preventing what happened before 1960 repeat itself, the 1980 coup aimed at preventing the repetition of fractionalization in the parliament, small radical parties gaining pivotal roles, and most importantly too much politicization, activism and militancy among the people. Electoral laws were amended in order to prevent the small parties from entering the parliament (e.g. the 10% national threshold). The freedoms brought by the 1960 constitution, especially those associated with political organizations, associations, protests, meetings, strikes and expression were curbed considerably through the 1982 constitution and new laws supplementing it.

The new constitution abolished the Senate, because the veto role of the Senate was given to the Presidency, an office whose political role was considerably increased as will be discussed below. The constitution maintained the CCT but changed the procedures for the appointment of its judges. Article 145 of the previous constitution stated that the judges were to be appointed by
high courts, both chambers of the assembly, and the president according to the quotas each had. For example, the three high courts appointed 8 of the main judges whereas the president appointed only two. On the other hand, Article 146 of the 1982 constitution gives the power to appoint the judges only to the President. The President chooses the appointees from the list of candidates advised by high courts, military courts and the Higher Education Council or directly from among high bureaucrats and lawyers. Table 3 summarizes the CCT appointments by the post-1980 presidents.

Table 3: Presidents and Appointment of CCT Justices

<table>
<thead>
<tr>
<th>President (Post 1980)</th>
<th>Appointments During Tenure Excluding Current CCT</th>
<th>Appointments to Current CCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evren (Nov 1982-Nov 1989)</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Özal (Nov 1989-Apr 1993)</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Demirel (May 1993-May 2000)</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>Sezer (May 2000-Aug 2007)</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>Gül (Aug 2007)</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: Information from the website of the Constitutional Court of Turkey. We see that presidents make about 10 appointments during their 7 year tenure. The aberrations are Özal, who was president for less than 4 years before his death and appointed 10 judges in that period, and Sezer who appointed 14. However, the number of appointments does not show a use of prerogative, since presidents appoint to fill the vacancies of those members who retired due to age or by their own will.

This system of appointments features two distinct levels of screening to determine the composition of the CCT. First, it removes all the say the legislative institutions had on the appointments to the CCT and subjects the input from the high-courts to the approval of the President. Second, although the President has the final word on appointments, most of the judges must be chosen from the list of candidates the high courts propose. The judiciary, high courts in particular, has been one of the few parts of the bureaucratic machine which remains staunchly secular, and has not been subject to large scale “infiltration” of Islamist-minded bureaucrats. This second screening ensures that the candidates will be secular minded people even if the President is not.
The presidency would be occupied by the leader of the military junta Kenan Evren for 7 years after the coup; and the constitution gave him the power to check on any “extremities” in the parliament. *De jure*, the veto of the President can be overturned by a 2/3 vote in the parliament; however, the veto power of the President was reinforced by the National Security Council (Milli Güvenlik Kurulu, NSC) which he resides over. This council is an institution introduced by the 1980 coup as another check on the parliament and especially the executive. Although it is only an advisory institution, it has been used as an arena where the Chiefs of Staff let the government know about what they think, voice their objections, even in the form of “warnings” in some instances. The threat of another coup has been the functioning principle of the Council, and the reason why the governments cared about the council meetings. The NSC was at the center of the “postmodern” coup in 1997, where the Chiefs of Staff effectively forced Erbakan’s Welfare Party, then in government as the major coalition partner, to resign by imposing a set of decisions, the so called February 28 decisions, emphasizing secularism.

Today, an outright coup is unacceptable\(^\text{23}\), the legal role of the NSC has been diminished due to political reforms, and the presidents after Evren have been civilian, sometimes conservative (Özal, Demirel) or even Islamist (Gül). The military has had to devise new ways of influencing the political sphere and delegation to the judiciary is one of them. The current President is a former member and leader of Justice and Development Party, which means there is no “check” from the office of the president on issues regarding political Islam. The presidential veto point that the secularists have relied on for a long time is now gone, and the CCT is the only secular veto point ("Kösk'ün yerini Anayasa Mahkemesi Aldı" 2008). In the 2008 political crisis over the constitutional amendment regarding Articles 10 and 42, Gül could have prevented the amendment from being taken to the CCT by vetoing it and sending it back to the parliament for
reconsideration. However, he approved the amendment, and the veto had to be issued by the CCT, which they did.

**Judiciary, the 1982 Constitution and Political Islam**

Three higher courts, Anayasa Mahkemesi (Constitutional Court), Danıştay (Council of State), Yargıtay (Supreme Court of Cassation) and the special civil courts named Devlet Güvenlik Mahkemesi (State Security Court, SSC) have been significant in political terms in the post 1980 period. The SSCs had jurisdiction over “thought crime” cases as well as the cases regarding the Kurdish insurgency, and is an example of creating a new judicial institution for special cases. The military was willing to forgo due process on these cases for the sake of speed and maximum punishment possible, and thus could not entrust them with the CCT. The threat of the SSC has limited the freedom of expression and any challenges to the “official line” on many issues. SSCs were abolished by a constitutional amendment in 2004 during the government by the Islamist Adalet ve Kalkınma Partisi (Justice and Development Party, JDP). Currently, High Penal Courts have the jurisdiction over the cases which would be judged in SSCs before.

Civil cases are appealed in the Supreme Court of Cassation and cases from administrative courts are appealed the Council of State. In recent years, these two high courts have had to adjudicate cases where the secularist principles are brought to question and their verdicts have been subject to much political debate. The Council of State was targeted in an armed assault, and some members were killed on May 17, 2006. The gunman, a lawyer, said he was angry at the members about the “headscarf verdict.” This was an appealed administrative case involving a pre-school teacher who was not allowed into the school because she appeared with a headscarf and was consequently punished administratively. The Council of State decision restated the
secularist principle that headscarves cannot be worn in the public domain (*kamu alanı*). One similar case was brought to court by an Alevi family, who did not want their child to attend the religious education classes at school (April 3, 2008). These classes are based on the Sunni teaching, and Alevis are Muslims whose practice is different from mainstream Sunni and closer to Shiite Islam. The high court said those of different faiths do not have to attend these classes and JDP leaders claimed that the Council had exceeded its authority (*AKP’li Fırat: Danıştay Yetkisini Aştı 2008*). The presence of these classes in curricula is an ongoing debate, and the Islamists argue they should stay and should even be more intensive (e.g. the emphasis on Imam Hatip High Schools).

The Supreme Court of Cassation has been in the political hotbed since it is the prosecutors of this court who bring the party closing cases to the CCT. The public prosecutors of the Supreme Court of Cassation follow Kurdish and Islamist political parties closely for any violation of the “unitary structure and secularism” in party activities or members’ speeches. A former chief prosecutor, Vural Savaş, wrote well publicized books on the topic of “militant democracy” arguing democracy needs to protect itself. According to this view, which is echoed by the Sabih Kanadoğlu quote above, where electoral institutions fail to weed out the threats to democracy, the judiciary should step in and protect democracy.

Finally, the CCT is the higher court which has probably had the most direct political role, and which has come to be seen as the defender of secularism. The CCT sees the cases about party dissolutions, and it has closed parties before. Most of the party closings decisions were based on unconstitutionality of the party activities or its leaders. Kurdish politicians had to organize themselves under different names since early 1990s, because the pro-Kurdish parties often face closing verdicts. 26 Islamist parties, which grew stronger in vote shares and achieved
coalition government partnerships and important municipal governorships, shared the fate of the pro-Kurdish parties. Legal action against the Kurdish political parties has very low domestic audience costs, since a significant portion of the population considers the Kurdish parties to be the legal-political arm of the PKK (Kurdish Workers’ Party), which has led a separatist armed campaign since 1984. Legal action against Islamist political parties is more controversial; the people who have voted these parties into government need a convincing justification that they indeed are a danger to democracy. While the case against Erbakan’s parties did not cause much public outcry, the case against Erdoğan’s JDP failed to generate public support because JDP is viewed as a moderate, center-right party.

In 2008, the high courts and the ruling JDP were openly attacking each other through memoranda and leading figures’ speeches to the media. The year before, during the process where a JDP dominated parliament was to elect the president, the military had published a memorandum on its website, inviting the secular minded people to oppose undemocratic and anti-secular threats. This memorandum was seen as a warning to the JDP, thus dubbed an e-coup. The parliament indeed elected JDP’s candidate, Abdullah Gül, as the president; however, the CCT decided that the procedural rules of the election were violated and voided the election. This led to a parliamentary decision for early general elections, which were held in July and resulted with a 47% vote and a clear majority in the parliament for JDP.

The overwhelming electoral support despite all the previous warnings of the military (and, for some, just because of the opposition of the military) led to a withdrawal by the military. The top generals would occasionally give pointed speeches still; but they focused more on the operations against the PKK in Southeastern Turkey and in Northern Iraq, and on thwarting the attacks and criticisms in the media over these operations. The opposition to the JDP, the attempt
to curb its powers came from the judiciary. The constitutional amendment on Articles 10 and 42 was taken to the CCT, and this amendment was also the centerpiece of the case to close the JDP for undermining the secular nature of the Turkish state.

At the height of the discussions over these cases, in May 2008, the Supreme Court of Cassation and the Council of State have accused the governing JDP of trying to interfere with the judicial process, undermining the independence of the judiciary and attacking the courts. Deputy Prime Minister Cemil Çiçek and the minister of Justice Mehmet Ali Şahin have responded by deeming the courts’ memorandums political. Çiçek said the Supreme Court of Cassation exceeded its authority, and that is unfortunate for the democracy and the judicial system in Turkey. What is interesting in both the discourse of the high courts and the Deputy PM is that they are competing over the right to speak in the name of the people. The high courts complained that the JDP has the belief that electoral victory means the public has given them mandate to do anything, and is trying to provoke public pressure in hopes of influencing the decision on the party closing case. On the other hand, Çiçek stated that the court cannot speak in the name of the people, and cannot target the legislative and executive organs, which have the representative powers given directly by the people as opposed to the courts whose members are appointed. The council of state has responded by saying that the constitution gives power to the courts, the courts have the duty to protect the basic principles of the constitution, and judicial organs can share opinions with the public on matters directly involving the judiciary.

In June, the CCT annulled the constitutional amendment, which made the party closing case likely to be also decided against the JDP. However on July 30, 2008 the CCT declined to close the JDP. They decided by a 6 to 5 vote that the party was NOT the focus of anti-secularist activities, but they still imposed, by a 10 to 1 vote, a monetary punishment such that the party
would not get half of the state monetary aid to political parties it is entitled to. The general reaction to this decision in the media and among people was relief. This unusual verdict shows the ingenuity of the CCT: it does not close the party in government, preventing much political controversy and turmoil; but it gives a very strong warning to JDP.

While the judiciary was busy with annulling JDP’s amendments and deciding whether the party is a threat to the secular state or not, it was also proceeding with the investigation and indictment of the “Ergenekon case,” unearthing failed coup attempts and revealing the “deep state”. Many JDP opposition figures, outspoken “Kemalists,” and retired officers of various ranks have been detained and questioned for being members of the “Ergenekon terror organization,” which allegedly aims at undermining the Turkish state by stirring the society and attempting coup d’etats. Through rounds of detainments the operations and the case has been criticized by “Kemalists,” who argued that the government is using the judiciary and this case to divert attention from its economic failures and the party closing case.

When cases against the JDP and the allegedly military connected Ergenekon are considered together, it seems like the judiciary an institution of the state caught between a rock and a hard place. When they judge the cases for party closings and the government’s controversial legislative changes, the military joins the applause by the Kemalists in the media and populace for the judiciary breathing down the JDP’s neck. However, they also try to bring to light the gladio-like organizations and to expose their more seemingly legal offshoots in which some high ranking members of the military are known to have been involved. While the “anti-military” camp including the Islamists follow this case contently, the military feels an outright challenge by the judiciary for the first time. Indicting retired officers for their illegal political actions is a first in Turkey, where junta members have never been taken to court.
Veto of the constitutional amendments by the CCT were dubbed “a gowned coup” or “a judicial coup” by the JDP officials and supporters, who argued that the court had exceeded its authority ("AKP: Cüppeli Darbe" 2008). Even if it is true that the judiciary is curbing the Islamists’ power, it is not clear in whose name they are doing it. While the “Ergenekon” case continues, and the judiciary pursues to expose the illegal activities the military may have been involved with; we cannot simply say the judiciary is a puppet of the military and following the military’s direction in deciding the cases against the Islamists. The high-courts are indeed limiting the Islamist activities and policies of the JDP in a way that the military currently cannot; but they are not doing this for the military.

The judiciary, including the CCT, still operates on the legal foundations defined by the constitution written by the military in 1982. Under the current situation, Islamists are in power, military’s political involvement in politics is frowned upon by the people and the judiciary is following its own agenda; which leaves the constitution to be the strongest political card that the military has. In 2007 the JDP has commissioned Prof. Ergun Özbudun to draft a new constitution, which will be the first civil constitution in the country’s history (Özbudun 2008). In the meantime, a referendum was held to amend the constitution to allow the president to be elected by popular vote for 5 years, and to be reelected for 5 more years. Justice and Development party has been proactive about small scale changes in the current constitution as well as preparing a new one.

V. Discussion and Conclusions:

Egypt and Turkey are at different points in democratic development. Egypt can be considered as an authoritarian system with recent attempts at democratic opening in the form of multiparty elections, although the environment for the elections is under significant control of the incumbent regime. Turkey, on the other hand, can be considered a transitional system where functioning democratic institutions
coexist with authoritarian ones, and they compete for control over politics. The options available to authoritarian “incumbents” who would like to retain their control are different, which leads to employment of different methods to achieve their ends. This necessarily generates different incumbent-judiciary relationship and different observed outcomes on judicial powers and independence.

Egypt’s authoritarian regime faces two problems in its attempts to control the political sphere: shortage in financial resources necessary for cooptation and patronage and the surge in Islamist groups’ popularity. At times when the financial problems become too serious, the Egyptian governments have employed political reforms to gain the trust of foreign investors and governments, a theme explored in depth in Tamir Moustafa’s work. In addition, we explore here how the Islamist groups’ organization and popularity have generated the possibility of domestic audience costs in this authoritarian system. The Egyptian regime today finds it difficult to “massacre” the judiciary, close the SCC or take a step back on the judicial supervision of the elections. This has had two consequences: First, the SCC realizes that the existence of a “real” threat from the opposition has increased the regime’s reliance on it, resulting in an increase in its independence. Thus, it has carefully supported and protected the opposition through its decisions. Second, the incumbent regime, seeing that the SCC is “shirking” and that it would be too costly to get rid of it, has chosen to establish a “parallel” judiciary and to curb the SCC’s powers by giving the jurisdiction over issues like election supervision to these alternative institutions.

In Turkey, the secular Kemalist alliance led by the military has changed considerably through time. While the whole bureaucracy, the academia and intellectuals were part of this alliance in the early 1960s, now only the judiciary remains as a reliable political ally with a clear preference for secularism. Among the bureaucracy as well as among the public, the conservative view finds as much support as the secularist view, if not more. So, the military has seen its support base shrink and challengers get stronger since 1960s. The diminishing support base, coupled with the democratic system that provides legitimacy to governments through elections has increasingly tied the hands of the military and rendered a coup like that of 1980 almost impossible. The military has delegated the function of keeping the Islamists’ (as well as Kurds’) political power under control to the judiciary, and judiciary has become more politically active
and powerful. The judiciary is able to do this because the “rules of the game” under which they operate was defined by the military after the coup. One should not mistake the judiciary’s intolerance of political Islam with rubber-stamping for the military; the case is rather simply that the interests of the military and the judiciary are aligned. The judiciary sees Islamist governments as much a threat to its existence as any authoritarian actor, even more a threat than the military. We see that the judiciary in Turkey has become independent enough to pursue a case like Ergenekon, which exposes ex-officers’ illegal political activities.

In this paper we have emphasized the judiciaries as political institutions and investigated the conditions under which they are created. We have also demonstrated how the level of independence and power of the judiciaries is inversely associated to the incumbent regimes’ ability to control politics. We discussed the role of domestic audience costs as a factor which limits the options available to the incumbents to control the political arena, and argued that Islamist movements can and do increase this cost for the incumbents regardless of the level of authoritarianism, but more so in more democratic systems. We use the Egyptian and Turkish cases to make our point. A quantitative study of all Muslim societies is needed to establish these relationships and the role of political Islam definitively.
References:


We use the word “Islamist” to define movements or parties which have political Islam as their agenda. Political Islam refers to the political agendas that emphasize Islamic law and principles in government and institutions of the state, to varying degrees.

2 Surprisingly, we do not observe many cases where first constitutions were imposed by foreign powers. Japan and Germany, whose constitutions were drafted after their defeat in the Second World War had constitutions before (Meiji 1889, Prussian/German Empire 1871, Waimar 1919 constitutions). Former colonies adopted constitutions after independence, colonial powers did not give them separate constitutions while under colonial rule.

3 We do not use the word “revolution” exactly in the Skocpolian sense; we use it in to mean a change in regime as a result of popular demand, manifested in public upheaval and protest. The resulting change may not be as radical and long lasting as in the traditional definition, but this definition covers those cases as well. A typical example of our definition is the Orange revolution in Ukraine in 2004-5.

4 See Kuran (1995) for a discussion of the persistence of the communist regimes and the mechanisms that led to its fall.

5 In this paper, we treat the institutions as the actors, as we assume that the interests of the individuals within the institutions (e.g. judges) are aligned with the interests of the institutions (e.g. the judiciary). Of course exceptions where some individuals’ interests conflict with the other individuals’ and the institutions’ interests may exist, especially if the other political actors employ the “divide and rule” principle. We assume cohesion within the judiciary throughout the paper.

6 For a review of this literature see: Solomon(2007), for a good discussion of the judicial politics under authoritarianism see Moustafa(2005).

7 Discussing the principal agent problems concerning the bureaucracies Moe (1989) writes: “Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right. They have career and institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources –expertise and delegated authority- that might be employed toward these selfish ends. They are new players whose interests and resources alter the political game.” Moe’s arguments about the bureaucracy apply perfectly to high courts.

8 The “contract” can be changed to expand the jurisdiction of the judiciary as well. Authoritarian and democratic governments delegate the decision-making on unpopular or controversial issues to the constitutional courts. This point will be elaborated below.

9 Authoritarian elections may not be free and fair, but they may give us hints about decreases in a principal’s legitimacy. Such a decrease in legitimacy is evident if the opposition makes significant gains in the elections despite all the disadvantages of running against the authoritarian regime. This can be seen in the 2000 and 2005 parliamentary elections where Mubarak’s party, the National Democratic Party (NDP) lost seats to the opposition – in particular, the Muslim Brotherhood independents.

10 This appointment of a more pro-Mubarak series of policies and positions may be one way the executive has attempted to threatening the judiciary. In appointing judges that are less independent-minded, Mubarak may have been sending a message that if you move against my policies, I will make it harder for you to operate and survive as an independent body. This – in addition to the creation of the security courts and administrative bodies to govern elections – can be seen as credible forms of threats against the SCC.

11 These actions by Nasser in the early years of the Arab Republic of Egypt show how the principal may create alternative systems to gain legitimacy and maintain executive control at the same time.


13 It should be noted that during the Sadat regime there was not a complete opening of the political system. But, through laws that allowed for multiparty electoral participation and the implementation of an independent supreme judiciary (the SCC), one can agree there was a move towards liberalization. See (Beattie 2000).

14 For more information concerning the statistics on the SCC rulings, see Figure 1 in (Moustafa 2007).

15 This was per a series of constitutional amendments made by the People’s Assembly that was controlled by the NDP. See (Hamzawy and Herzallah 2008).

16 Interview in a weekly magazine close to the Islamists, (Özçınar 2006)

17 Named by some “cüppeli darbe”, or coup of the gowns, referring to the gowns that the judges wear. See below.

18 There is a difference between “conservatives” and “Islamists.” Most center-right parties including DP are conservative; they have not had a political Islam as their agenda but they have alluded to the religious sensitivities and demands of their constituencies. Islamist parties, while also conservative, explicitly espouse political Islam, and
this guides their discourse and policies. The first Islamist party is National Salvation Party (NSP) led by Necmettin Erbakan. Refer to Toprak (1981) for a discussion of Islamist mobilization and the example of the electoral success of NSP.

19 The Republican Senate had elected, appointed, and permanent members. 15 of the members were elected by the President and the permanent members consisted of National Unity Committee (Milli Birlik Komitesi, basically the junta) and previous Presidents. What is interesting about the 150 elected members is the eligibility requirement of having a degree in higher education. The expectation was that the “educated” Senate would limit the powers given to political parties by masses which were considered ignorant, uneducated, easily manipulated. The Senate could not vote for confidence or no confidence for the government.

20 A former Head of the CCT, Yekta Güngör Özden, while still a member, wrote that the CCT is a result of the 1960 “Revolution” and the period between 1950-1960 (the period of DP rule) (Özden 1985, 42). The new constitution brought more independence to the judiciary as a whole. For example, personnel decisions concerning judges were transferred from the Minister of Justice to the Supreme Council of Judges (Devereux 1965).

21 Other political parties which were led by Erbakan and closed by the Constitutional Court are: Welfare Party (1997) and Virtue Party (2001). National Salvation Party was closed by the junta after the coup in 1980.

22 Judges, prosecutors and lawyers often pay symbolic visits to Atatürk’s mausoleum in their official gowns to protest the Islamist parties’ governments. Members of the judiciary often refer to themselves as the defenders of the republic, much like the Chiefs of Staff do.

23 This assertion needs to be qualified. When making voting decisions, Turkish people assume that the military will step in and set the course back on the right track if the Islamist party they elected goes too radical. The military may be able to stage an “acceptable” coup and avoid audience costs if they convince the people through propaganda that the governing Islamists have indeed gone too radical and have become a threat. Events leading up to the “postmodern” coup in 1997 and plans for an alleged coup against the JDP revealed in the media indicate that the military attempts to create an environment where people find a coup acceptable, even demand one. Creation of that environment has become more difficult but it is not impossible.

24 These amendments, if passed, would have allowed for wearing the headscarf in institutions of higher education, which is a very controversial issue in Turkey. The headscarf has practically become the major battleground in the competition between secularism and Islamism.

25 The indictment for the “Ergenekon Case” argues that this assault was planned and mastered by the terrorist organization named Ergenekon, which will be elaborated below. According to the indictment, the assault on the high-court was aimed at stirring the public opinion against the Islamists and the Justice and Development Party government. See (Ergenekon İddianamesinin Tam Metni 2008) for full text of the indictment (in Turkish).


27 A great majority of cases regarding the PKK or the Kurdish political parties were judged in Military Courts or State Security Courts, there was not much objection among the public for undemocratic nature of the trials. The public had already judged them as threats to the state!


30 Mainstream Radikal newspaper’s headline was “Turkey Lets a Sigh of Relief” ("Türkiye 'Oh' Dedi" 2008).

31 This amendment package was a direct response to the political crisis during the election of the 11th president. This is reminiscent of the way military wrote 1961 and 1882 constitutions to prevent unfavorable events preceding the coups from happening again.