Judicial Activism in Perilous Times: The Turkish Case

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Under what circumstances do courts act in ways that challenge the political hegemony of the military in countries with weak democratic institutions? This article addresses this question by focusing on a critical case of judicial activism in Turkey. It argues that lower courts unexpectedly can be centers of judicial activism that contributes to expansion of civil liberties and restrictions on arbitrary state power when the high judiciary supports the political status quo. This is because lower courts provide greater access to legal mobilization pursued by civil society actors. At the same time, judicial activism in lower courts is sustainable only when political power is distributed among elites with conflicting interests, and the civilian government offers support and protection to activist members of the judiciary.

The Turkish judiciary has been noticeably weak in curbing arbitrary power exercised by the military, although the judiciary enjoys strong institutional autonomy and frequently employs veto power over the civilian government and parliament. Given the high levels of political autonomy of the military in Turkey, one may argue that the lack of judicial oversight over the military is not surprising. This article takes a critical look at the alliance between the judiciary and the military and argues that the cooperation between these two institutions is not necessarily sustainable. Under what circumstances do courts act in ways that challenge the political hegemony of the military in countries with weak democratic institutions? The article builds on conceptualizations of courts as interactive institutions that seek other political actors' support to answer this question (Roesler 2007). It makes two primary arguments. First, and ironically, lower courts may be more supportive

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of restrictions on arbitrary state power and political rights than the higher courts in unconsolidated democracies such as Turkey. This is because lower courts are more amenable to pressures emanating from civil agents of democratization (e.g., human rights organizations, media outlets, bar associations, etc.) that are capable of mobilizing public opinion. The higher courts are insulated from such pressures. Hence, judicial activism that contributes to the expansion of political rights and civil liberties may come from unexpected sources—lower courts. Second, lower courts need support from other political actors such as civilian government to *sustain* their activism against the arbitrary exercise of state power. In the absence of protection from the government and the parliament, lower courts are very vulnerable to pressures from the high judiciary and other powerful state actors such as the military. Hence, the complicity—or at least the passivity—of the civilian government and parliament is a key variable that sustains the culture of impunity.

The article offers a critical case study that provides a novel perspective into the relationship among the judiciary, the military, the government, and civil society organizations in Turkey. A counterinsurgency operation, which involved the illegal exercise of violence against civilians, went awry in the southeastern conflict-zone region of Turkey. The legal process following the incident reveals both the potential for judicial activism and the delicate conditions under which this activism is realized in Turkey.

The Judicial-Military Alliance in Turkey

Democracy can be "thought of as a means of managing power relations so as to minimize domination," which is itself defined as the illegitimate exercise of power (Shapiro 2003:3–4). Democratization "consists of reducing autonomous power clusters within the regime's operating territory, especially clusters that dispose of their own concentrated coercive means" (Tilly 2007:90). Courts play a pivotal role in democratization by making sure that the state does not infringe on basic political rights and civil liberties. From this perspective, a judiciary is active as long it is willing and capable of detecting and punishing rights violations committed by the state and protecting vulnerable groups such as minorities and opposition figures from state repression. Under what conditions does the judiciary assume an activist stance and become an agent of democratization in countries where state actors often act with impunity?

Turkey provides an interesting case to directly address this question. While Turkey has a history of free electoral competition

going back to 1950, the military overthrew popularly elected governments in 1960, 1971, 1980, and 1997. Civilian governments have failed to curb the political autonomy of the Turkish Armed Forces (Türk Silahlı Kuvvetleri, TSK) and have not established a culture of human rights, despite the recent initiation of Turkey's accession negotiations to the European Union. In essence, the Turkish regime can be defined as combining electoral democracy with guardianship, which entails that a group of elites governs by reason of its unique knowledge, wisdom, and virtue (Dahl 1989:52). In Turkey, the high judiciary, which is insulated from the influence of political parties and allied with the military, claims the ultimate guardianship role (Shambayati 2004; Tezcür 2007). The Constitutional Court, established after the 1961 coup, structures the boundaries of the legitimate political domain by banning political parties (Kogacioglu 2004). At the same time, the institutional autonomy of the Court does not foster judicial activism in the service of civil liberties and human rights (Belge 2006; Türkmen 2008).

According to the Worldwide Governance Indicators study (1996–2007) conducted by the World Bank, Turkey has a mixed performance in the dimension of rule of law. The indicators are based on dozens of different data sources conducted by several dozen organizations. The rule of law dimension primarily measures the extent to which citizens, experts, and enterprises have confidence in and abide by the rules of society, including the quality of contract enforcement, property rights, the police, and the courts (available at http://www.info.worldbank.org/governance/wgi). Turkey's aggregate score in rule of law is slightly better than those of the new EU member countries Bulgaria and Romania, and slightly worse than those of Croatia, Poland, and Slovakia. Turkey is a relative underachiever given its relatively higher income level. At the same time, the Turkish courts rarely supervise the vast executive powers claimed by the military and infrequently hold members of the state security responsible for illegal behavior. Citizens have lacked basic judicial protections against arbitrary detention, torture, and state-sponsored killings, especially during the early 1990s, as in El Salvador, Guatemala, and Peru during the 1980s (Goodwin 2001:237–40). The European Court of Human Rights (ECHR) often finds Turkey guilty for human rights abuses. Moreover, the judiciary has frequently persecuted political dissidents who publicly challenge the ideological commitments of the regime (for a study of courts in Latin America, see Pereira 2005). A recent study based on 50 in-depth interviews with judges and prosecutors in Turkey reveals that many of them espouse views that prioritize the security of the state over democracy and civil liberties. This seems to be the result of hierarchical and informal

pressures that cultivate a culture of discipline and intimidate the members of the judiciary from acting more liberally (Sancar 2007).[1] The TSK also uses its considerable political leverage to ensure that the judiciary does not threaten its interests. For instance, it organized special briefings for judges and prosecutors in 1997 to ensure that they shared the priorities of the TSK in its fight against the "internal enemies" (i.e., Islamic political actors). Turkey's EU membership process has not automatically made respect for human life the guiding principle for Turkish judges. This is because the export of rule-of-law ideology is often characterized by the challenge of legal indeterminacy (compare Hagan et al. 2008:637).

Electoral democracies do not always entail the assertion of democratic control over the internal security services (Stepan 1988; Call 2002), and the TSK has enjoyed high levels of political autonomy as measured in several dimensions (Pion-Berlin 1992). The TSK has immunized itself from civilian judicial prosecution by building a separate judicial system under its control (Hajjar 2005; Pereira & Zaverucha 2005; Kardaş 2006), negotiates impunity for human rights abuses committed during the coups (Pion-Berlin 1993), is heavily involved in domestic security, has its own intelligence gathering units, and is not under the control of the ruling governments. Its budget and arms production are not necessarily subject to public control and accountability. In addition, the TSK has the ultimate say in the formulation of the "national security doctrine" (reported by the Turkish daily *Hürriyet*, 20 March 2006; http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4111061&tarih=2006-03-20). This periodically updated document identifies internal enemies to be eradicated (Cornell & Roberts 1990; McSherry 1992).

The fact that the TSK has conducted counterinsurgency operations against the Kurdish insurgents since the mid-1980s has been a major factor sustaining its political autonomy. In particular, the clandestine activities of the Gendarmerie Intelligence are well-documented by the Turkish press (e.g., the pro-Kurdish daily *Ülkede Özgür Gündem*, 27–29 April 2006 issues; http://www.gundem-online.com/haber.asp?haberid=11357). The Gendarmerie, which is practically under the command of the General Staff, is responsible for maintaining public order on 90 percent of Turkey's land surface (Sarıbrahimoğlu 2006:101). Furthermore, the TSK is legally authorized to intervene in disturbances to restore public or-

[1] A retired TSK general who fought against the insurgents in the 1990s bragged in an interview of how he made his soldiers throw bombs near the residences of newly appointed judges (reported by the Turkish daily *Sabah*, 27 July 2006; http://arsiv.sabah.com.tr/2006/07/27/gnd108.html).

der by a protocol signed between the Ministry of Interior and the General Staff in July 1997, known as Emniyet Asayiş Yardımlaşma (Security and Public Order Mutual Aid—EMASYA). Finally, some authors have suggested that the NATO-sponsored stay-behind army established in Turkey in 1952 was involved in the engineering of the coups in 1971 and 1980 that primarily targeted leftist activism (Selçuk 1987:60–8; Turhan 1994; Yalçın & Yurdakul 2005:35–99; Kılıç 2007).[2] In particular, the political violence preceding the 1980 coup had characteristics that resembled the "strategy of tension" that aimed to invite authoritarian rule by orchestrating violent campaigns attributed to the left and eroded public confidence in civilian governments (for the strategy of tension in Italy, see Ferraresi 1996:86–9).[3] In any case, the Turkish secret army was not dismantled in the early 1990s and directed its efforts against Kurdish nationalists and Islamic activists.

The hegemonic preservation thesis provides insights into the strategic alliance between the judiciary and the military in Turkey. According to this thesis, political elites whose hegemonic interests are threatened by popular politicians delegate some of their power to constitutionally empowered judicial institutions in order to preserve their privileges. These elites hope that judicial intervention by the high courts in political struggles will serve to their advantage (Hirschl 2004a:11–12). They have strong incentives to sanction or facilitate judicial activism, especially when the justices share their ideological preferences, the courts enjoy a reputation for professionalism and impartiality, and the judiciary is insulated from popular pressures (Hirschl 2000, 2004a:44, 2004b). In this vein, the 1961 and 1982 constitutions in Turkey, which were written and approved under military regimes, created a powerful high judiciary that often challenged the popularly elected governments and parliament.

The nature of the alliance between the TSK and the higher courts became more pronounced after the Justice and Development Party (Adalet ve Kalkınma Partisi, AKP) came to power in 2002. The AKP, which was founded by a group of politicians that split from the Islamist movement, advocated a greater role for Islam in public and political life. The military elite was constantly wary of the party's intentions and often adopted a clear stance

[2] According to Ganser (2005), these stay-behind armies funded by the CIA directed terrorist attacks to create political disorder and provoke the authoritarian repression of leftist political movements (2005:2). Ganser's thesis is not always convincing, as it elides primary sources and provides inaccurate information. For a more nuanced approach, see Nuti (2007).

[3] Bülent Ecevit *incidentally* became aware of the existence of a secret army during his tenure as Prime Minister in 1974. See interview with Ecevit, Turkish daily *Sabah*, 11 April 2005; http://arsiv.sabah.com.tr/2005/04/11/gnd101.html.

against the government's policies. At the same time, the TSK was no longer in a position to directly overthrow the government given the globalization of the Turkish economy, Turkey's integration process into the EU, and the popularity of the ruling party. As a result, the TSK often relied on the high judiciary, in particular the Constitutional Court, to veto AKP initiatives that were perceived to threaten the secular nature of the Turkish Republic. The Constitutional Court prevented the AKP from choosing its preferred candidate as president on technical grounds that the necessary quorum was not established in the parliament in May 2007. The military was anxious to prevent the AKP candidate from being president, a position with considerable veto powers and the ability to appoint members to key institutions including the Constitutional Court. Yet the candidate was elected president after the AKP swept the July 2007 elections, and the necessary quorum was established in the post-election parliament. The Court also vetoed a piece of parliamentary legislation that would revoke the ban on headscarves on university campuses in June 2008. Both of these very controversial decisions had the active backing of the TSK. Most strikingly, the chief public prosecutor demanded the dissolution of the AKP, which won 47 percent of the national vote, in March 2008. While a majority of the Court members voted to ban the AKP, they remained short of the qualified majority necessary for party bans. It seems that the economic, political, and international costs of dissolving the popular governing party overwhelmed the benefits of such a decision for the members of the Court. The Court and the TSK were not that willing to be responsible for the socioeconomic and political instability likely to follow the AKP's dissolution. Instead, the Court labeled the AKP as a "focal point of antisecular activities," and did cut in half the party's treasury funding for 2008 (*Radikal*, 31 July 2008; http://www.radikal.com.tr/Default.aspx?aType=HaberDetay&ArticleID=891107&Date=31.07.2008&CategoryID=98). This decision significantly restricted the policy options available to the party.

While the hegemonic preservation thesis is useful in understanding why the empowerment of the judiciary does not necessarily contribute to democratization and the limits on arbitrary state power in Turkey, it fails to provide an explanation when courts act against the interests of the military and prosecute its members for rights violations. This article argues that the strategic alliance between the judiciary and the military is not necessary sustainable. Neither ideological predispositions nor the political autonomy of the military and its influence over the judiciary are sufficient by themselves to make the state security forces immune to judicial prosecution. It is essential to focus on the role of other actors, including lower courts, the government, and civil society

organizations, to get a better sense of the conditions under which judicial activism may actually challenge the military. While the military may have strong informal influence over the high judiciary, the military's ability to control the behavior of the lower court judges cannot be assumed. While lower court judges do not necessarily espouse values more supportive of human rights than high court judges, they are more likely to be influenced by the government, public opinion, and civil organizations. When actively supported by these influential actors, lower courts directly challenge the political hegemony of the military and contribute to the expansion of political rights and civil liberties. Ironically, lower courts may be transformed into agents of democratization while the higher courts remain defenders of the status quo.

Judicial Behavior and Legal Mobilization

Recent research has demonstrated that judges are strategically *constrained* actors who take the preferences and priorities of powerful political actors into consideration when making decisions (Knight & Epstein 1996; Epstein & Knight 2000; Stone Sweet 2000:90, 200; Ginsburg 2003:66). They are likely to calculate risks associated with their decisions and are more likely to rule against the interests of weakened political actors (Helmke 2002). They become more assertive when political power is distributed among competing political actors (Iaryczower et al. 2002:713; Smithey & Ishiyama 2002; Vondoepp 2006:397) and are less likely to confront political actors with strong executive authority (Herron & Randazzo 2003). Without the active support of these competing political actors especially, the justices are likely to prefer not to confront the military and show self-restraint, given their concerns with career advancement (Ramseyer & Rasmusen 2001).

On the basis of this conceptualization of judges as strategic actors, it can be argued that the ability of Turkish courts to investigate human rights abuses and punish state security forces eventually depends on the support they receive from other relevant actors including the government, political parties, the media, and civil society organizations. Moreover, lower courts may be more inclined to challenge arbitrary state authority. They are more open to organized popular demands for the rule of law and accountable governance than the higher courts that are more insulated from such influences and share the priorities of the military elite. The literature on social movements and legal mobilization provides valuable insights to address the question of how courts are transformed into agents of democratization in unconsolidated democracies or semi-authoritarian regimes.

Legal mobilization is originally conceptualized as "the process by which a legal system acquires its cases" (Black 1973:126). It entails a democratic form of political participation that enables disadvantaged citizens to "invoke public authority on their own and for their benefit" (Zemans 1983:692). Legal mobilization can be thought of as a social movement tactic employed by disadvantaged groups in their struggles for rights and benefits (Burstein 1991). The scope and success of legal mobilization ultimately depends on the resources of the litigants, which involves their organizational power and ability to establish coalitions with other social groups. It can be argued that groups with greater resources operating under democratic circumstances have higher rates of legal mobilization than groups with lower resources operating under more repressive regimes (Giles & Lancester 1989). A legal mobilization perspective offers a more progressive understanding of law, which "can be, in the hands of defiant citizens, a source of disorder and egalitarian reordering" (McCann 1994:ix). Disadvantaged and oppressed groups use law to contest the prevailing power relations (1994:282). These groups can take advantage of opportunities offered by a legal system to become active participants in political struggles and bring about substantial changes in the behavior of socioeconomic and political elites as long as they build a sustainable support structure. This structure "consists of resources—sympathetic and competent lawyers, finances, and organizations—that make possible sustainable, strategic appellate legislation" (Epp 1996:765). Legal reforms, the introduction of rights, and liberal judges do not bring by themselves progressive change. A rights revolution gets underway only when social movements willing to use litigation are present and when lawyers are in a position to assist them (Epp 1998:5). Civil society activists with professional help from legal specialists mobilize law on behalf of disadvantaged citizens and challenge discriminatory practices. Even in highly authoritarian contexts, resourceful activists and oppositional groups can gain access to courts that reach verdicts against the interests of the ruling regime. The Egyptian Supreme Constitutional Court, for example, emerged as an alternative source of power that was more sympathetic to the claims of civil society organizations and oppositional groups (Moustafa 2007; El-Ghobashy 2008).

This theoretical framework regarding judicial activism and legal mobilization produces two hypotheses regarding the behavior of the judiciary in political contexts with weak democratic traditions such as Turkey. First, courts act strategically (especially in politically charged cases) and take the distribution of power among relevant political actors into consideration when reaching decisions. The courts are unlikely to challenge hegemonic political actors unless

they receive active support from other influential political actors. As a result, courts *consistently* act more independently and assume an activist posture; that is, they restrain, control, or punish state actors, when power is distributed among competing entities. Second, lower courts are more likely to emerge as conduits of progressive legal change than higher courts mainly because lower courts provide more access to disadvantaged and oppressed groups when these groups muster enough resources. As suggested by the hegemonic preservation thesis, higher courts are not necessarily receptive to popular demands for the expansion of political rights and civil liberties, as they are allied with political elites in favor of the status quo. By contrast, lower courts are likely to take stances against arbitrary exercise of state power and official discrimination when resourceful civil society actors and popularly elected politicians pursue legal cases with vigor.

Counterinsurgency and Courts in Turkey

Turkey presents a remarkably rich setting to address these hypotheses and evaluate the role of courts in restraining state power. The Turkish state has engaged in a conflict against a militant insurgent Kurdish group (Parti-ye Karkerên Kurdistan, PKK) for the last quarter-century. Turkey, the United States, and the EU brand the PKK a terrorist organization. The conflict has claimed the lives of tens of thousands of citizens, and both sides have committed gross human rights violations. The PKK, officially founded in November 1978, greatly benefited from the 1980 coup, which generated a spiral of radicalization among Kurdish activists (Van Bruinessen 1984; Romano 2006; Marcus 2007). The state's suppression of all political expressions of Kurdish identity made violence the only viable method in the eyes of many Kurdish activists who were increasingly becoming aware of their ethnic identity.

A key reason why the militarily defeated PKK continued to mobilize huge public support is related to the counterinsurgency tactics employed by the state. The Turkish state was intolerant of the activities of legal Kurdish nationalistic parties that participated in elections and organized acts of civic disobedience (Watts 1999). An anti-terror law in 1991, which gave sweeping powers to the security organs and the judiciary, severely restricted the scope of freedom of expression and of the press. The state treated all public expressions of Kurdish cultural and political identity as support for the PKK, and it indiscriminately suppressed nonviolent demands. The legal persecution of Kurdish political demands was accompanied by a more sinister campaign involving extrajudicial killings. State-sponsored clandestine units engaged in an extralegal cam-

paign against civilians identified as "enemies of the state," especially in the early 1990s. The units aimed to establish state authority by instilling fear among the populace. For several years, they collaborated with a radical Islamist organization that was fighting a very brutal war against the PKK (Çiçek 2000; Faraç 2002). The first half of the 1990s witnessed thousands of extrajudicial killings (Van Bruinessen 1996; Bozarslan 2001). According to a parliamentary report, 630 unidentified murders mostly targeting PKK sympathizers were committed in 1992 and 1993 (TBMM 1995). The perpetrators of many of these killings were never identified and, when identified, remained at large. Available evidence suggests that an infamous organization within the Gendarmerie, known by its Turkish acronym JİTEM (Jandarma İstihbarat ve Terörle Mücadele, Gendarmerie Intelligence and Fight against Terrorism), was responsible for coordinating the illegal activities and directing the extrajudicial killings (Şahin & Balık 2004; Ağaşe 2006). The illegal activities of these "counterinsurgency units" came to public view only after a traffic accident in November 1996, when a car carrying a parliamentarian, a senior police officer, a mafia leader on the run, and the latter's girlfriend was hit by a truck. The accident came to be called the Susurluk incident, and it unexpectedly revealed the intricate web of relations linking elected politicians, high-ranking bureaucrats, and hit men (Sağlar & Özgönül 2007). A parliamentary commission and a special investigator revealed that segments of the state security forces committed murders with impunity, engaged in drug trafficking and extortion, and kidnapped for ransom (Savaş 1997; TBMM 1997). Nonetheless, trials following the accident failed to unearth the scope and extent of these relations and to unravel the counterinsurgency units embedded in the Turkish state. As happened in Guatemala in the 1970s and 1980s, state-directed political violence often deteriorated into criminal violence when elements of the security forces became involved in drug trafficking, smuggling, and extortion (McSherry & Mejia 1999; Mejia 1999). Counterinsurgency tactics that employed indiscriminate violence actually aggravated the very conditions that contributed to the emergence of the insurgency in the first instance (Wickham-Crowley 1990; Kalyvas 2004; Herreros 2006; Encarnación 2007).

In summary, the Turkish state heavily relied on law to discipline and persecute citizens who challenged its uncompromising policies toward the Kurds. Law was not a reliable resource for citizens who were the target of human rights abuses committed by state security forces. Yet this situation has begun to change in recent years as courts have become more willing to investigate human rights abuses and hold state forces accountable for their illegal deeds.

Methodological Approach and Data Collection

This article presents an in-depth study of a critical legal case to examine the scope and limits of judicial control over the Turkish state's counterinsurgency campaign. Studies of critical cases are especially good for identifying mechanisms characterizing causal relationships and constructing complex theoretical frameworks (Gerring 2004; Mahoney 2007). The case under scrutiny is critical because it created a unique opportunity for legal mobilization, whereas similar cases in the past, with one partial exception, did not offer such opportunities.

On November 9, 2005, civilians caught three individuals red-handed when they bombed a bookstore in the town of Şemdinli, which is located on the remote southeastern corner of Turkey. The suspects were two noncommissioned officers of the TSK and an ex-PKK militant on the payroll of the Gendarmerie. The scandal created a public uproar, and the government promised that all individuals responsible for the attack would be identified and punished. Several months later, a public prosecutor submitted an indictment that accused the three suspects of disrupting the unity of the state and undermining the integrity of the country, and accused the Commander of the Turkish Land Forces for protecting the suspects. This unprecedented and unexpected judicial action was a direct challenge to the political hegemony of the TSK. This indictment resulted in one of the most important judicial cases in modern Turkish history and provides a microcosm of the complex relationship between the judiciary, the military, the civilian government, and civil society actors. The case eventually became a litmus test of the establishment of the rule of law in Turkey.

The article adopts an ethnographic approach and builds on a rich variety of primary sources, including in-depth interviews, participant-observation, reports of civil society organizations and parliamentary investigatory committees, records of parliamentary debates, court documents, and media sources. I conducted 12 in-depth interviews with individuals, including two victims of the bomb attack, three lawyers defending the victims, a former member of the parliament who vigorously pursued the case from the beginning, two high-ranking politicians from the ruling AKP, a public prosecutor in Istanbul, a former military judge, and two well-connected individuals who offered unique perspectives on the AKP's position. The interviews, which were not taped for security reasons and lasted 60–100 minutes, helped me get a better sense of the incident, the trial process, and the position of the AKP. The names and dates of the interviews are provided in the Appendix. One interviewee requested to remain anonymous. In addition, I visited the towns of Şemdinli and Yüksekova in June 2007 to in-

terview local people and examine the setting of the bomb attack and public protests. I also systematically compiled the media coverage of the incident from nearly a dozen sources. I conducted a close reading of the court documents in order to identify legal reasoning that characterized the decisions. Memoirs, books, and articles based on journalistic investigations in Turkish and English inform a historical narrative that supplements these primary sources.

The Actors

Multiple actors with conflicting interests and shifting alliances were involved in the trial following the bomb attack. At one extreme was the TSK, which was eager to transfer the case to a military court and practically close it. The TSK was also concerned that the trial would tarnish the public image of the institution and argued that the case would demoralize the state security forces. At the other extreme were the civil society organizations such as human rights and bar associations, liberal media outlets, Kurdish nationalists, and international actors such as EU representatives who demanded the full prosecution of all officers responsible for human rights violations. These actors played important roles in mobilizing resources and the public opinion. They would also like to see the unraveling of the clandestine counterinsurgency units and perceived the trial as a critical step in this direction. A large body of lawyers represented the victims of the bomb attack, and members of various nongovernmental organizations represented the victims, and international organizations were present during the trials. Civil society actors also exerted pressure on the AKP to take a more principled stance. The positions of the AKP government and the main opposition party, the secularist Republican People's Party (Cumhuriyet Halk Partisi, CHP) were more ambivalent. While the AKP would have liked to see the political influence of the TSK decrease, it adopted a very timid stance after the Commander of the Land Forces was indicted. The party's priority was not to completely alienate the TSK leadership, whose ideological disposition was clearly at odds with the government. The government decided not to become closely involved with the case in order to avoid the wrath of the TSK and therefore remained passive for most of the trial. The CHP was initially supportive of the trial. However, after the announcement of the indictment, the party dramatically changed its stance. The CHP, whose ideological orientation had much in common with the TSK, was concerned that it would be impossible to rein in the AKP government without the armed forces' political involvement. Finally, the judiciary was divided. The

high courts, including the Supreme Court of the Appeal, sided with the TSK. Defying the expectations of the hegemonic preservation thesis and models of bureaucratic behavior, judges and prosecutors in the lower courts were more willing to contest the impunity enjoyed by the state security forces.

The public prosecutor who prepared the indictment accused the suspects of disrupting the unity of the state and undermining the integrity of the country. He basically asked the state to live up to its own legal standards and eschew illegal methods under the pretext of fighting against terrorism. However, the prosecutor and the judges assigned to the trial were professionally vulnerable vis-à-vis the powerful High Council of Judges and Prosecutors (Hakim ve Savcılar Yüksek Kurulu, HSYK), which was created by the 1982 constitution. The council is headed by the Minister and Undersecretary of Justice and composed of five permanent and five alternative members; it has the power to appoint, promote, demote, and dismiss all members of the judiciary. The President appoints the Council's members among a pool of candidates exclusively coming from and elected by the high courts. The decisions of the Court, which are made by simple majority vote, are final and not open to judicial appeal.

The passivity of the AKP government was a major reason why the prosecutor and the judges were ultimately penalized for their decision to defy the TSK. The case was ultimately transferred to a military court, and the suspects were released. While the civil activists and lower courts failed to prosecute the suspects, the trial was a major blow to the political hegemony of the TSK, which enjoyed near-impunity in its struggle against the PKK. The trial galvanized public opinion, led to unprecedented critical public discussion of the TSK's counterinsurgency methods, and demonstrated that the Turkish legal system, despite its authoritarian aspects, presents opportunities for civil society actors with organized resources. Subsequent political developments showed that the legacy of the trial was lasting and contributed to the formation of a more liberal political environment.

Goodfellas

The province of Hakkari has historically been one of the remotest and least developed regions of Turkey (Yalçın-Heckmann 2002). The PKK has had a significant presence in the province; its long and mountainous borders with Iran and Iraq are ideal for smuggling and drug trafficking. The conflict between the TSK and the PKK took a different turn when a series of 18 bombings hit the province from July to early November 2005. After a bomb attack in

the town of Şemdinli killed five soldiers, the bombings became more frequent. The bombing of a festival organized by the local branch of the pro-Kurdish party celebrating the World Peace Day on September 1 was particularly unusual. Leaflets promising revenge for the killed soldiers were distributed. Several attacks in September and October targeted businesses known to be sympathetic to the PKK. A huge explosion on November 1 damaged around 70 residences and businesses in Şemdinli. On November 9, a grenade attack against a bookshop in the town in the middle of the day resulted in the death of a civilian. What made the November 9 attack, now known as the Şemdinli incident, extraordinary was the fact that the citizens caught the perpetrators. The two noncommissioned officers of the TSK and a "confessor," an ex-PKK militant now working for the army,[4] were carrying out one of their "routine" counterinsurgency operations.

As in the Susurluk incident, it was purely coincidence that they were caught red-handed. The target of the bombs, the owner of the bookstore who had already served 15 years for providing logistical help to the PKK, survived the explosions unscathed and pursued the assailant who was the confessor. He observed, "I was targeted because I did not quit political activism after serving my prison term. While many people are no longer involved in politics after prison years, I persist. They did not like that." The bookstore owner asked for help from the other citizens who prevented the officers and confessor from escaping with their car. "If we had all been killed, they [the authorities] would have proclaimed three PKK militants were killed when the bomb they were manufacturing accidentally exploded," remarked the other survivor who was wounded in the attack. While the prosecutor was conducting his investigation, several hours after the attempted bombing, a sergeant opened fire on the surrounding crowd and killed a man. In the words of the parliamentarian, "the security forces tried to hinder the prosecutor's investigation as they were worried that their illegal tactics of fighting terrorism would be exposed."[5] In any case, the prosecutor accomplished his task and reported what he found in the trunk of the car: arms, grenades, ammunition, bulletproof vests, a notebook containing military intelligence, a "death list" of

[4] The TSK and the police often employed ex-PKK militants, called confessors, for many purposes including intelligence-gathering and armed assaults. The confessor who bombed the bookstore had strong personal reasons to join the security forces: the PKK had murdered his two brothers.

[5] Esat Canan was the only member of the parliament from the Hakkari province who pursued the incident with great interest and determination. One of his relatives was kidnapped and killed by a gang composed of officers, village guards, and confessors in 1996. The ECHR ruled that Turkey had to pay reparations to the murdered person's relatives in June 2007. Reported by the Turkish daily *Radikal*, 28 June 2007; http://www.radikal.com.tr/haber.php?haberno=225321&tarih=28/06/2007.

individuals who were perceived to have dubious loyalty to the state, documents about citizens' political views, and a chart of tribes loyal to the state, among other things. Meanwhile the state lost control in the town and protestors attacked state buildings and police stations. Six days later a public demonstration against the bomb attack in the nearby town of Yüksekova ended violently when security forces opened fire on the crowd and killed three protestors (İHD 2005b). During their funerals, F-16 fighter jets flew at very low altitudes to intimidate the crowd.

The Şemdinli incident immediately became the most important political issue in Turkey. Intense public debate about clandestine state forces, responsible for a wide array of activities ranging from political massacres to organized crime, had begun after the Susurluk incident in November 1997. Consistent with the legal mobilization perspective, civil society organizations made the Şemdinli incident a cause célèbre. The incident provided civil activists and Kurdish politicians with a unique opportunity to expose the illegal nature of the counterinsurgency and bring an end to the official impunity. The parliament, the government, political parties, and several civil society organizations sent fact-finding delegations to the area (İHD 2005a; TBMM 2005). There was also extensive media coverage of the incident. Liberal public figures forcefully argued that the bomb attack was above all a challenge to the rule of law and Turkish democratization.

On November 23, 2005, the parliament formed an investigatory commission that would produce a very detailed report in the following April. The Turkish parliament had previously authorized commissions to conduct investigations of unidentified murders and the Susurluk incident. Yet these commissions failed to be effective because they lacked both subpoena power to make individuals testify and authority over the TSK, which was under no obligation to provide the information demanded by the commissions. In addition, reports produced by the commissions were not binding to the government, which preferred not to heed its findings.

The ruling AKP initially promised that all forces responsible for the attack should be exposed and held accountable. In a speech delivered on November 21, 2005, during his visit to the province, Prime Minister Recep Tayyip Erdoğan declared, "Nobody should opt for illegal means. That era is over. Those dark days are now in the past. All our problems will be solved through democratic means and the rule of law" (*Radikal*, 22 Nov. 2005; http://www.radikal.com.tr/haber.php?haberno=170759). In a speech delivered during a parliamentary debate on November 23, 2005, the Minister of Interior argued that the attack was part of a series of attempts to undermine the government and Turkey's accession process to the EU. Meanwhile, the most interesting statement came from

Commander of the Land Forces Yaşar Büyükanıt, who became the Chief of the General Staff in August 2006: "I know one of the noncommissioned officers. He is a good guy. He speaks Kurdish and participated in operations in Northern Iraq when I was the commander. We respect the judicial investigation that would reveal whether he is guilty and [*sic*] not" (*Milliyet*, 12 Nov. 2005; http://www.milliyet.com.tr/2005/11/12/son/sonsiy02.html).

The "Judicial Coup"

The legal process began with inconsistencies. While the confessor was detained immediately after the incident, the two noncommissioned officers were let go and continued to work for the Gendarmerie Intelligence investigations. The TSK found no fault with the officers. According to the *Hürriyet* (21 Nov. 2005; http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=3545598&tarih=2005-11-21), a report prepared by the Hakkari Province Gendarmerie Headquarters maintained that the trio was not responsible for the attack. In fact, on April 20, 2006, the Minister of Justice announced in response to a written motion that their superiors honored the two noncommissioned officers with awards for their superior performances in previous military operations conducted in late October 2005. The two were arrested on November 29 only after public outcry. Yet in January 2006, the court released the sergeant who opened fire during the prosecutor's investigation while his trial was pending. At the same time, a court in Hakkari finally acquitted the remaining defendants in a separate trial who were accused of forming a gang and engaging in murder, torture, kidnapping for ransom, and arms smuggling in a trial that began in 1997 (Berberoğlu 1998). The defendants, including military officers, had previously been found guilty, but the Supreme Court of Appeals (*Yargıtay*) repeatedly overthrew the verdict (reported by *Radikal*, 23 Nov. 2005; http://www.radikal.com.tr/haber.php?haberno=170851).

The most unexpected event occurred when a court-assigned public prosecutor, who had good connections with the government, announced the Şemdinli indictment in March 2006 (TCVCB 2006). Three aspects of this meticulously prepared indictment, accepted by the 3rd Penal Court in the province of Van, deserve special attention. First, the prosecutor indicted the trio who bombed the bookstore on charges of disrupting the unity of the sate and undermining the integrity of the country (Article 302 of the Turkish Penal Code). It was unprecedented for a prosecutor to charge members of the state security forces under Article 302, which usually applied only to cases where defendants were accused

of working for and sympathizing with the PKK. "Similar incidents happened in the past but they were all covered-up. We did not really expect that the prosecutor would produce such a comprehensive, meticulous, and bold indictment," remarked one of the defense lawyers. Another commented, "In the past, we could not even bring the members of the state security forces to the court when they are charged with inflicting torture. The indictment was a major step in the direction of establishing the rule of law." The prosecutor reasoned that the employment of illegal means in the war on terror undercut public confidence in the state and contributed to the goals of the PKK by undermining state authority, creating disorder, and crystallizing divisive ethnic identities. Consequently, the prosecutor maintained that the trio was responsible for disrupting the unity of the state (TCVCB 2006:66–68). That judicial reasoning was unique in recent Turkish history as it unequivocally denounced crimes committed by security forces under the pretext of war on terror.

Second, the indictment boldly accused the Commander of the Land Forces of forming a criminal gang, abusing his position, forging official documents, and interfering with the judicial process. The first three charges were based on the statements of a Kurdish businessman who alleged that the Commander and one of the noncommissioned officers were engaged in illegal practices in the late 1990s. The last charge was related to the Commander's patronizing comment about the noncommissioned officer quoted above (TCVCB 2006:48). According to Turkish law, prior permission of the Chief of the General Staff is required before the Commander can be put on trial. Furthermore, the military court should have two members who are superior in rank to the defendant. These regulations meant that the Commander was in practice immune from prosecution until his retirement.

Finally, the indictment adopted a pro-AKP language. In the indictment, the prosecutor explained how the conflict between the elected politicians and appointed bureaucrats had been central to Turkish politics (TCVCB 2006:63–66). He complained that bureaucrats perceived themselves as the real owners of the state and became anxious with the rising power of elected politicians. The prosecutor argued that it was very plausible that groups entrenched in the state would collaborate to take a united stance against the civilian government and would cultivate a lack of confidence in the government among citizens. He was concerned that such attacks would generate a vicious cycle of violence that would empower the military authority at the expense of the civilian authority. The ensuing violence would put immense pressure on the civilian government and hinder its goals of joining the EU and pursuing democratic reforms. The prosecutor implied that the

elements in the TSK pursued a deliberate "strategy of tension" to preserve their prerogatives and block the reformist agenda of the AKP government.

It can be plausibly reasoned that the prosecutor decided to openly challenge the TSK because he believed that the AKP government and a considerable segment of public opinion would actively back the indictment. This behavior is consistent with the first hypothesis suggesting that members of the judiciary confront political elites only when they draw the support of other politically powerful actors. That is in turn more likely when power is more fragmented. From this perspective, the timing of the indictment was not surprising either. The unstable coalitions, which had formed the government from 1991 to 2002, had been in no position to contest the TSK's political hegemony. Without a sympathetic and strong government, lower courts had been too weak to act against the interests of the TSK. In contrast, the AKP government enjoyed substantial levels of popularity and oversaw one of the most ambitious reform periods of modern Turkish history, a period characterized by high rates of sustainable growth. Meanwhile, the AKP led an uneasy coexistence with the TSK, which strongly opposed the AKP's agenda of increasing the role of Islam in public life. While the AKP wished to see the TSK's political influence reduced, it also preferred not to completely antagonize the military establishment. Moreover, civil society organizations became more active and increasingly questioned the TSK's involvement in the political process. Consequently, power was more evenly distributed, and the prevailing political atmosphere was more conducive to lower court activism.

In this environment, reactions to the indictment were mixed and reflected the priorities of the political actors. On the one hand, civil activists, the Kurdish opposition, and liberal pundits applauded the prosecutor and hoped that the indictment would be a serious blow to the TSK's political hegemony. On the other hand, the Chief of the General Staff declared that the prosecutor had some ulterior motives and that the indictment was a direct attack against the TSK. Two weeks later, the General Staff posted a note on its Web site attacking the prosecutor:

> The [indictment] aims to tarnish the TSK and weaken its determination and will in its war on terror. . . . There is no need to open an investigation into these members . . . . The TSK sincerely believes in the rule of law and judicial independence . . . and processed charges against the prosecutor who prepared the indictment . . . . All these attempts will not be sufficient to sow dissension within this sacred institution. (http://www.tsk.mil.tr/bashalk/basac/2006/a07.htm).

In a similar vein, the leader of the main opposition party (the CHP) described the indictment as a civilian coup attempt against the TSK with the involvement of some elements in the judiciary.[6] Some commentators argued that the prosecutor was involved in a conspiracy to smear the name of the Commander of the Land Forces, who was expected to be the Chief of the General Staff in August 2006. As reported by the *Milliyet* (8 March 2006; http://www.milliyet.com.tr/2006/03/08/siyaset/axsiy01.html), these developments alarmed the AKP, which did not want to become involved in an open confrontation with the TSK. The Minister of Justice immediately ordered an investigation about the prosecutor. On April 20, the High Council of Judges and Prosecutors (HSYK) decided to expel the prosecutor from the profession. According to the *Hürriyet* (21 April 2006; http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4289558&tarih=2006-04-21), he was particularly found at fault for including the Commander of the Land Forces in the indictment despite the fact that he was not directly involved in the Şemdinli incident. The AKP basically sacrificed the prosecutor in an attempt to placate the TSK.

Meanwhile, the parliamentary commission investigating the Şemdinli incident completed its report in mid-April 2006. The head of the Police Intelligence Bureau had testified before the commission on February 2, 2006, and presented a memo. The memo, published by the *Sabah* (24 March 2006; http://arsiv.sabah.com.tr/2006/03/24/gnd97.html), indicated that a gang composed of state security members engaged in illegal activities in the region. It noted that the illegal organization originated from the top, including the Commander of the Land Forces and the Commander of the Gendarmerie. It suggested that the Prime Minister should eliminate the gangs within the TSK with the help of the Chief of the Staff. The Minister of Interior dismissed the head of the Police Intelligence Bureau from his position on March 22 after a formal complaint from the Gendarmerie High Command.

The commission report was nonconfrontational, reflecting the government's priority of appeasing the TSK, and was completely silent regarding the accusations directed against the Commander of the Land Forces (TBMM 2006). The report concluded that there was no evidence of an organization within the state that employed illegal counterinsurgency methods and aimed to sustain emergency rule in the predominantly Kurdish areas to block Turkey's EU ambitions (TBMM 2006:645). This conclusion was basi-

[6] As reported in the official magazine of the CHP, *Halk*, 15 March 2006 (http://www.chp.org.tr/index.php?module=museum&page=stream&entry_id=980). This was a remarkable change of argument from the initial investigations conducted by CHP members in the immediate aftermath of the incident.

cally inconsistent with the content of the report, which had made several important observations. First, it noted that the Gendarmerie frequently overstepped its authority by conducting intelligence and operations in police areas without informing the police and the civilian authority (TBMM 2006:623, 654–6). As a result, the military forces became the predominant force in the region, bypassing the civilian administration (TBMM 2006:660–7). Next, it suggested that five of the 17 bombings that took place before November 9 targeted the property and activities of individuals who were known to be sympathetic to the PKK, which had no reason whatsoever to harm its own base (TBMM 2006:632–41). The report also implied that the military pursued a policy of indiscriminate punishment toward the local population. For instance, the commander in the town of Yüksekova imposed an informal embargo on the town by not allowing his soldiers to shop at the local stores (TBMM 2006:657).

Disciplining the Activist Judges

The trial of the suspects began on May 4, 2006, at the 3rd Penal Court of the province of Van. In accordance with the expectations of the legal mobilization perspective, civil activists and the Kurdish opposition eagerly seized this unique legal opportunity to transform law into a force that restricts rather than enables state power. More than 300 lawyers represented the victims and several members of the parliament, and representatives of Amnesty International attended the trial. Members of the security forces were also present in the courtroom in order to show their support for the defendants. Several media outlets covered the trial as breaking news. In the second session, the newly appointed prosecutor omitted the sections on the Commander of the Land Forces when reading the indictment. He also stated that the defendants were now indicted on the charge of forming an organization with the purpose of committing crimes (Article 220 of the Turkish Penal Code) instead of disrupting the unity of the State and undermining the integrity of the country (Article 302) as stated in the original indictment. This change meant that the high-ranking military officers would not be prosecuted and was a complete repudiation of the spirit of the original indictment. But the panel of judges reached a verdict in the fourth session, on June 19, and convicted the two noncommissioned officers of several crimes, including membership in a criminal organization, first-degree murder, attempted murder, and voluntary injury. They were given prison sentences of about 40 years each. One of the three judges opposed the verdict and argued that the defendants should be charged with

disrupting the unity of the State and undermining the integrity of the country. A day later, the owner of the bombed bookstore was arrested on charges of being a member of the PKK. While his trial was pending, he was released from prison in April 2007. The court convicted the confessor of similar charges in November 2006, and gave him a prison sentence of about 40 years.

Several points should be highlighted in the reasoned decision of the court (TCV3ACM 2006). First, the court argued that there was overwhelming and convincing evidence that the trio was responsible for the bomb attack. In addition, the court observed that the defendants were deliberately attempting to prevent the court from reaching a verdict and were abusing the right of defense. The court refused the defense's requests to transfer the case to a military court and to reject the judges on the grounds that they became partial (TCV3ACM 2006:110–24). Furthermore, this court (the TCV3ACM) overlooking the Şemdinli case referred to the January 2002 Susurluk decision by the Supreme Court of Appeals (*Yargıtay*) in its arguments. The Supreme Court of Appeals argued that the practice of legitimizing illegal actions under the pretext of fighting against terrorism is against the spirit of the rule of law (TCV3ACM 2006:124). The court also reasoned that it was unthinkable that the trio planned and conducted the attack independently without the approval, knowledge, and participation of their superiors in the military hierarchy. The court noted, "It will be necessary to investigate all dimensions of the case, which would involve the other public officers serving in the region, to expose the complex relationships behind the attack . . . . It was not possible to identify the individuals who ordered and directed the attack during the current investigations and trials" (TCV3ACM 2006:128). This was both a confession of the court's own limitations and a thinly veiled reference to the TSK's decision to protect the officers masterminding the counterinsurgency operations. Finally, the court explained why the trio was punished for violating Article 220 instead of Article 302:

> There is no doubt that the apparent purpose of the defendants is, at least, to fight against terrorism by employing illegal approaches and arbitrary methods. Such approaches and methods serve to weaken the unity of the state, generate public disorder, cultivate an environment of lack of confidence . . . . As it is clear that the purposes of our state security forces cannot be those, the defendants may have some ulterior motives. On the basis of the principle that the defendants benefit from suspicion, it became necessary to accept that the purpose of the defendants was to fight against terrorism by employing illegal methods rather than to disrupt the unity of the state and undermine the integrity of the country. (TCV3ACM 2006:126)

The court's decision to sentence the defendants to long prison sentences was important in itself because the defendants were acquitted and were given only minor punishments in similar cases in the past. The court took a clear stance against human rights violations committed by state security forces under the pretext of the war on terror. This was a crucial legal development that undermined the political culture of impunity and happened in the absence of any support from civilian authority. A principal factor that made this puzzling change possible was the legal mobilization pursued by civil activists, Kurdish opposition, and several media outlets critical of the TSK's political influence. These actors' intense interest in the case ensured that the course of the trial became central to public discussions of democratization and the establishment of the rule of law in Turkey. International rights organizations such as Human Rights Watch and Amnesty International supported these actors. The victims were represented by a large group of qualified lawyers who had significant experience in human rights violation cases. The media also closely followed the evolution of the trial. Many media outlets posted the indictment on their Web sites for public accessibility. The EU 2006 Progress Report on Turkey mentioned the case as a prominent example of the continuing influence of the TSK in political affairs (EU Commission Enlargement 2006). This diverse and resourceful support structure enabled the judges to act more independently and reach a verdict that was clearly disfavored by the TSK. Lower court judges acted timidly in similar cases in the past mainly because those cases remained relatively obscure and legal mobilization by civil activists remained limited.

At the same time, lower courts lacked the power to unravel the structure that governed and organized illegal counterinsurgency operations. The judges in lower courts in general were isolated and had no support from other state organs. The government preferred to adopt a lower profile, the General Staff took a very antagonistic stance, the opposition parties were not interested in pursuing the case, and the high judiciary was not happy with the verdict. These developments lend support to the second hypothesis regarding the differences between lower courts and the high courts regarding judicial activism in the service of human rights. The former offer both legal protection to repressed groups and more opportunities for legal mobilization by civil activists than the high courts that are allied with powerful political elites. Yet as articulated by the first hypothesis, lower court activism is sustainable only if some influential political actors offer protection to the activist members of the judiciary.

In October 2007, the HSYK banished (to a remote city in Eastern Turkey) a public prosecutor who publicly expressed his

support for the prosecutor who prepared the original indictment. The Council also demoted the chief prosecutor in the province of Van who had accepted the indictment (BİA 2006). A week later, the Principal Prosecutor of the Supreme Court of Appeals argued that the convictions of the noncommissioned officers were unsustainable and that the case should be sent to a military court. He argued that the state security forces could not be charged on the basis of Article 302 (TCYCGK 2007).

The 9th Department of the Supreme Court of Appeals unanimously overruled the verdicts on May 8, 2007 (TCY9CD 2007a). It argued that judicial investigations were incomplete, the suspects were denied of their defense rights, and there were technical faults. Furthermore, the Department ordered that the case should be transferred to a military court on the grounds that all actions of the military personnel during the war on terror, including the confessor who bombed the bookstore, are under the jurisdiction of military courts (TCY9CD 2007b). Regarding the charges made on the basis of Article 302 in the original indictment, the department offhandedly noted:

> When the case was analyzed, there was no evidence that such crimes were committed. Moreover, the assumption that the suspects who are soldiers fighting against terrorism committed the same crimes committed by the terrorist organization [PKK], which is disrupting the unity of the state and undermining the integrity of the country, is even beyond any fantasy and entirely depends on assumptions that lack legal value. (TCY9CD 2007a:2)

Meanwhile, the military establishment exerted pressure on the judges. The Commander of the Land Forces who was accused in the indictment and later became the Chief of the General Staff denounced the indictment in a press conference on April 12, 2007. He claimed that the real target was the TSK and characterized the indictment as "a violation of the rule of law that would be recorded in world judicial history" (*Radikal*, 13 April 2007; http://www.radikal.com.tr/haber.php?haberno=218256).

Defying expectations of bureaucratic behavior and consistent with the second hypothesis, the judges of the 3rd Penal Court in Van did not automatically comply with the decisions of the Supreme Court of Appeals. On June 13, 2007, the lower court agreed to revoke the verdicts but refused to transfer the case to the military court. It insisted that it had jurisdiction over the case. The open defiance of a high court's decision in such a politically charged case has been very unusual as lower court judges' appointment, promotion, and hence financial status are decided by the HSYK, which is controlled by the high judiciary. Not unexpectedly, the Ministry of Justice opened a disciplinary investigation

into the judges who resisted the decision of the Supreme Court of Appeals. Several weeks later, another court in Van rejected the new public prosecutor and the defendants' lawyers' request of replacing the judges overseeing the case. A month later, yet another court in the province of Diyarbakır rejected the defendants' lawyers' requests to replace the judges, transfer the case to a military court, and release the suspects. It was, in fact, remarkable that lower court judges refused to bow down and risk their professional careers and advancement in the face of constant and immense pressure from the top. In the words of a lawyer who was closely involved in the judicial process,

> The principled stance of the judges was unprecedented. In the past, the same judges sentenced the PKK militants to long years in prison. Also, they are not necessarily supporters of the ruling AKP. Hence, one cannot say that they are part of a campaign against the TSK orchestrated by the government. I think this is rather a collective expression of professional commitments and ethics of the judges and prosecutors. Since the 1980s, the state security forces executed people under the pretext of war on terror and were acquitted in the courts. This generated a trauma within the judiciary. Now the judges are claiming, "Do not execute people on behalf of the state and demand our complicity. This time, we will not comply." They are also aware that the TSK is no longer capable of staging coups and hence adopt more independent stances. Yet the high judiciary has internalized militarist ideology and is strongly allied with the military.

This bottom-up resistance within the judiciary was vulnerable to pressure from the top given the lack of active support from the government and political parties. On June 29, 2007, the HSYK rotated around 1,500 judges and prosecutors. The judges who served in the 3rd Penal Court of Van and a prosecutor who was pursing the case were demoted. The judges in the 4th Penal Court of Van, who rejected the defendants' lawyers' request of replacing the judges, were also appointed to less prestigious positions. Not surprisingly, the newly appointed judges of the 3rd Penal Court were more conformist and unanimously ruled that the case should be transferred to a military court in September 2007 (compare Solomon 2007:126). The court approvingly quoted the Principal Prosecutor of the Supreme Court of Appeals, who argued that the suspects, given their roles as members of the TSK, could not engage in actions disrupting the unity of the state and undermining the integrity of the state. According to the Principal Prosecutor, the defendants could not be members of an illegal criminal organization (TCV3ACM 2007:94–8).

The lawyers representing the victims of the bomb attack vigorously protested the decision and objected to the Supreme Court

of Appeals' decision to revoke the original verdict. They also argued that the decision to transfer the case of the confessor to a military court clashed with basic legal principles. In response, the Ministry of Justice authorized an investigation into the lawyers. On December 14, 2007, a military court released the confessor and the two noncommissioned officers of the Turkish army from prison and postponed the trial to March 2008. The lawyers representing the victims left the courtroom in protest and withdrew from the case. In May 2008, the sergeant who had opened fire on the crowd after the bomb attack was arrested on separate charges. As reported by the Turkish daily *Zaman* (22 May 2008; http://www.zaman.com.tr/haber.do?haberno=692852), he was accused of murdering a local businessman for personal gain in a Western Anatolian town.

Conclusions

This in-depth study of the Turkish judiciary informs sociolegal theory of judicial activism in two respects. Primarily, it joins a long tradition in sociolegal scholarship arguing that lower courts play a crucial role in shaping citizens' access to substantive justice and perceptions of how the legal system functions (e.g., Blumberg 1967; Feeley 1979). Previous studies of judicial activism in semidemocratic or authoritarian countries mostly focused on the high courts, including the constitutional courts, and paid much less attention to lower courts. Yet lower courts can be the centers of progressive and democratic legal change in these countries. They may provide more access to judicial process to disadvantaged and opposition groups with resources including financial means, legal expertise, international linkages, and media access. This leads to the paradoxical conclusion that less powerful lower courts emerge as agents of democratization and expansion of rights, whereas the powerful high courts protect the vested interests of the political elites in countries with fragile democratic institutions. Next, this article agrees with scholarly approaches arguing that judicial behavior is best understood as a reflection of the judiciary's interaction with other political actors. Lower courts can *sustain* their activism when political power is distributed more evenly and the civilian government and parliament back judicial activism. Without powerful allies, lower courts lack the influence and resources to resist the decisions of the high judiciary.

The extremely risk-aversive stance taken by the AKP government during the Şemdinli incident was an important factor limiting the ability of the judges to fully investigate and expose the clandestine counterinsurgency networks. The stark difference between

the behavior of the AKP and the TSK is revealing. The TSK protected the trio who bombed the bookstore to the very end. The officers continued to regularly receive their salaries and were appointed to active positions when they were released. By contrast, not only did the public prosecutor lose his job, but he was also obliged to pay huge sums in damages to individuals he named in the indictment (http://www.yuksekovahaber.com/news_detail.php?id=7808). The ruling party disowned the prosecutor after he was accused of pursuing the agenda of the AKP. In the words of a lawyer, "If the civilian authority could have demonstrated a persistent political will, the prosecutor would have stayed. The government did not even fight." This view was shared by a public prosecutor who commented that the inaction of the AKP made the judiciary vulnerable to the pressures from the TSK. Interestingly, a senior AKP member observed, "We paid a big price: the intellectuals and liberals sharply criticized us for being unable to rein the military. Yet we could not do much by ourselves. The army should take the initiative in cleaning itself from these rogue elements." Furthermore, the government did nothing to empower the parliamentary commission investigating the incident. Elsewhere, truth or parliamentary commissions have proved to be instrumental in documenting human rights abuses committed by state security forces and publicizing victims' tragedies. Their activities can undermine the culture of impunity by delegitimizing the state-sponsored violence (Popkin & Roht-Arriaza 1995) and can contribute to the larger population's internalization of human rights by increasing respect for law (Gibson 2004:25).

It can be claimed that the Şemdinli incident was an isolated case that resulted in a defeat for rights advocates and ended lower court activism. After all, the case was transferred to a military court and the defendants were released. The counterinsurgency structure remained intact, no high-ranking officer was put on trial, and suspicious bomb attacks restarted in the Şemdinli-Yüksekova zone during summer 2008. The activist members of lower courts were disciplined, and public interest in the case gradually eroded. One may be inclined to conclude that nothing has changed, and legal mobilization by civil activists and lower court activism failed to achieve any significant results. However, subsequent developments do not warrant such a pessimistic assessment and demonstrate the role of courts in disseminating symbols and messages that inform sociopolitical action and raise public awareness of rights (Galanter 1983:134–5; McCann 1994:7, 307–8). The lasting and expansionary legacy of Şemdinli became evident in June 2007, when police discovered a large arsenal of hand grenades in a house in İstanbul. With the full backing of the AKP government and civil society organizations, the scope of the investigation broadened and

encompassed very prominent public personalities. Included in the approximately five dozen suspects were a retired commander of the Gendarme force, a retired general who was thought to be the key figure in illegal counterinsurgency operations and other criminal activities since the early 1990s, another retired general who served as an army commander, and several well-known politicians, journalists, and mafia types. The two top generals were also accused of planning a coup against the AKP government while they were on active duty until 2004. There was strong evidence that most of these figures engaged in illegal and violent activities to overthrow the AKP government. In a sense, they were pursuing a version of the "strategy of tension" to undermine the authority of the civilian government and invite authoritarian rule. The case was named "Ergenekon," a reference to the name of the clandestine organization.

For liberal pundits and activists, the case was the most important opportunity to eliminate state units that act beyond the control of civilian authority and the rule of law. The TSK was uneasy with the developments and generally avoided open interference with the legal process in order to avoid risking its already diminished political capital. The opposition CHP characterized the case as an AKP-directed conspiracy. The most significant change was the behavior of the AKP government, which was the target of the Ergenekon criminal organization. The party was eager to energetically pursue the case out of self-interest. When *protected* by the civilian authority and backed by a reenergized civil society, a public prosecutor decisively pursued the case and effectively challenged the judicial immunity of the ex-TSK members. He was able to identify many members of the organization, document its activities (including bomb attacks and assassinations), and strike a significant blow to its structure by July 2008 (Tayyar 2008).

This article also offers some insights into the discussion that focuses on the trade-off between security and liberties of constitutionalism in times of terrorism (e.g., Hardin 2004; Ackerman 2006; Posner & Vermeule 2007). Turkey's long experience with insurgency suggests that the courts' acceptance of the expansion of executive power with the purpose of fighting terrorism may have some unintended consequences. Once the judicial and legislative controls over the executive's power are weakened, the threats to national security may become self-fulfilling prophecies that perpetuate pockets of authoritarianism. The judicial mechanisms are likely to fail to protect citizens from the government that commits human rights abuses in the name of the war on terror. The antiterrorism or counterinsurgency tactics employed by executive organs may beget the very conditions that increase the appeal of terrorist and insurgent groups.

A final comment on the practice of reaching theoretical conclusions from a case study is in order. This case study contributes to theoretical development in two ways. First, this article has an *implicit* two-layered comparative design. It primarily contrasts judicial activism in the Şemdinli incident with the lack of judicial activism in similar cases in the past. The existence of multiple centers of power (i.e., the TSK versus the AKP) and legal mobilization pursued by civil society actors made a huge difference. The comparison of the Şemdinli incident with the Ergenekon case highlights the role of the civilian government in different outcomes. While legal mobilization stimulates judicial activism in lower courts, government support is crucial for the *sustainability* of this activism in the face of extensive pressures from the TSK and the high judiciary. Finally, the case study approach is particularly useful for identifying the relevant causal mechanisms that characterize theoretical relationships (Tilly 2001). An in-depth study of a legal case provides unique insight into the process of how the scope of judicial activism in lower courts, which is conditioned by a set of factors, has substantial implications for the study of democratization. Constitutional changes and political-legal reforms are important for progressive developments in semi-democratic contexts but do not necessarily change judicial and political behavior. They rather generate opportunities that can be seized by members of the judiciary, who would in turn galvanize civil society actors and social movements to raise "rights consciousness" and to utilize law as a valuable resource in their attempt to counter politically hegemonic forces.

Appendix: Interviews

Retired Military Judge Dr. Ümit Kardaş, İstanbul, June 21, 2007.
Metin Korkmaz, Şemdinli, June 25, 2007.
Seferi Yılmaz, Yüksekova, June 25, 2007.
Lawyer Cüneyt Caniş, Ankara, September 7, 2007.
Lawyer Selçuk Kozağaçlı, Ankara, October 10, 2007.
Former Parliamentarian Esat Canan, Ankara, October 11, 2007.
Lawyer Murat Timur, Van, October 16, 2007.
Anonymous Public Prosecutor, İstanbul, December 3, 2007.
Columnist Mehmet Metiner, İstanbul, December 7, 2007.
Former Parliamentarian Haşim Haşimi, Ankara, December 12, 2007.
Parliamentarian Abdurrahman Kurt, Ankara, December 13, 2007.
Parliamentarian İhsan Arslan, Ankara, December 15, 2007.

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