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Resiliency and Pitfalls of Crisis Regimes: Reimagining The Future of Turkey's Democracy through the Lens of the Indian Emergency

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Abstract

Five days after the attempted coup d'état of 15 July 2016, a state of emergency was declared in Turkey. Under the emergency rule, constitutional rights and liberties are suspended and parliament and the courts are reduced to the regime's rubber stamp, while the country is ruled by one man through decrees. While many question how the legal and political developments in Turkey will unfold, and whether and how the democratic backslide and decline in rule of law can be reversed, Indira Gandhi's emergency (1975–77) offers a useful historical heuristic case. With striking similarities to the conditions in Turkey today, during the Indian emergency the judiciary, especially the Indian Supreme Court (ISC), was subjugated to the will of Prime Minister Gandhi through means of constitutional amendments and political appointments that compromised the integrity of justices. Yet, shortly after the end of emergency the ISC regained the trust and respect of the Indian people, thereby playing an instrumental role in the restoration of Indian democracy. Through a close analysis of the Indian emergency rule, the present article explores the conditions of democratic survival and whether and how the Turkish judiciary can reclaim its independence, spearhead a rights revolution, and help restore the democratic order.

Keywords: Turkey, India, referendum, democracy, judiciary, constitutional amendment

"Crisis Regime" best describes Turkey since the attempted coup d'état of 15 July 2016. A state of emergency was declared on 20 July 2016, originally for three months, but extended for the sixth time in January 2018 with no end in sight. Under the emergency rule constitutional rights and liberties are suspended, government forces and pro-government vigilante groups are granted complete legal immunity, and parliament and the courts are reduced to the regime's rubber stamp, while the country is ruled by one man through decrees. Neal Tate defines a crisis regime as a "political system which is initiated by the sudden seizure of new or drastically expanded executive powers by a political leader for the purpose of

coping with the demands of a leader-proclaimed extraordinary crisis."[1] Crisis rulers, he argues, "initially portray their seizure of power as necessary but temporary, but usually end up extending their rule indefinitely, transforming a nonauthoritarian, constitutional regime into an authoritarian [one]" (e.g., Muhammad Zia-ul-Haq's rule in Pakistan, or Ferdinand Marcos' rule in the Philippines).[2] Becoming a crisis regime *par excellence* under Turkey's current emergency, all fundamental rights from *habeas corpus* to right to property, from free speech to due process have been suspended and the rule of law and the separation of powers have been undermined, while the judiciary has been captured and subjugated through arbitrary dismissals and political appointments. The constitutional amendments of April 2017 institutionalized such a system by further undermining legislative and judicial branches and consolidated their powers in the office of the president and normalized the state of emergency posing the question of if Turkey can reclaim its democracy.[3]

Turkey's April 2017 referendum and its adoption of an unprecedented form of presidentialism is not a drastic shift but rather another stage of the country's democratic backsliding.[4] The increasing number of referendums in Turkey demonstrates how crisis regimes utilize the law and legal institutions to claim popular consent and legitimacy, and to solidify their rule while maintaining a democratic façade. This instrumental use of law or rule by law by repressive regimes, gives rise to a particular form of legality often referred to as "authoritarian legality" in the literature.[5] Some scholars have analyzed recent constitutional and legislative developments in Turkey as a particular episode of a broader phenomenon of legal authoritarianism, often comparing them to similar developments in Hungary, Poland, Russia, and

[1] Neal C. Tate, "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies," *Political Research Quarterly* 46, no. 2 (June 1993): 316.

[2] Ibid.

[3] Maria Haimerl, "The Turkish Constitutional Court under the Amended Turkish Constitution," https://goo.gl/ps7fMW, accessed November 2017.

[4] In comparison to other Eastern European cases, however, Turkey's democratic backslide and decline in rule of law have been much deeper. According to the most recent report by the Varieties of Democracy Index, Turkey is one of the top five countries in the world to experience the worst democratic backslide over the period of 2011–16 (https://goo.gl/J8Xbab). Likewise, according to the World Justice Project's Rule of Law Index, in 2016, Turkey ranked last in the Eastern Europe and Central Asia Region and 99th out of 113 countries globally (https://goo.gl/N8aghw).

[5] Anthony W. Pereira, *Political (in)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina, Pitt Latin American Series* (Pittsburgh: University of Pittsburgh Press, 2005).

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elsewhere.[6] While many question how the legal and political developments in Turkey will unfold, and whether and how the democratic backslide and decline in rule of law can be reversed, Indira Gandhi's emergency (1975-77) offers a useful historical heuristic case. With striking similarities to the conditions in Turkey today, during the Indian emergency the judiciary, especially the Indian Supreme Court (ISC), was subjugated to the will of Prime Minister Gandhi through means of constitutional amendments, political appointments, forceful transfers, and political persecution that compromised the integrity of justices. Yet, shortly after the end of emergency the ISC regained the trust and respect of the Indian people by rising as a staunch defender of fundamental rights and freedoms, thereby playing an instrumental role in the restoration of Indian democracy. India's experience helps us to explore the conditions of democratic survival and whether and how the Turkish judiciary can rise against the political regime, reclaim its independence, spearhead a rights revolution, and help rebuild the democratic order. In other words, can the Turkish judiciary play a comparable role to that of India and restore the conditions of democratic practices?

Institutionalization of a Turkish Crisis Regime and the Capture of Judiciary

Since July 15, 2016, the AKP government Adalet ve Kalkınma Partisi (Justice and Development Party) has detained and dismissed about 150,000 government employees, including 4,463 judges and public prosecutors, 8,693 academics, and 305 journalists. By last count in January 2018, 187 media outlets, more than 3,000 schools and NGOs, and fifteen universities have been shut down.[7] According to a *Financial Times* article titled "Assets Worth $11 Billion Seized in Turkey Crackdown" accessed in November 2017, about 1,000 businesses (allegedly linked to the U.S.-based cleric, Fethullah Gülen) have been seized and their assets, collectively worth over $11 billion, have been confiscated. In order to fill in the judicial vacancies, the government has transferred and appointed 9,073 judges and prosecutors in the period of July 2016 to December 2017, according to the publicly available

[6] Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016); Ergun Özbudun, "Turkey's Judiciary and the Drift toward Competitive Authoritarianism," *The International Spectator* 50, no. 2 (June 2015): 42–55; Kim Scheppele, "Worst Practices and the Transnational Legal Order," last modified 2016, https://goo.gl/jksRzi; Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100, no. 2 (January 2015): 392–461.

[7] "Turkey's Post-Coup Crackdown," Turkey Purge, last modified 9 January 2017, https://turkeypurge.com.

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Board of Judges and Prosecutors webpage, accessed in January 2018, which can be seen as one of the most drastic reconstructions of the country's judiciary. While the nature of this reconstruction remains to be seen, in the same period, 8,050 candidates were admitted into the Ministry of Justice's Justice Academy to be trained as a new generation of judges and prosecutors. In November 2016 alone, 3,800 new judges and prosecutors were recruited; in June 2017, 2,750 were recruited; in December 2017, 1,500 were recruited. These figures are gathered from public announcements issued for judgeship and prosecutorial office exams available on the Ministry of Justice's website. Most of these new recruits are viewed as those with close associates of the ruling AKP. Such perceptions are reinforced by reports, like a May 2017 article published in *The Economist*, that of the 900 judges and prosecutors appointed in April 2017, 800 had close AKP links.

The extensive institutional reforms and replacements since July 2016 indicate that the judiciary substantially lost its autonomy. This lost autonomy is not a detour but instead the consolidation and final stage of the process of the institutionalization of the crisis regime which can be seen through three broadly defined periods. The first period, 2007–10, is the reaction to the formative years of AKP during which the secularist judiciary constantly questioned the party's commitment to secular practices and democracy and threatened it with closure. In the second period, 2010–13, the AKP began taking control of the judiciary in alliance with the Gülenists,[8] a religious network that is claimed to have masterminded the 2016 coup. The third and final stage, 2013–17, indicates the dominance of the judiciary by the rising party-state regime.

The first period was marked by the secularist judiciary's scrutiny of the AKP's policies. For instance, in May 2007, the Constitutional Court (CC) annulled the first round of the presidential elections on procedural grounds in order to block AKP candidate and party founder Abdullah Gül's election. In June 2008, the CC cancelled the constitutional amendments to remove the headscarf ban for female university students. Although the 1982 constitution (Article 148) allows review of constitutional amendments solely on procedural grounds, the court reviewed the headscarf amendments on substantive grounds arguing that the proposed amendments indirectly altered the eternity clause (a constitutional provision that cannot be amended) concerning secularism (Article 2), thereby undermined the basic structure

[8] The Gülenist cadres are reported to have begun systematically moving into the judiciary at the beginning of the 1980s. Hence, by 2010, they were already a formidable center of power within the Turkish judiciary.

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of the regime. A few weeks later, in the so-called AKP closure case, the CC, one vote short of the required 3/5 majority to dissolve the party and ban its leaders from politics, declared the AKP to be "the focal point of anti-secular activities" and cut half of its public funding as penalty.[9] From its founding in 1961 to 2008, the CC closed down twenty-four political parties, including three of AKP's predecessors—the National Order, Welfare, and Virtue parties. Although this time the governing party barely dodged the bullet, the threat of closure and ban from politics was imminent. The AKP responded to the threat with a constitutional amendment in September 2010, which, many commentators believe, aimed to pacify and take over the judiciary.

The constitutional amendment of September 2010 expanded the number of judges on the CC from eleven to seventeen, which would immediately change the majority on the bench in favor of the government.[10] It also changed the composition of the Supreme Board of Judges and Prosecutors (SBJP), which would in turn allow groups (e.g., Gülenists) aligned with the Islamist government to manage and control judicial appointments. The politicization of the SBJP has been especially important given that it is the key institution that oversees the appointment, dismissal, and disciplining of the members of the judiciary. The September 2010 amendment expanded the SBJP's members from seven to twenty-two, and empowered lower court judges and prosecutors to directly elect ten of those while the rest were to be appointed by the government and other judicial bodies. According to Mustafa Akyol in an Al-Monitor article, published on 2 September 2014, the changes introduced by the 2010 amendment, facilitated the ruling party and its then allies, the Gülenists, to take control of the SBJP—an old secularist bastion of the Turkish judiciary.[11]

Although it is not possible to determine the end of the alliance, after Turkey's popular public protests against the ruling government, the so-called Gezi Park protests, in June 2013, relations between the AKP and Gülen movement began deteriorating. The declining relations between the two became more visible following a corruption probe in December 2013, which implicated several government ministers along with then Prime Minister Erdoğan and his family members.[12] The release of documents led Erdoğan to accuse "Gülenist" prosecutors and judges of plotting a coup against his regime. The tense relation resulted in the adoption of several pieces of

[9] Arato, *Post Sovereign Constitution Making*, 238–44.
[10] Ibid., 251.
[11] See, https://goo.gl/E4nzG5.
[12] Yüksel Sezgin, "Erdogan-Gulen-Gul Rivalry: All the Sultan's Men," *Al Jazeera*, 1 January 2014, https://goo.gl/jPbJyT.

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legislation in 2014 that strengthened the executive branch's control over SBJP and reorganized the Court of Cassation and the Council of State.[13] In a series of decisions that altogether aimed to hamper the judiciary's ability to prosecute the corruption charges, 680 judges and prosecutors were sacked and about 7,000 were transferred—in most cases against their wishes.[14]

The ruling party tightened its already tight grip on the country's judiciary in the environment created by the attempted coup on 15 July 2016. While the failed coup exposed the extent of Gülenists' reach within many key institutions, referring to the security-focused environment as "a gift from God," Erdoğan launched wide-ranging changes in line with the party's vision for a "new Turkey." The changes following the coup attempt were drastic. For instance, within twenty-four hours of the attempted coup, two members of the CC were arrested on charges of being members of "an armed terrorist organization." In its reasoned decision, dated 9 August 2016, regarding the dismissal of judges in question, the CC ruled that due to the urgency of the conditions it was not necessary to produce concrete evidence to prove someone's membership in the "Gülenist terror organization (i.e., FETÖ)" instead a general belief formed by the majority about individuals in question was deemed sufficient to dismiss the suspects from the bench given the risks they allegedly posed to the constitutional and democratic order.[15]

The CC's decision to dismiss its own members without requiring any legally admissible evidence was a direct assault on judicial independence as well as due process and the rule of law. In a more drastic way, in October and December 2016, the court curtailed its own power in response to petitions challenging the constitutionality of decrees issued under the emergency. According to Article 148 of the 1982 constitution, emergency decrees are not open to constitutional review by the CC. However, in landmark decisions in 1991 and 2003, the CC reinterpreted Article 148 and established some standards for validating decrees that aimed to protect fundamental rights

[13] Özbudun, "Turkey's Judiciary."

[14] https://goo.gl/cQtF2Z, accessed January 2018.

[15] The ruling justified the dismissals in the following words: "(31) The facts that the FETÖ/PDY has been organized within nearly all the public institutions and that the concrete coup attempt stemmed from this structuring turned the danger into present danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order. (32) Dismissal from profession of members of the judiciary, who are considered as having any links with terrorist organizations, particularly the FETÖ/PDY, or structures, organization or groups engaging in activities against the national security, is of special importance for ensuring the reliability and honor of the judiciary which is one of the fundamental values of a democratic society." See, "Press Release," The Constitutional Court of the Republic of Turkey, last modified 8 September 2016, https://goo.gl/kPyKFi.

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and liberties even during times of emergency.[16] However, in multiple rulings in 2016, the court reversed its earlier jurisprudence and declared the emergency decrees to be beyond the CC's review. Some of the decrees (e.g., KHK 687) granted complete criminal and administrative impunity to government officials for actions related to their duties and provided legal shield for grave human rights violations committed by the regime. Hence, the CC (along with other higher courts) has become a willing accomplice in the Erdoğan regime's destruction of the constitutional order in Turkey.

The constitutional referendum of April 2017 established a presidential regime with unprecedented powers and with almost no checks.[17] Under the new system, the parliament has lost its oversight authority over the cabinet, and its powers to overwrite presidential veto are also reduced. The parliament cannot impeach the president or shorten his term; but the president can dissolve the parliament, unilaterally declare a state of emergency, and issue presidential decrees that carry the force of law.[18] Moreover, the 2017 amendment reduces the number of members on SBJP from twenty-two to thirteen and does away with elections. Six members are appointed directly by the president and the rest by members of the parliament (the majority of whom are handpicked by the president in his capacity as the chairman of his party—i.e., AKP). Likewise, the number of judges on the CC is reduced from seventeen to fifteen—twelve of whom are directly appointed by the president, and the rest by the parliament. Turkey's existing increasingly restrictive emergency rule and institutionalization of its crisis regime, especially in the aftermath of the 2017 April amendments, and the role that the Turkish judiciary has come to play in this new era of authoritarian legality are reminiscent of Indira Gandhi's emergency rule (1975–77) and the destructive role that the ISC played during this period.

Reversing Crisis Regimes: Lessons from Indira Gandhi's Emergency Rule and the Reassertion of Judicial Independence

Indira Gandhi served as the prime minister of India from January 1966 to March 1977, and again from January 1980 to October 1984. When Indira Gandhi became prime minister in 1966, she encountered an independent and defiant supreme court (a system her father, Jawaharlal Nehru, was

[16] Selin Esen, "Judicial Control of Decree-Laws in Emergency Regimes—A Self-Destruction Attempt by the Turkish Constitutional Court?" last modified 19 December 2016, https://goo.gl/ueLDrG.

[17] Esen, "Judicial Control."

[18] Yüksel Sezgin, "How a Constitutional Amendment Could End Turkey's Republic," *The Washington Post*, 24 January 2017, https://goo.gl/RqsXZu.

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instrumental in establishing from 1947 to 1964 as primeminister), which she considered an obstacle to implementing her socialist policies.[19] Ghandi preferred a "committed judiciary" and over the next decade pursued policies that undermined the independence and autonomy of the Indian Supreme Court (ISC). From 1966 to 1977, according to the website for the Supreme Court of India, she appointed twenty-four new judges to ISC and amended the constitution twenty-five times.[20] Although the court remained fairly independent until about 1975, thereafter it was subjugated to the will of the prime minister reminiscent of Turkey's current picture.

Both in India and Turkey the ruling parties were emboldened by their electoral successes. By the 1970s, Indira Gandhi, with absolute majorities in both houses of the parliament, was in the midst of a nationalization and land reform program. Prime Minister Gandhi's battle with the Indian judiciary was an ideological one—just like Erdoğan's battle in the early 2000s with the secular Turkish judiciary. Right to property was at the center of debate between the government and the ISC. In 1967, the court struck down the 17th amendment, which had restricted landowners' right to property and stated that the parliament could not amend the constitution to take away fundamental rights. The Congress Party struck back with two "radical" acts—the 24th and 25th amendments—that empowered the parliament to make changes to fundamental rights, and limited the court's jurisdiction in land acquisition and nationalization cases, respectively.[21]

The constitutionality of these amendments was soon challenged at the ISC. In 1973, the court ruled in a landmark case (*Kesavananda Bharati v. Kerala*) that the parliament could not alter the "basic structure" of the constitution, and that fundamental rights included the right to property. Just like the Turkish CC's "basic structure" judgment in the above-mentioned 2008 headscarf case, the ISC in its 1973 ruling invoked an abstract framework (basic structure) in order to protect the constitutional order against the brute political power of the majority in the other two branches of the government.

A day after the historical Kesavananda judgment, Indira Gandhi altered the country's long-established judicial rules and appointed a loyalist as the chief justice of the ISC. In the face of the judiciary's growing activism, the prime minister grew increasingly frustrated and began contemplating a regime change that would increase the powers of the executive branch vis-à-vis other branches. In this respect, some Congress members suggested doing away

[19] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (New York: Oxford University Press, 1999), 124.

[20] https://goo.gl/24h8CD, accessed November 2017.

[21] Austin, *Working a Democratic Constitution*, 235.

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with the parliamentary system in favor of strong executive presidentialism. As the idea of regime change was gaining traction within Congress circles, Indira Gandhi was presented with a "gift from God"—as Erdoğan might put it—in the form of a court judgment that she invoked as an excuse to declare a state of emergency. On 12 June 1975 the Allahabad High Court found the Prime Minister guilty of electoral fraud, effectively voiding her election to Lok Sabha and banning her from politics for six years. For Gandhi, the court's decision amounted to an "attempted coup" by the judiciary acting in alliance with the opposition. A few days later, the Congress Party declared its leader to be "indispensable to the nation." Gandhi swiftly introduced another constitutional amendment and declared a state of emergency on June 26.

Echoing recent events in Turkey, under the Indian emergency civil liberties were also suspended. About 140,000 opposition members, academics, students, and journalists were arrested, while about 10 million people, according to Terrence McCoy's 2014 Washington Post article, were sterilized (in most cases involuntarily) for population control. In this new era the ISC became the guardian of the regime. It first set aside the Allahabad High Court's judgment and validated Indira Gandhi's contested election to the parliament. Thereafter, it set out to battle independent-minded high courts by overturning judgments that challenged the tyranny and lawlessness of the emergency while the government banished "non-submissive" judges.[22] In April 1976, the court ruled—just like the Turkish CC, which upheld the emergency decrees—that during the emergency all fundamental rights were suspended, including Article 21 of the constitution, which protects the right to life. In fact, at the hearing the Attorney General argued that even if life was to be taken illegally by the government during the emergency, the courts were helpless.[23] The ISC simply accepted this outrageous assertion.

Like the April 2017 amendments in Turkey, which resulted in a wholesale regime change, Indira Gandhi's 42nd amendment (containing fifty-nine clauses) also introduced radical systemic changes. Although presidentialism was not part of the amendment, the package gave Gandhi near dictatorial powers. Overall, the amendment undermined the federal system, stripped the judiciary of its powers, curtailed civil liberties, and gave the parliament broad authority to amend the constitution. Unaware of the growing unpopularity of her regime, Gandhi made a strategic mistake and called for

[22] Upendra Baxi, *The Indian Supreme Court and Politics, Mehr Chand Mahajan Memorial Law Lectures*, (Lucknow: Eastern Book Co, 1980).

[23] Anshul Kumar Pandey, "The Darkest Hour in Indian Judicial History—When the Supreme Court Surrendered Its Autonomy During Emergency," *India Times*, 30 May 2016, https://goo.gl/CicMYJ.

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new elections in March 1977. In a massive defeat the Congress Party lost about 200 seats, including those of the Prime Minister and her son. Gandhi conceded and revoked the emergency, which had by that point already been institutionalized under the 42nd amendment—just like the April 2017 amendments in Turkey.

The massive defeat in India was caused by more than a reaction to the emergency. What made it possible was the ability of various opposition groups to put aside their differences and unite against Gandhi's authoritarian rule under the banner of Janata Party (JP), which offered the electorate a viable democratic alternative.[24] JP ruled India over the next two years, during which time the rule of law was restored. The 43rd and 44th amendments were passed in order to repeal the anti-democratic provisions of the 42nd amendment and to restore powers to the judiciary and limit emergency powers in the constitution.

The JP government also restored and respected the independence of the Indian judiciary. It refrained from political appointments to the ISC and reversed the compulsory transfer of high court judges ordered by Gandhi. The JP era gave the judiciary much-needed room to reassert its freedom without fear of retaliation. After the emergency period, Indian judges experienced an ideological transformation through which they redefined the role of judiciary in a democratic society.[25] In 1979, the ISC introduced a new legal tool known as "public interest litigation" (PiL). PiL can be filed by third parties or by the court itself in order to defend the public interest. Thanks to PiL, the post-emergency court soon emerged as an active protector of fundamental rights and social justice and thereby regained the trust of the Indian people.

A Comparison and Concluding Remarks

When contemplating whether the Turkish crisis regime can end and how the country's restricted judiciary can play a similar role, if any, in restoring the rule of law and democratic order, the Indian case can be instructive. Although there are differences between the two cases, the comparison yields both institutional and political insights. First, India is a federal system with state-level high courts in addition to the federal ISC. During the emergency, while the ISC was fully subjugated to the will of the government, most of the state-level high courts remained defiant.[26] Second, the Indian legal

[24] Austin, *Working a Democratic Constitution*, 396–97.

[25] Lisa Hilbink, "The Origins of Positive Judicial Independence," *World Politics* 64, no. 4 (October 2012): 587–621.

[26] A.G. Noorani, "The Judiciary and the Bar in India During the Emergency," *VRÜ Verfassung und Recht in Übersee* 11, no. 4 (May 1978): 403–10.

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system is based on common-law tradition, which gives greater freedom to individual judges. Turkey differs on both points. Turkey is a unitary state where all courts are under the control of the central government. Moreover, the Turkish legal system is based on Roman law, where judges "tend to have the mentality of civil servants rather than that of a superintendent over government."[27] It should be also noted that PiL, as a powerful legal tool, is not available to Turkish judges. But the Turkish judiciary could still play a positive role through lower courts activism and extended use of the individual application mechanism by the CC. Lisa Hilbink shows that activist Spanish judges had begun taking a stand against Franco well before Spain's transition to democracy thanks to an ideational shift that occurred among members of the judiciary. Spanish judges, Hilbink notes, redefined their roles as guarantors of fundamental rights, independently of the formal political context, and seized every strategic opportunity to "speak law to power."[28] This is certainly a possibility for the Turkish judiciary—especially for lower courts, which could provide disadvantaged groups with greater access to judicial processes than the CC or other high courts in Ankara.[29]

In 2010, under growing pressure from European institutions, the procedure of individual application (constitutional complaint) to the CC was introduced in Turkey. Although the CC has not yet been able to fully utilize this tool, in several landmark decisions between 2011 and 2016, it upheld the fundamental rights of individual citizens despite the strong disfavor and opposition of the AKP government.[30] With the changing political environment, the court could potentially use individual complaints as a springboard to jump-start a rights revolution—just as the ISC utilized the PiL to champion human rights after the end of emergency.[31]

[27] Kenneth M. Holland, ed., *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991), 8.

[28] Hilbink, "The Origins," 590.

[29] Güneş Murat Tezcür, "Judicial Activism in Perilous Times: The Turkish Case," *Law & Society Review* 43, no. 2 (May 2009): 305–36.

[30] Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law & Society Review* 40, no. 3 (September 2006): 653–92; Engin Yildirim and Serdar Gulener, "Individual Application to the Turkish Constitutional Court as a Case of Constitutional Transfer," *Global Constitutionalism* 5, no. 2 (June 2016): 269–94.

[31] On 11 January 2018 the CC ruled in response to individual applications of two jailed journalists, Sahin Alpay (https://goo.gl/pzU1dt) and Mehmet Altan (https://goo.gl/Tigyuq) that the journalists' prolonged pre-trial detentions violated their "right to personal liberty and security," and the "freedom of expression and the press." It would be premature to view these two recent decisions as precursor to a post-emergency rights revolution—as we do not

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However, in order to play this positive role, the autonomy of self-respecting individual members of the judiciary will be critical as much as their ability to see some light at the end of the dark tunnel of Turkey's declining democracy. That light in part should come from the political sphere and formation of a pro-democratic block of parties and citizens. If the Turkish opposition parties can replicate the success of the Janata alliance in the 1977 Indian elections by uniting around a common cause—ending Erdoğan's undemocratic and unlawful regime (assuming future elections will be "free" and "fair")—they can encourage the judiciary to undergo an ideational transformation and emerge as the champion of human rights.

Indira Gandhi returned to power in January 1980. Although the Indian judiciary this time was more protective of its independence—thanks to post-emergency ideational transformation—Gandhi's second tenure certainly was a tense period which could have been completely avoided had the Janata government been able to properly review and hold Indira Gandhi accountable for violations during the emergency. India's experience shows that overcoming crises in the judiciary very much depends upon the capacity of the judiciary to redefine its mission and its own commitment to democratic values as well as on the ability of political opposition to offer a viable democratic alternative to the Turkish citizens and state institutions.

yet know whether this was an early sign of forthcoming systematic changes in the court's treatment of the emergency regime or simply a "mistake"—given the court's track record since July 2016 the latter seems more likely. In any case, at the time of writing, lower penal courts, where the two journalists stand on trial, have not yet complied with the rulings claiming that the high court has overstepped its jurisdiction and thereby refuse to release the journalists from prison.

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