Judges Discover Politics

SOURCES OF JUDGES' OFF-BENCH MOBILIZATION IN TURKEY

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ABSTRACT

When do judges initiate public action outside the courtroom? What kinds of political activities do they engage in? What are the consequences of their interactions with social and political actors? This article investigates judges' efforts to influence law and policy as opinion leaders, protesters, and network builders. In light of recent devevelopments in Turkey, I argue that intrajudicial conflict, that is, the increasing salience of hitherto dormant tensions inside the judiciary, is the primary source of off-bench judicial mobilization. Participants in off-bench judicial mobilization seek to maintain, reform, or transform judicial institutions in ways that enhance their ideational and strategic goals.

When do judges initiate public action outside the courtroom? What kinds of political activities do they engage in? What are the consequences of their interactions with social and political actors? This article investigates the sources and consequences of judges' efforts to influence law and policy as opinion leaders, protesters, and network builders—efforts I refer to as *off-bench judicial mobilization*. While judicial institutions' expanding role in adjudicating moral and political disputes—a process known as the judicialization of politics—has received considerable scholarly attention, research on legal professionals' direct interventions into politics is usually limited to studies of lawyers (with the important exception of Trochev and Ellett [2014]). The image (and self-image) of judges and prosecutors as disinterested and apolitical providers of justice has perhaps contributed to this neglect; yet, as this article's case study of Turkish judges shows, even a legal culture that has traditionally isolated judges from politics is susceptible to deep transformations under the pressure of a changing political landscape and changes within the judiciary itself.

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I argue that the intensification of intrajudicial conflict, which refers to the increasing salience of hitherto dormant tensions inside the judiciary, is the primary source of off-bench judicial mobilization. Judges' disagreements over judicial independence, political regime, and legal reform are played out in their efforts to influence the public through advocacy, build alliances with political and social actors, and engage in protest politics. Participants in off-bench judicial mobilization seek to maintain, reform, or transform judicial institutions in ways that enhance their ideational and strategic goals. Therefore, their off-bench mobilization results in *judicial reconfiguration*, a process through which the judiciary's power and autonomy within the broader political system are renegotiated by alliances of politicians, civil society networks, and the legal professionals themselves. Judicial reconfiguration does not end intrajudicial conflict: as judicial actors' relative positions keep shifting in the process of reconfiguration, old alliances unravel and new possibilities open up.

Judges and prosecutors rarely, if ever, have uniform interests and values, but the intensification of intrajudicial conflict happens only under certain conditions. I identify extrajudicial opportunity structures, such as the presence of a social or political crisis that requires the attention of legal professionals, as an enabling condition. However, the judicialization of politics is neither a necessary nor a sufficient condition for off-bench judicial mobilization. Furthermore, even when judges and prosecutors become politically salient as a result of high-profile court cases, their off-bench mobilization is not limited to the issue that is at stake in the courtroom.

To assess this theoretical framework, I use the recent political and judicial developments in Turkey as a case study. Turkish judges and prosecutors have become increasingly more active as pundits, civil society activists, and network builders since 2005. A more permissive legal framework and a number of high-court rulings that challenged the Justice and Development Party (Adalet ve Kalkınma Partisi; AKP) government enabled judges and prosecutors to transform the judiciary's self-image of apoliticism and public invisibility. Vocal liberal judges and lawyers supported the government against military and judicial institutions, which were exerting tutelary power over the political process, using the protection of the secular republic as a justification. The intense intrajudicial conflict reached a climax in 2010, when the government, in alliance with supportive legal professionals and intellectuals, proposed the overhaul of the judicial institutions in the form of a constitutional referendum. The judicial reconfiguration that followed the constitutional amendments did not end intrajudicial conflict, however: as the government began to staff high courts and the judicial administration with loyalists, a number of liberal judges ended their alliance with the progovernment judges, and the basic parameters of the intrajudicial conflict were redefined.

The article is organized as follows: Section I explains the article's theoretical contribution by providing an overview of the literature on the sources of judicial mobilization. Section II describes the case selection and data collection methods used for this study. Then I analyze the recent history of judges' off-bench mobilization in Turkey, using

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newspaper and magazine articles, memoirs, academic publications, and civil society reports. I identify three stages of judges' interactions with other political actors: the dormancy of intrajudicial conflict between the 1980 coup and 2005, which marks a period of collusion between the military and high courts; increasing off-bench judicial mobilization in the context of political crisis and intrajudicial conflict between 2005 and 2010; and the reconfiguration of the judiciary in the wake of the 2010 constitutional referendum. The case study demonstrates the dynamics of judicial conflict inside and outside the courtroom, explains the causes and patterns of alliances established around judicial matters, and addresses some of the alternative explanations of off-bench judicial mobilization. The article concludes with a general discussion of the theoretical contribution as well as some observations on the future potential of judicial mobilization in Turkey, given that the main protagonists of the governing coalition, including those inside the judiciary, are drifting apart.

I. JUDGES AS POLITICAL ACTIVISTS

Judges aim to influence lawmakers through their action outside the courtroom in all kinds of regimes, especially those undergoing a period of crisis or transition. From France to Serbia, Zambia to Tunisia, Lebanon to Egypt, Russia to Pakistan, judges have engaged in negotiations, public advocacy, sit-ins, demonstrations, and boycotts in the recent past to halt perceived legislative efforts to weaken the judicial branch (de Haan, Silvis, and Thomas 1989; Berkman 2010; Trochev and Ellett 2014).[1] Drawing on her case study of Spanish judges under the Franco dictatorship, Hilbink (2012, 599) adds that off-bench mobilization can take the form of writing newspaper columns, working on legal literacy programs, speaking on radio broadcasts, denouncing the government's encroachment on legal principles, and proposing legal reform.

At times, judges' withdrawal of support from a regime has the effect of delegitimating that regime further. For example, the Judges' Club in Egypt, an informal organization with a long history of political activism that brings together the majority of the nation's judges (Bernard-Maugiron 2008; Lesch 2011), clashed with President Hosni Mubarak on several occasions. Following the overthrow of Mubarak's regime, they organized a series of sit-ins and protests against the Mohamed Morsi government's attempts to restructure the judiciary, which took place in the month before the July 2013 military coup. Likewise, a controversy with the high court judges that resulted in massive protests by the members of the legal profession in 2007 was among the reasons for the fall of Pervez Musharraf's military regime in Pakistan (Ghias 2010).

There is little systematic research on off-bench judicial mobilization per se. Nonetheless, a number of theoretical approaches examine the increasing political relevance and

1. Also see *Daily Star* (Lebanon), July 19, 2008; *Guardian*, February 10, 2011; *New York Times*, May 29, 2012, October 6, 2012; *Daily News* (Egypt), May 29, 2013; and *Daily Nation* (Zambia), August 10, 2013. Full citations of newspaper articles are in the appendix.

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activism of judges inside (and sometimes outside) the courtroom. In what follows, I will give an overview of the theories that explain judges' political activism and work through the gaps in this line of theoretical inquiry.

A. Judicialization of Politics

Many scholars see a direct link between the judicialization of politics and the political salience of the judiciary.[2] As court decisions adjudicate social and political controversies at an increasing rate (Tate and Vallinder 1995; Stone Sweet 2000; Couso, Huneeus, and Sieder 2011), the political profile of judges on and off the bench becomes a matter of public concern. For some scholars, this raises the fear that "politicization" will amount to little more than politicians' meddling in judicial processes (Domingo 2004; Dressel 2010). Beyond this more pejorative use of the word "politicization," however, the salience of judicial processes can also result in judges' increasing self-awareness that they may influence politics through their rulings as well as through public advocacy. The reason is that judicialization goes hand in hand with the institutional empowerment of the judiciary, which enhances judges' autonomy vis-à-vis the other branches of government and enables them to make bold political pronouncements. In addition to the formal attributes of the regime, the key factors that determine judicial mobilization include politicians' cost/benefit analysis in establishing potentially activist courts (Moustafa 2007b), the degree of political fragmentation (Helmke and Rios-Figueroa 2011), public trust in courts (Smithey and Ishiyama 2002), ideational change (Couso and Hilbink 2011; Hilbink 2012), and court culture, which can be defined as "judges' ideas about law and the judicial endeavor, and the practices they develop as they do their job" (Kapiszewski 2011a, 59). Furthermore, judges' increasing political importance in the courtroom generates a mixture of political backlash and the formation of support networks including civil society and media actors, which creates the conditions for off-bench mobilization (Ghias 2010). Accordingly, one should expect the judges to engage in off-bench mobilization during and after processes of judicial empowerment.

B. Judges as an Interest Group

Another influential model of judicial behavior portrays legal professionals as members of an interest group (Posner and Landes 1975). The interest group model may refer to material interests, but judges are also reported to rule in order to enhance the power and legitimacy of their institution (Kapiszewski 2011b, 477–78). Judges seek to uphold their own professional standing and that of other legal professionals either in a consciously self-interested way or as a result of socialization patterns that leave judges concerned about the status of the judiciary (Barton 2008). Thus, they are likely to engage in off-

2. Tate and Vallinder (1995, 13) define the judicialization of politics as either "the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators . . . or, at least, . . . the spread of judicial decision-making methods outside the judicial province proper."

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bench mobilization in order to defend the rights and privileges of the profession against political encroachments.

C. The Legal Complex

The "legal complex" approach, developed and examined in several coedited volumes by Terence C. Halliday, Lucien Karpik, Malcolm M. Feeley, and coauthors, documents the variety of actors and activities that constitute public judicial action. The authors define the legal complex as "the system of relations among judicial institutions, legal occupations and legal academics in a given society" (Halliday, Karpik, and Feeley 2007, 6). The issues that shape the legal complex at a given historical moment tend to center on the defense of negative liberties. Judicial mobilization may be liberal or illiberal in character (Remus 2011), and the legal professionals may be united or divided in their political stance. As a result, the relationship between the bar and the bench may be mutually supportive or mutually oppositional (Karpik and Halliday 2011, 218). Moreover, scholars adopting the legal complex framework have shown that judges, prosecutors, and legal academics are constitutive elements of legal activism just like political lawyers.[3]

Trochev and Ellett (2014) have conducted the most comprehensive analysis of off-bench judicial behavior in hybrid regimes thus far. Drawing on the legal complex approach, they examine the ways in which judges use a mixture of "secret negotiations with [regime forces], secret mobilization of judicial allies, public relations campaigns, collective protests, and open mobilization of judicial allies" to assert judicial autonomy. Judges' success in achieving their goals depends on the depth and breadth of their networks, which bring together legal professionals, politicians, domestic and international civil society actors, and the media. In their efforts to enhance judicial power, overt resistance to the executive is not the judges' only or primary tool. However, "somewhat paradoxically it is in situations wherein the attacks are most extreme or threatening that judges may be willing and able to go the furthest in terms of resistance" (72).

II. INTRAJUDICIAL CONFLICT AND OFF-BENCH JUDICIAL MOBILIZATION

First and foremost, it should be acknowledged that none of the studies discussed above, with the exception of Trochev and Ellett (2014), takes off-bench judicial behavior as its subject matter exclusively. The judicialization of politics and interest group models tend to examine court rulings, while studies of the legal complex approach deal primarily, though not exclusively, with political lawyering. What follows, therefore, is an attempt to harness existing theoretical frameworks to develop a better understanding of judges' off-bench mobilization rather than criticize those theories in their own terms.

3. The "legal complex" and "cause lawyering" approaches have emerged as contending theoretical frameworks to describe and explain politically motivated legal work. For accounts that compare and contrast these approaches, see Karpik (2007a, 2007b), Hatcher (2009), and Prabhat (2011).

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The judicialization of politics does contribute to judges' political activism, less as a sufficient or necessary condition than an enabling one. Judges are more likely to overcome their self-isolation and perceived apoliticism when conventional political actors appear incapable of resolving or containing political crises. The reason is in part that legal professionals' competence in statutory and constitutional matters opens a window of opportunity for public visibility. In addition, political crisis signals uncertainty about the political regime, which the judges may interpret as an opportunity to transform existing interbranch relations (Helmke 2004) and, I argue, intrabranch relations as well. Finally, crisis situations sometimes create the impetus for off-bench mobilization by affecting legal professionals' job security and reputation directly.

For example, the Egyptian judges' 2005 protest became possible because the judges, who were initially asked to monitor the general elections, were entirely sidelined when the regime realized that it had to resort to fraud to maintain its grip on power (Wolff 2009). This direct experience of political disempowerment fueled the protests. As the case study below illustrates, Turkish judges began to organize themselves and engage in public debates when the political conflict between the AKP government and the civilian/military opposition bloc was played out in high-profile rulings by the Supreme Court of Appeals (Yargıtay) and the Constitutional Court (Anayasa Mahkemesi) between 2007 and 2009, which triggered legal professionals' support for, as well as dissent against, the high courts.

However, even in the case of judicialization, the judges choose the extent to which they participate in off-bench mobilization. There are countries where courts' rising political profile has not necessarily resulted in public advocacy or protest politics on the part of judges (e.g., the United States). Judges' willingness to seize the opportunity for activism varies (Woods and Hilbink 2009, 746) across time and space. Furthermore, exclusive focus on judicialization runs the risk of ignoring intrajudicial dynamics that are at least as influential on conflict and cooperation between legal professionals as the balance of power between the branches of government.

The self-organization of judges as an interest group likewise has some merit in explaining off-bench judicial mobilization: protests in places such as France and Egypt suggest that the concern for wages and benefits can motivate judges to take their grievances to the streets. However, interest group theory falls short on two accounts. First, judges rarely, if ever, protest for bread-and-butter issues only. Evidence shows that public advocacy and protest are framed in terms of judicial independence, democratization, and the provision of justice. Even if some members of the legal profession are co-opted through promises of material improvement, many others continue to protest for political demands. For example, the radical judges' union in France has not limited itself with salary negotiations; it has taken clear positions on major political controversies since the late 1960s and held conferences on "human rights, legislation, prison reform, and class justice" (de Haan et al. 1989, 479). Furthermore, even when judges and prosecutors do ask for material improvement, other issues (such as power relations inside the judiciary) can be so divisive that members of the profession fail to form a united front. Second, the

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interest group theory pays insufficient attention to the divisions within the judiciary. Even if one assumes that judges fight for collective self-interest (i.e., the power, prestige, and material well-being of the profession), judicial politics revolves around precisely the definition of that interest and the distribution of material and nonmaterial resources within the judiciary.

The legal complex approach comes closest to explaining the prominence of intrajudicial conflicts and ideational sources of judges' off-bench mobilization. Legal professionals indeed mobilize for and against political liberalism, which prompts them to establish or join social networks. Yet, the theory should be refined in one fundamental respect: political liberalism, far from a set of undisputed principles, is a source of contention for the actors involved. The conventional definition that emphasizes the rule of law, moderate government, and basic rights is laudable in its parsimony, but legal professionals, academics, and civil society actors often disagree over the basic parameters of what constitutes liberalism, liberal democracy, or liberal reform. For example, self-designated liberal judges and intellectuals in Turkey kept emphasizing civilian government in their reform efforts—perhaps not surprising given the long history of military interventions in that country. Likewise, the definition of *judicial independence*, far from an agreed-on concept, is in fact the main source of contention among reform-minded judges in Turkey. While some stress autonomy from the government as the essence of independence, others underline the relations of hierarchy and domination within the judiciary as the fundamental threat to independence. Given the vast literature on executive encroachments on the judiciary, it may be counterintuitive to find that liberal judges in Turkey saw the government as an ally rather than a threat to judicial independence between 2005 and 2010. Thus, the basic concepts used in the liberal legal complex literature are endogenous to the judicial and extrajudicial struggles for political change.

Judges' political activism is a cyclical process in which social and political crises may serve as enabling conditions insofar as their judicialization triggers mutually reinforcing processes of contention inside and outside the judiciary. It is the nature of the intrajudicial conflict that is likely to determine the parameters of ideational and strategic contention among the members of the legal profession, as well as the kinds of alliances they seek. Conflicts between high-court judges and rank-and-file judges, the administration of judicial institutions, ideology, and disagreements about the interpretation of laws lie at the heart of intrajudicial conflict. As a result, judges get involved in off-bench political activism (negotiations, protest, and public advocacy) and seek alliances inside and outside the judiciary.

The sources of off-bench judicial mobilization are to be found at the confluence of strategic and ideational considerations. Principled ideas appear to be among the most common source of disagreement between judges inside and outside the courtroom. Judges' and prosecutors' organizations frame their off-bench activities in the language of judicial independence, accountability, political stability, human rights, and so forth. However, these principled ideas are not formed in a vacuum; the institutional setup of

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judicial institutions shapes the relative power and position of judges and prosecutors in the system, both as individuals and as members of a profession, which in turn influences their ideas about how the judiciary should be organized. As the example of Turkey suggests, high-court judges presiding over a hierarchical and rigid judicial administration would tend to defend their institution from executive interference while brushing aside the rank-and-file judges' calls to make the judiciary more accountable, whereas the rank and file would frame their objections in the name of intrajudicial democracy and accountability.

As the theoretical framework and the examples provided above suggest, judges' political activism is not an automatic response to broader political developments; even when the judicialization of politics enables off-bench mobilization, it does not determine what the activism will be about. Rather, power relations inside the judiciary have an impact on what judges advocate and protest, toward which ends, and how. Judges and prosecutors rarely act in unison against an overbearing civilian or military government; off-bench judicial mobilization is less a unified struggle than the manifestation of intrajudicial conflict. More often than not, bar associations and legal networks find themselves weakened by factional conflict (Hilbink 2007; Moustafa 2007a). Some members of the legal profession fail to support, and even mobilize against, liberal agendas that are perceived to be against regime interests (Barzilai 2007; Williams 2010).

For example, despite judges' high rates of membership in the Judges' Club in Egypt, ideological divisions persisted, which the Mubarak regime exploited skillfully to its advantage (Moustafa 2007a, 200). Soon after the fall of that regime, disagreements between the judges who held a favorable opinion of the Muslim Brotherhood and those who opposed the movement resurfaced. In Pakistan, the bar was divided along party lines, while the bench appeared supportive of Musharraf's regime; it was only the combined effects of the 2006 bar elections and protests following Musharraf's suspension of Chief Justice Iftikhar Choudhry that consolidated a more or less unified coalition against the regime (Ghias 2010, 990).

Judges and prosecutors in lower courts follow high courts closely. Especially in countries where rank-and-file judges are expected not to disagree with the views promoted by high courts, hierarchical control can be a source of judicial deference as well as a source of resentment on the part of the rank and file. Even though lower courts do not rise up against appellate courts most of the time, under favorable conditions they may defy the dictates from above (Tezcür 2009) and thus expose dormant tensions. The presence of powerful administrative bodies that regulate tenure and promotion decisions accentuates the hierarchical nature of judicial control, as well as the intensity of the intrajudicial conflict under enabling conditions.

Legal professionals engage in political activities as members of broader networks. What determines their choice of allies? Is there a specific pattern that explains the relationship between intrajudicial conflict and the alliance established through off-bench judicial mobilization? It is plausible to argue that judges' material interests, professional

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training, and socialization patterns may encourage them to side with political, economic, or cultural elites. Different formulations of the "hegemonic preservation" thesis suggest that judges tend to identify with a dominant social class or with state institutions in a variety of contexts (Hirschl 2000, 2004). The close relationship between the judiciary and monarchist networks in Thailand (Dressel 2010, 674) and Turkish high courts' long-standing alliance with other state bureaucracies (especially the military) in the name of regime preservation (Shambayati 2002; Belge 2006) are two cases in point.

However, alliances between judicial and nonjudicial actors should not be reduced to the dynamics of hegemonic preservation. Some judges may side with the powers that be, but intrajudicial conflict would encourage others to take an oppositional stance (Ginsburg 2012, 727). Strategic accounts of judicial behavior predict that judges are likely to hedge their bets in moments of heightened political competition and elite fragmentation (Helmke 2004; Ginsburg and Moustafa 2008; Helmke and Rios-Figueroa 2011). By corollary, at least some of the judges who become politically active in the context of a political and social crisis would try to build alliances with nonhegemonic political groups, especially those that may rise to elite status in the foreseeable future. These alliances can, but do not always, reinforce hegemonic actors' grip on power; in most contexts judicial actors defy the existing structures of power and hierarchy inside and outside the judiciary (Tezcür 2009), or shifting alliances with powerful actors expand the judiciary's power through "zigzagging" over time (Trochev 2008).

Finally, the examples of Egypt, Pakistan, and Turkey suggest that alliances between judges and civilian or military bureaucracies, social movements, and politicians do not merely reflect the existing political cleavages in a society. Even if extant political controversies trigger those struggles, judicial actors still frame their arguments from a legal and judicial perspective that does more than mimic the perspectives of their allies and opponents outside the judiciary. Judicial struggles frame the language of social and political contention during processes of judicial reconfiguration. Furthermore, judges' participation in negotiations, public advocacy, and protest does not end intrajudicial conflict; instead, new alliances are likely to emerge under a shifting political and legal landscape.

III. DATA AND METHODS

I use a mixture of in-depth interviews, press archives, academic publications, and civil society reports to reconstruct the recent history of judges' off-bench mobilization in Turkey. I conducted a total of 40 interviews with legal professionals and social and political actors between May and July 2014. I interviewed seven judges and four prosecutors, several of whom were leading figures in the newly established judges' associations. I also interviewed nine lawyers and an additional 20 individuals who were knowledgeable on recent judicial transformations in their roles as civil society activists, politicians, or researchers. I asked each interviewee about his or her role (if any) in, and perspectives on, the recent judicial and political conflicts. The interviews lasted between 45 minutes and over 2 hours.

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Given that media reporting tends to reflect, rather than transcend, the social and political cleavages in Turkey, I rely on diverse sources to collect data. I collected news articles relevant to judicial politics from a number of newspaper sources. Many judges have contributed to *Radikal İki* and *Taraf* frequently. In addition, I performed word searches on the mainstream *Hürriyet*, the progovernment *Yeni Şafak*, and the Gülen movement's *Zaman* newspapers to find relevant news articles between 2005 and 2013. I also analyzed news releases and declarations by the judges' associations and other civil society groups.

I use the collected data to trace the processes through which off-bench judicial mobilization takes place. In particular, three factors are identified: (1) critical junctures that trigger or intensify political and judicial crises and enable judicial mobilization, (2) judges' off-bench actions and interactions with other social and political actors in moments of crisis, and (3) judges' own interpretations of these judicial and political processes.[4] The main goal is to identify the causal processes that explain the emergence of off-bench political activism, to document instances of such activism, and to analyze the ways in which judges reinforce, challenge, or transform conflicts inside and outside the judiciary.

IV. OFF-BENCH JUDICIAL MOBILIZATION IN TURKEY

Until recently, judicial institutions had maintained an appearance of inner harmony in Turkey, despite the presence of dormant tensions. Intrajudicial conflict spurred off-bench mobilization in the deepening political crisis of the mid-2000s that eventually pitted the AKP government against the Constitutional Court and the Supreme Court of Appeals and brought the dormant tensions inside judicial institutions to the surface. A more permissive law of associations as part of the European Union accession process resulted in the formation of the first judges' and prosecutors' organization, which splintered along ideological lines soon after. As the intrajudicial conflict intensified, judicial actors began to engage in off-bench political activism: judges wrote newspaper columns, appeared in television debates, occasionally took part in street protests, and built alliances with politicians, bureaucrats, lawyers, and public intellectuals in the name of struggles for judicial independence, political liberalism, and regime preservation.

Judges, academics, politicians, media groups, and civil society organizations coalesced around two discernible networks: one group identified judicial independence from government as its rallying cause, while the second group was a coalition of liberals and progovernment conservatives who challenged the hegemony of high-court judges and judicial administrators over the entire legal profession. Defying simple models of unified judicial resistance against the overbearing executive, many liberal-minded judges found the AKP government to be a suitable ally against the militant secularist judges who

4. A caveat is in order here. Reflecting the interpretive spirit of this article and keeping in mind that designations and self-designations are among the sources of contention in the politics of the legal complex, I use the descriptors "liberal" and "secularist/Kemalist" only as self-designations.

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dominated high courts and judicial administration. The tug of war between the two camps, fought increasingly with the use of legal and judicial language in political debates, resulted in *judicial reconfiguration*: the 2010 constitutional amendment broke the secularist elite's hold on high courts and the judicial administration. However, the alliance between the government and liberal-minded judges was short-lived, as the conservative elements allied with the government took exclusive control over judicial institutions, ignoring liberals' calls for intrajudicial democratization.

In what follows, I describe the aura of apoliticism among Turkish judges to appreciate better the quick shift that has enabled the recent off-bench mobilization. Then I illustrate the ways in which intrajudicial conflict has shaped the principles for which off-bench mobilization took place, as well as the nature of alliances between legal professionals and outsiders. I pay special attention to the observable implications of alternative hypotheses, such as the notion that off-bench judicial mobilization is simply an offshoot of the judicialization of politics, or that it is aimed at maximizing judges' self-interest.

A. The Apoliticism of Turkish Judges (1982–2005)

It is widely held that the secularist Republican alliance has dominated the judiciary since the early 1960s, when constitutional review was introduced.[5] Aside from an ideology of secularism and statist nationalism (often referred to as "Kemalism" in short),[6] what held the alliance together was a shared identity as civil servants tasked to protect the regime (Koğacıoğlu 2004; Tezcür 2007; Shambayati and Kirdiş 2009). This tutelary position allowed the judges to find common cause and build close connections with bureaucracies holding similar aspirations, most notably the military. Nonetheless, periods of political upheaval triggered splits within the seemingly coherent alliance at times, as witnessed in the high degree of incongruence between the military establishment and high-court judges in the polarized atmosphere of the 1970s (Belge 2006, 658).

The decidedly right-wing military coup of 1980 put an end to the pluralistic and highly polarized picture in the political realm, as well as within the judiciary. The Supreme Board of Judges and Prosecutors (Hakimler ve Savcılar Yüksek Kurulu) was established in 1982 to regulate or, maybe more accurately, discipline the bench.[7] Embodying the undemocratic spirit of the military government (1980–83), the Supreme Board's membership was limited to appellate court judges, the minister of justice, and the undersecretary of the ministry. It lacked an independent secretariat or budget, and the

5. Belge (2006, 656) includes the civilian and military bureaucracy as well as the Kemalist intelligentsia in the alliance. What holds them together is a shared Kemalist worldview. Also see Shambayati (2002).

6. Kemalism, a hegemonic ideology named after the founder of the republic, Mustafa Kemal Atatürk, includes secularism, Westernism, and nationalism as its fundamental tenets. For definitional debates, see Parla and Davison (2004).

7. The new board merged the Supreme Board of Judges and Supreme Board of Prosecutors, two bodies recognized under the 1961 Constitution.

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minister of justice had agenda-setting power in board meetings (Keser and Niyazioğlu 2011, 126–27). Despite repeated calls for the abolishment or dramatic transformation of the Supreme Board, the political momentum for change could not be built before the late 2000s.[8]

Four trends dominated the postcoup judiciary. First, the legality of the coup could not be questioned.[9] Second, court decisions reflected the national security principles adopted by the military-dominated National Security Council.[10] Accordingly, socialist/communist, Kurdish, and Islamist political parties were consistently criminalized. Third, courts failed to prosecute the majority of human rights violations, especially those committed by state agents during the internal conflict with the Kurdistan Workers' Party (PKK) rebels. State security was (and still is) prioritized over civil and human rights in Turkey.

Finally, continuing a long-term trajectory of self-isolation from the public, judges and prosecutors were strongly discouraged from engaging in political activities that went against the interests of the judicial establishment or the military (interview with retired judge Ümit Kardaş, June 18, 2014). Even though court rulings played an important role in shaping political developments throughout the 1990s and early 2000s, high-court judges and the Supreme Board presented themselves as disinterested guardians of the political regime, and most rank-and-file judges chose not to challenge them directly (interviews with judge Kemal Şahin, July 22, 2014, and retired judge Yaşar Yetiş, July 16, 2014). The absence of overt intrajudicial conflict was less a consequence of harmony inside the judiciary than the presence of an unaccountable hierarchy that disciplined unruly judges and prosecutors. However, the conflict surfaced under an auspicious political and legal context.

B. Enabling Conditions: The Judicial Crises (2005–9)

High-profile court rulings assumed the center stage after 2005. Some of them put into question the military's role in politics, while others reflected courts' response to the increasing salience of Islamic references in Turkish politics. In what follows I provide a

8. There were numerous attempts for legal and judicial reform before (and during) the AKP governments. The 1982 Constitution was not fully replaced, but it was amended 18 times between 1987 and 2013, which reveals the degree of disaffection with its content. Legal change accelerated in the late 1990s, when Turkey was recognized as a candidate for European Union accession (see Özbudun 2007; *Zaman*, September 24, 2013).

9. Prosecutor Sacit Kayasu, who made an attempt to investigate the coup-era human rights violations in 2000, was disbarred by the Supreme Board of Judges and Prosecutors in 2003 (interview with Sacit Kayasu, July 17, 2014).

10. The National Security Council (Milli Güvenlik Kurulu) was a product of the 1960 coup, and its powers were expanded after the 1980 coup. The council brought together the military high command and the representatives of the executive in monthly meetings, and the recommendations of the council were binding on the government. An EU accession reform package in July 2003 changed the composition of the council in favor of civilians and eliminated its executive powers by redefining it as an advisory board (Commission of the European Communities 2004, 21–22).

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brief outline of the substance and procedure of these trials and show that each trial process provided an opportunity for dissenting voices in the judiciary to speak out against perceived encroachments on judicial independence and accountability.

On November 9, 2005, a bookstore owned by a former PKK militant in Şemdinli was attacked with a grenade. The locals captured the assailants on the scene, and the resulting police investigation revealed that two of them were members of the Gendarmerie (Jandarma), accompanied by an informer.[11] In addition, the grenades used in the attack were registered with the Gendarmerie. The case pitted prosecutors and judges who sought to investigate the suspects' connection to the military high command against high-court judges bent on dismissing calls for accountability (for a detailed analysis, see Tezcür [2009]).

Soon after Şemdinli, high-court rulings tested the limits of militant secularism and the AKP government's power to resist a hostile judiciary.[12] Because of space limitations, a very brief summary is provided in what follows:

In May 2007, the Constitutional Court invalidated the first round of the presidential election that took place in the parliament on the grounds that the quorum of two-thirds was not met. One year later, the court invalidated a constitutional amendment (Act no. 5735) that expanded the constitution's "equality before law" definition by including freedom from discrimination on the basis of clothing (Uzun 2009).[13] The amendment would have overridden prior court rulings that banned the head scarf in public spaces.[14] The next stage of the legal drama concerned not only the AKP's policies

11. The Gendarmerie is a branch of the Armed Forces that fulfills policing responsibilities outside urban areas.

12. The AKP government's roots in political Islam, liberal reform agenda, and endorsement of the free market cemented a broad-based coalition throughout the 2000s (Gümüşçü and Sert 2009). Yet, it also faced considerable opposition in its early years, especially by individuals and social groups that doubted the party's democratic and secular credentials. The secularist Republican People's Party (Cumhuriyet Halk Partisi; CHP), the military, and high courts opposed the AKP as a bloc (Cizre 2008). Political tension reached a climax in April 2007, when the AKP declared Abdullah Gül as its presidential candidate. Massive antigovernment demonstrations by secularist civilians, called the Republic Protests, signaled a political crisis. While the protests were ongoing, Chief of General Staff Büyükanıt expressed in a memorandum the military's will to defend the secular constitutional order (*BBC News*, April 28, 2007), which was understood to be a thinly veiled threat against the government.

13. The amendment can be found in *Resmi Gazete*, February 23, 2008, no. 26796, p. 1 (http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=TUR&p_classification=01.01&p_origin=COUNTRY). The Constitutional Court ruling is numbered E.2008/16, K.2008/116, June 5, 2008 (http://www.resmigazete.gov.tr/eskiler/2008/10/20081022-15.htm). The court's ruling closed legal venues within the existing constitutional order, but the ban has since been superseded de facto in most universities and public institutions.

14. A 1988 law lifting restrictions on the head scarf (3511 Sayılı Yasa, *Resmi Gazete*, no. 20032, December 27, 2008) was annulled a year later by the Constitutional Court (E: 1989/1, K: 1989/12, March 7, 1989). Another legislative attempt (3670 Sayılı Yasa, *Resmi Gazete*, no. 20679, October 28, 1990) faced annulment by the court in 1991 (E:1990/36, K:1991/8, April 9, 1991).

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but its very existence. The Constitutional Court, which has frequently used its authority to ban political parties to defend the regime against what it saw as separatist, subversive, and religious fundamentalist movements (Koğacıoğlu 2004), was one vote short of banning the AKP. Instead, it ruled that the AKP was a focal point of antisecular activity and ordered to cut much of its public funding (E.2008/1, K.2008/2, July 30, 2008).

Around the same time as the secularism-related rulings, the Turkish judiciary found itself adjudicating the long history of coups, coup attempts, and human rights violations. The country had suffered two full-fledged military coups (1960 and 1980) and two quasi coups in which the military forced civilian governments to resign (1971 and 1997). The military high command's tendency to use alleged antisecular activities, Kurdish separatism, and/or the communist threat as an excuse to intervene into civilian politics is well known (İnsel and Bayramoğlu 2006). It was against this historical backdrop that reports of arrests in connection to a coup plot made the headlines in June 2007. Since then, the *Ergenekon* (named after a legendary valley in Turkish mythology) and *Balyoz* (sledgehammer) trials have shaped political debates.[15] In addition to the alleged coup plots against the AKP government in its first term in office, the prosecutions promised to uncover the history of extrajudicial killings, massacres, mass graves, torture, and forced removals, which mostly targeted civilian Kurds during the internal conflict with the PKK rebels, as well as many leftists, liberals, and members of minority groups at different periods.[16]

The judicialization of politics had a direct effect on a number of legal professionals, thereby exposing the intrajudicial conflict. Some judges and prosecutors were punished

15. The *Balyoz* verdict jailed over 300 defendants, most of whom were retired or active-duty military personnel. The Supreme Court of Appeals upheld the majority of the sentences in October 2013 while acquitting 36 and asking for a retrial for 88. Complaints about due process violations bore fruit in the defendants' appeal to the Constitutional Court: all of the accused were released from prisons in June 2014, pending retrial. The *Ergenekon* verdict in August 2013 sentenced 17 defendants for life, including former Chief of Staff İlker Başbuğ, and handed harsh sentences to the majority of the 275 defendants, among them military personnel and civilians (*BBC News*, August 5, 2013). Some of the accused have won appeals since then.

16. At the risk of oversimplification, there were three kinds of opinions. For the supporters of the prosecution, the trials represented nothing less than a rule-of-law revolution, as scores of retired and active-duty military personnel, including generals, faced judicial accountability for the first time in the nation's history. One commentator even called the *Balyoz* trial Turkey's "Nuremberg" (*Radikal*, September 23, 2012). Their critics dismissed the trials as a campaign to discredit and demoralize the Armed Forces, whose guardianship of the regime disturbed the Islamist AKP government. A third opinion agreed in principle with judicial accountability for coup attempts and human rights violations but expressed skepticism with the way the prosecution was handling the case. Many commentators pointed to the long pretrial detention periods, the collection of evidence through wiretapping and the surveillance of electronic communications, and the hastily prepared and lengthy indictments, which contained information that was at best tangentially related to the cases at hand (Park 2009; Unver 2009). In the end, the sympathetic critics have considered the trials a missed opportunity in Turkey's coming to terms with its past (*New York Times*, August 6, 2013).

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by their colleagues because they were on the "wrong" side of the dividing line. İlhan Cihaner, a prosecutor accused of having ties to the "deep state," was arrested, only to be reinstated by the Supreme Board of Judges and Prosecutors (*Economist*, February 27, 2010). The *Balyoz* and *Ergenekon* defendants complained about the courts' arrest warrants when trial without arrest would have been a viable option (*Hürriyet*, June 18, 2010). In sum, much of the legal drama took place outside the courtroom, as all parties to the conflict were trying to remove the legal professionals perceived as obstacles.

Before I close this subsection, another important enabling condition should be acknowledged: Article 16 of the Law of Associations (1983) (2908 sayılı Dernekler Kanunu) prohibited judges and prosecutors from establishing civic associations. In line with the spirit of the 1980 military coup, the law projected the fear that civil society activism would compromise civil servants' professionalism and impartiality. The law was at odds with international norms concerning the freedom of assembly. As part of Turkey's EU compatibility reforms, a new Law of Associations (5253 sayılı Dernekler Kanunu) lifted the ban in 2004 (Özkorkurt 2008).

C. Intrajudicial Conflict: The Formation and Splintering of Judges' and Prosecutors' Civic Associations

The Judges and Prosecutors Association (Yargıçlar ve Savcılar Birliği; YARSAV) was established as the first civic association for judges and prosecutors in June 2006. YARSAV's self-stated goals can be summarized as follows: ensuring judicial independence and impartiality; promoting respect for human rights and the rule of law; protecting ethical conduct; defending judges' interests in hiring, training, and promotion processes; and improving the living conditions of judicial professionals.[17] Although it was an umbrella coalition of different political views, the Kemalist judges and prosecutors were the clear majority (interview with Leyla Köksal Tarhan, secretary-general of YARSAV, June 26, 2014). YARSAV consistently emphasized the importance of judicial autonomy from government or, to be more precise, from the AKP government. It held that the authority to appoint legal professionals should be transferred from the Ministry of Justice to the Supreme Board of Judges and Prosecutors.[18] YARSAV has since criticized the government and its allies, especially the powerful Gülen movement, for undermining judicial inde-

17. "Yargıçlar ve Savcılar Birliği Derneği Tüzüğü" (http://www.yarsav.org.tr/index.php?p=217).

18. For example, the association made a successful appeal to the Council of State to suspend a ministry-administered exam to appoint judges and prosecutors in 2006 (Yüksel 2012, 88), but the victory was short-lived: after a minor legal battle in which the Constitutional Court upheld the ministry's decision and the Council of State subsequently suspended yet another appointment exam, the relevant regulations were amended to set the ministry's right to appoint legal professionals on firm legal footing. For the ministry's public announcement on the amendments, see http://www.pgm.adalet.gov.tr/duyuru/yeniadli_ilan_mart07.htm.

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pendence by pressuring judges and packing courts.[19] YARSAV's call for independence from government interference has found support from the secularist opposition. Former chairwoman of the association, Emine Ülker Tarhan, was elected as a member of parliament from the secularist CHP in 2011.

Some other judges (not to mention the government), on the other hand, have regarded YARSAV as the judicial wing of the secular-republican old guard that sought to undermine the democratically elected government through a "judicial coup" (*Newsweek*, April 5, 2008). It was in the context of increasing polarization within the judiciary between 2005 and 2009 that a rival organization to YARSAV was born. Intellectual exchanges between liberal-minded legal professionals who had been publishing their views on law, politics, and society in national newspapers since 2005 culminated in the Association of Judges and Prosecutors for Democracy and Freedom (Demokrasi ve Özgürlük İçin Yargıçlar ve Savcılar Birliği; Demokrat Yargı) in late 2009. As some of its founders later described, it was a "contentious coalition" between leftists and the religious conservatives (*Express*, 2011). The founding members were known to be vocal critics of the judges and prosecutors who sought to ban the AKP and entrench impunity for state personnel. Among the founding members was Osman Can, who had resigned from YARSAV 1 month before. Can had become a rising star among the liberal and progovernment circles for his views against the proposed ban on the AKP in 2008 and his advocacy for a new constitution (*Today's Zaman*, January 10, 2010).

Demokrat Yargı's founding principles expressed some priorities that were markedly different from YARSAV's, such as the end of military tutelage, the reorganization of the Supreme Board of Judges and Prosecutors, and equal rights for judges of all degrees (*Haber Türk*, December 17, 2009). The new association strongly condemned past military coups and constitutions promulgated under military regimes. Aside from upholding judicial independence, two warnings in the founding document stand out: first, powerful judicial institutions have often justified their disrespect for democratic political processes with the claim that high courts are outside (or beyond) politics. This feigned apoliticism, far from protecting judicial impartiality, has served as an ideological fig leaf for their political interventions. Second, judicial decision making should be understood

19. The Gülen movement is a faith-based political and business network, led by cleric Fethullah Gülen. The movement emphasizes faith-driven service (*hizmet*) and has focused on acquiring clients and recruits through private university preparation courses in Turkey and Turkish-language high schools in parts of Central Asia and Africa. Its embrace of nonviolent Sunni Islam and interfaith dialogue has appealed to sympathetic Western audiences in the post-9/11 context. Its tendency to organize in the media and education sector, and avoid political confrontations with the powers that be, has won much praise while also raising suspicions that the movement was attempting to infiltrate key political institutions (like the police and the judiciary) without provoking a backlash from the political or military elites. The movement and the AKP were allies in their common defense of limited liberal reform and social conservatism, but their relationship has deteriorated since 2012 (*Tanyeri*, November 2010, 16–23).

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as a responsibility toward the people rather than a right over them (*Zaman*, December 17, 2009). Therefore, accountability to the public and its elected representatives should be restored.

In line with these principles, Demokrat Yargı members' public statements conveyed the message that relations of domination within the judiciary, rather than government interference, constituted the chief threat to judicial independence in Turkey. Judicial reform had to target the oligarchic countermajoritarian structure within and around the judiciary that used high-court activism to counteract legislative initiative, uphold illiberal legal norms, and stifle dissenting judges and prosecutors. Its advocacy for change found resonance among government circles, as the AKP leadership faced aggressive opposition by the high courts in the mid-2000s. The government and liberal judges found common cause in dismantling the old guard.

The creation of a rival judges' organization almost immediately after the formation of the first one confirms three key insights into off-bench judicial mobilization described in this article: first, judges and prosecutors rarely, if ever, see themselves as a united front against the other branches of government. Intrajudicial conflict is likely to be the driving force of off-bench judicial mobilization. Second, shared material and professional interests are not the sole or primary motivation for off-bench mobilization, which explains why YARSAV's emphasis on improving members' living conditions did not stop many members from splitting. Third, dormant intrajudicial conflict becomes visible only under an auspicious legal and political context that empowers oppositional elements inside the judiciary to redesign judicial institutions through activism.

D. Off-Bench Political Activism in Action

The judicialized conflicts between 2005 and 2009 reveal the logic of network-building activities in and around the judiciary. The 2005 Şemdinli incident, and especially the disbarment of the first prosecutor investigating the case, was the first test for the fledgling judicial associations. Would judges and prosecutors stand up for their colleague, or would they concur with the Supreme Board's decision that prosecutor Sarıkaya had abused his authority by implicating the military high command? Public debates on Şemdinli reflected a neat dividing line: the military high command, the CHP, and Kemalist pundits supported the Supreme Board, while liberals and progovernment sectors spoke against the disbarment. The predominantly Kemalist YARSAV was notably silent throughout, which was interpreted as giving the board's decision tacit consent.[20] The judges who would later establish the self-identified liberal Demokrat Yargı criticized

20. The only document that cites the Şemdinli case on YARSAV's website is a press release dated August 27, 2011. The document does not state an opinion on that case; instead, it criticizes the vocal defenders of the Şemdinli prosecutor who fell silent in the face of the disbarment of a prosecutor who was investigating a corruption chain with alleged ties to government circles ("Deniz Finery Soruşturmasını Yürüten Cumhuriyet Savcılarının Görevden Alınması Hakkında Basın Açıklaması," http://www.yarsav.org.tr//index.php?p=264).

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YARSAV's silence. Orhan Gazi Ertekin, the cofounder of Demokrat Yargı, expressed support for the activist judges and prosecutors who stood up against higher-ups (*Zaman*, April 3, 2008).

YARSAV's website contains no documents between March 2007 and April 2009, when the major legal battles over secularism and the AKP took place. However, the association's president, Ömer Faruk Eminağaoğlu, maintained a public presence throughout the debates. He opposed the constitutional amendment to lift the head scarf ban (*Hürriyet*, January 29, 2008) and supported the Constitutional Court's annulment decision, arguing that only a constituent assembly should have the authority to make changes concerning the irrevocable principles of the constitution (*Hürriyet*, June 9, 2008). He was a member of the prosecutorial team that prepared the indictment in the AKP ban case. In turn, the government wiretapped his communications to explore his connections with the alleged coup plots. In 2009 the Ministry of Justice asked for his disbarment, but the judge who saw his case, Osman Kaçmaz (who later became a YARSAV candidate for the Supreme Board of Judges and Prosecutors), cleared him of charges (*Milliyet*, February 9, 2010). Kaçmaz himself faced charges of abusing his authority and violating secrecy during criminal investigation. Clearly, there was an intense struggle between the Kemalist judges and the government in those years.

The judicial crises of 2007–8 highlighted the role of liberal intellectuals in legitimizing the AKP government in the eyes of domestic and international observers who were too keen to interpret the developments through the false dichotomy of secularism versus Islamism. Instead, the liberals argued, the judicialized conflicts were a power struggle between the old and the new elites, and the moderate Islamists deserved liberal support (see, e.g., Alpay 2008).[21] Demokrat Yargı members wrote frequently in self-designated liberal newspapers such as *Taraf* and *Radikal*, as well as progovernment dailies, including the Gülen community's *Zaman*.

In addition, liberal judges supported the prosecution in the *Ergenekon* and *Balyoz* trials in the beginning. When high courts and the judicial administration began to punish the judges and prosecutors who saw these cases, Demokrat Yargı members declared their support for their colleagues in trouble (*Zaman*, June 17, 2010). It was only after the breakup of the conservative-liberal coalition that Demokrat Yargı took a critical stance toward the coup trials.

In sum, judges' and prosecutors' advocacy, protest, and networking followed a clear pattern between 2005 and 2010: the YARSAV members represented the opposition to the AKP government and made judicial independence from the government their rallying cry, while the self-designated liberal and conservative judges and prosecutors, some of

21. Osman Can, cofounder of Demokrat Yargı, was an active player in the AKP ban decision: as the reporting judge of the Constitutional Court, he argued against the proposed ban on the AKP, dismissing the prosecution's claim that the party threatened the secular order. Consequently, he became a hero among the progovernment circles but was dismissed from his university position.

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them Demokrat Yargı members, supported the government's efforts to fight back the high courts and reconfigure the judiciary.

E. Judicial Reconfiguration (I): The Constitutional Amendment of 2010

Since the 1980s many legal professionals and scholars had recommended redesigning the judicial institutions to end the hegemony of the self-perpetuating high-court oligarchy. As described in the section above, intrajudicial democracy was the principle that motivated the off-bench political activism of liberal and progovernment judges and prosecutors in the 2000s. With a sympathetic government, judicial reconfiguration became a real possibility in 2010.

The AKP leadership had promised to draft a new, civilian and democratic constitution since its founding, but the idea had not met with success, in part as a result of opposition to the party's rule and in part owing to disagreements within the party.[22] In early 2010, the government announced a new approach to constitution making. While the commitment to ratifying a new constitution in the future was not abandoned, the proposal at the time was to amend more than 20 articles of the 1982 constitution to expedite the democratization process. The constitutional amendment proposal covered a host of issues ranging from lifting the impunity of the makers of the 1980 coup to socioeconomic rights (Bali 2011; Özbudun 2012). Redesigning the judiciary was at the heart of the amendments. Four sets of proposals stood out in this regard: (1) changing the size and composition of the Constitutional Court and the Supreme Board of Judges and Prosecutors, (2) introducing an appeal process for some Supreme Board and military court decisions,[23] (3) allowing individual citizens to make personal applications to the Constitutional Court, and (4) restructuring the jurisdiction of civilian and military courts in favor of the former.

The Constitutional Court did not veto the reform proposal, as feared, but took the issue to a popular referendum (*Milliyet*, June 13, 2010; E.2010/49, K.2010/87, July 7, 2010). The referendum took on a political significance beyond the content of the proposed changes because the AKP leaders portrayed the vote as a giant step toward what they called "advanced" democracy. There was no shortage of revolutionary metaphors:

22. As promised in its 2007 election campaign, the AKP government appointed a commission of liberal-minded constitutional scholars to draft a new constitution to replace the undemocratic 1982 text. The commission delivered a draft constitution, which, among other things, proposed to democratize the selection procedure for high courts and the judicial administration and introduce an appeals process for the decisions made by military courts and the judicial administration (Arslan 2007). Despite the initial euphoria, however, the constitutional project fell off the agenda in 2008. Those sympathetic to the government pointed to the interventions of high courts to explain why the government had no time or energy to pursue a constitution project. Ergun Özbudun, one of the members of the AKP-appointed constitution commission, and Ömer F. Gençkaya note that in addition to the judicial crises, "possibly some differences of opinion within the [AKP] itself caused the project to be silently shelved at least for the time being" (Özbudun and Gençkaya 2009, 105).

23. The amendments ensure judicial review only for the board's impeachment decisions (Keser and Niyazioğlu 2011).

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declaring his support for the referendum process, Osman Can once referred to the overall social and legal change around 2010 as Turkey's 1789 moment (*Zaman*, April 17, 2010, August 29, 2010). The secularist opposition campaigned against the referendum, arguing that the reconstruction of the judiciary amounted to government takeover rather than democratization. The Kurdish political movement, dismayed by the absence of proposals regarding Kurds' cultural rights, campaigned for a boycott. All eyes turned to liberals, who had few votes to contribute at the national level but could play a critical legitimating role for the government. Liberal intellectuals and judges had thus far maintained the progovernment alliance against bureaucratic and military tutelage yet expressed disappointment with the limited amendment proposals (*Guardian*, September 4, 2010). Most liberal public figures, including the leadership of Demokrat Yargı, declared that they would support the amendments under the motto "not enough, but yes" (*yetmez ama evet*; *Taraf*, July 2, 2010).

The referendum was ratified by 58% of the voters on September 12, 2010. A new beginning for the judiciary was under way.

F. Judicial Reconfiguration (II): The Supreme Board Elections and the End of the Conservative-Liberal Coalition in the Judiciary

The election for 10 seats on the Supreme Board of Judges and Prosecutors was the first step following the constitutional amendments. It was the first time that judges and prosecutors working at lower-level courts could vote for the board members. The democratic transition of the Supreme Board was off to a rough start, however. The Supreme Electoral Council (Yüksek Seçim Kurulu), a body that regulates and monitors elections in Turkey, imposed a propaganda ban on candidates. The decision eliminated the possibility that individual candidates' principled ideas would influence the vote and increased the likelihood that voters would choose candidates on the basis of vaguely defined blocs. It was in this context that rumors of an unofficial list of candidates, preferred by the Ministry of Justice, began to circulate.

The election was held on October 17, 2010. The progovernment candidates won all the seats (*Hürriyet*, October 18, 2010; *Taraf*, October 18, 2010). Deputy secretary of the Ministry of Justice and allegedly the person behind the ministry list, İbrahim Okur, received the highest vote. YARSAV and Demokrat Yargı failed to send members to the board. Thus, the election signified not only the triumph of the progovernment camp within the judiciary over the antigovernment camp but also a rift within the coalition for judicial reform: individuals more closely aligned with the government claimed the victory for themselves, while the liberals were sidelined.[24]

24. Then Minister of Justice Sadullah Ergin and ministry bureaucrats defended the election process and the results (*Hürriyet*, October 18, 2010). They argued that judges' associations such as YARSAV and Demokrat Yargı did not speak to the ideas or aspirations of most legal professionals, and that was why they lost in the elections.

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The board elections complicated intrajudicial politics. Not surprisingly, YARSAV regarded the election results as a confirmation of their suspicion that the government was eroding judicial independence by taking over judicial institutions. It was not only YARSAV that protested, however. Many judges who had supported the 2010 referendum expressed disappointment with the postreferendum victory of ministry bureaucrats and subsequent developments in the judiciary (*Taraf*, December 15, 2011, December 19, 2011). Despite repeated denial by the Ministry of Justice, the smashing victory of ministry-affiliated judges was attributed to ministerial interference during the campaign process. Many blamed the Gülen movement for placing sympathizers in key judicial positions (*Taraf*, October 15, 2010, February 9, 2013).

Many members of Demokrat Yargı, the government's ally until several days before the board election, cried foul.[25] Demokrat Yargı judges accused the Gülen movement of orchestrating a court-packing campaign that rewarded loyalists to the movement while screening out liberals, leftists, and Alevis—in general, candidates who were not government loyalists (*Radikal İki*, August 25, 2013). The change of personnel in the Supreme Court of Appeals in mid-2011, in which a list of 160 candidates replaced outgoing members, reinforced Demokrat Yargı's belief of court packing (*Hürriyet*, July 3, 2011). The confrontation with the new board deepened the rift within the association: Osman Can, one of the founding members, left Demokrat Yargı. He joined the AKP in September 2012, was appointed to the party's central decision-making and administrative board (*Zaman*, September 27, 2012), and became a member of parliament in 2015.

YARSAV and Demokrat Yargı participated in the judicial reconfiguration process as rivals, but the first intrajudicial elections left both of these groups sidelined. Despite the apparent similarity in their position, the members of these groups diagnosed the shortcomings of judicial reform differently: while YARSAV saw the judicial reconfiguration following the 2010 amendment as a confirmation of their fear of government takeover, Demokrat Yargı members blamed the outcome on a mixture of court packing and an impoverished judicial culture that failed to assert its professional and political autonomy from the bureaucracy (*Yeni Şafak*, October 20, 2010). For YARSAV, judicial reform was overpoliticized, whereas for Demokrat Yargı, the failure owed to a lack of independent political thinking. The fragile judicial institutions became battlegrounds for political actors because they lacked self-identity or collective institutional memory, argued Demokrat Yargı judges.

Both organizations have continued off-bench judicial mobilization since the 2010 referendum. Although they are the only major organizational actors, the recurring

25. The internal strife within the association had to do with the nature of cooperation with the Ministry of Justice. According to Orhan Gazi Ertekin, the majority rejected Osman Can's suggestion to draw a list of candidates with the ministry, opting instead for an independent bloc. In addition, he cites disagreements within Demokrat Yargı to explain Can's resignation. Can, on the other hand, holds that he resigned because he did not want to take part in a judges' association after his decision to leave his post at the Constitutional Court (*Taraf*, November 1, 2010; *Zaman*, December 1, 2010).

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elections for the Supreme Board and the Supreme Court of Appeals, as well as recent political developments, have accentuated other dormant conflicts inside the judiciary and have forced former alliances to break up. It is too soon to analyze the implications of recent events on judicial institutions, but the government's recent crackdown on judges suspected of sympathizing with the Gülen movement, a former ally of the government until the fallout in late 2013, suggests that the after-effects of judicial reconfiguration, far from normalizing the judicial institutions, will reinforce intrajudicial conflict.

The case study of Turkey confirms the main argument, that is, off-bench judicial mobilization can result from tensions inside the judiciary, and aims to reconfigure judicial institutions. It is true that the judicialization of politics between 2005 and 2010 enabled off-bench mobilization, but, as the theoretical framework suggests, the issues for which judges and prosecutors mobilized (i.e., judicial reconfiguration) went beyond the content of high-profile court cases (i.e., the head scarf issue, the party ban, and military coup plots). The mobilization did not reflect the dynamics of interest group politics either: while most judges tended to agree on improving their well-being and the power of the profession, these issues did not figure prominently in their public statements and certainly did not lead them to form a united professional front against the other branches. Finally, the Turkish case suggests that judges and prosecutors do not understand off-bench judicial mobilization to be a zero-sum game between the branches of government. The alliances among legal professionals, politicians, intellectuals, and the media reflected the divisions inside the judiciary, and at least some judges saw the AKP government as their ally before and after the 2010 constitutional referendum.

V. CONCLUSION

This article is an attempt to document judges' off-bench activities as opinion leaders, protesters, and network builders, and to uncover the causes and consequences of these activities. Extrajudicial processes do not determine judges' activism mechanically, but the judicialization of social and political conflict is likely to enable judges to take a political stance. In the specific case of Turkey, judicial mobilization sought to transform high-court judges' portrayal of the profession as an apolitical enterprise. Disagreements over the meaning of judicial independence, and judges' shifting alliances with a host of political, military, and civil society actors, shaped the dynamics of off-bench mobilization. This activism has had consequences: procedures of judicial appointment, as well as the relationship between the government and the judiciary, were altered dramatically between 2010 and 2014, though not necessarily in the ways anticipated by many of the judges themselves. For all the twists and turns the justice system has lived through recently, one development appears irreversible: judges have become visible members of the public sphere.

What does the future hold for Turkey? As of this writing, the governing AKP and the Gülen movement are in a fierce struggle for power. Between December 2013 and mid-2015, tens of judges and prosecutors and hundreds of police officers found themselves

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sacked or demoted. Suspecting the hegemony of Gülen supporters in the post-2010 judiciary, the AKP is looking for ways to re-restructure the Supreme Board of Judges and Prosecutors. Do these developments signal total executive takeover and, consequently, the end of meaningful judicial mobilization in Turkey?

There is every reason to be pessimistic, but the recent politicization of the judiciary in Turkey may have unforeseen positive consequences. There is now a generation of lawyers, judges, and prosecutors who have taken part in the struggles over judicial reform, in stark contrast to the (feigned or real) apoliticism of the past. They have exercised agency on and off the bench and experienced the pros and cons of building alliances with extrajudicial actors. For some of them the recent political developments may have provided an opportunity to curry favor with the government, but most have witnessed personal and institutional setbacks. If these legal professionals resist co-optation by powerful political actors in the future, it is perhaps possible that this period in Turkish judicial history will usher in a judiciary that is genuinely independent in its thinking and acting.

The theoretical framework presented here yields important implications for other contexts, too. First, judges' off-bench activities should be incorporated more directly into the scholarship on law and courts in other countries, not least because these activities can shape who gets promoted to high courts and the judicial administration, and under what terms. Second, the scope conditions need to be rethought. Judges engage in contentious politics under democratic regimes (e.g., France), as well as authoritarian (e.g., Pakistan under Musharraf) and hybrid ones. This paper argues that intrajudicial conflict is the driving force of off-bench political activism in Turkey (and perhaps elsewhere) and that the presence of a social and political crisis serves as an enabling condition. Beyond this general claim, cross-national variation in terms of the specific goals, content, and intensity of off-bench judicial mobilization is likely subject to scope conditions, which should be uncovered by comparative research in the future. And finally, in a world where the language of the law shapes political discourse almost everywhere, this article's contention that not only court rulings but also the increasing political activism of judges brings a legal and judicial perspective to political conflict can offer a nuanced analysis of the relationship between courts and politics.

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