

A COMPREHENSIVE REPORT ON THE ABOLITION OF  
RULE OF LAW IN TURKEY

2017

NON-INDEPENDENCE AND NON-  
IMPARTIALITY OF TURKISH  
JUDICIARY



PPJ

Platform for Peace and Justice

*This report is written by a group of human rights lawyers and activists for the persecuted victims of the heinous coup attempt of the 15th of July 2016 who – although they had nothing to do with it – were dismissed from their jobs, sentenced to civil death, detained and/or arrested, and could not use lawyers because they could not afford to. The report is predicated on concrete evidence that there is no effective domestic remedy in relation to applications to the ECHR and other international organizations with respect to ECHR articles 6 and 10.*

# NON-INDEPENDENCE AND NON-IMPARTIALITY OF TURKISH JUDICIARY

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## INTRODUCTION

1. This report was written based on actual events that have occurred in the Turkish judiciary, in particular, since January 2014, **focusing on the courts that deal with criminal cases and the Constitutional Court.** Criminal jurisdiction is carried out by the courts in the three-tier judiciary system: Criminal and Assize Courts of First Instance (First Tier), Regional Courts of Justice Criminal Chambers<sup>1</sup> (Second Tier), and the Court of Cassation (Third Tier). In addition, the Constitutional Court is the last instance court where individuals can apply for violations of fundamental rights in criminal cases. The first and second tier courts were under the supervision of the High Council of Judges and Prosecutors (hereinafter ‘HCJP’ or ‘HSYK’).
2. These courts have been operating under the authority of the Council of Judges and Prosecutors (HSK), the name of which was changed after the amendment to the constitution dated the 16th of April 2017 and which has 13 members. Therefore, independency and impartiality of the first and second tier courts should be evaluated taking into consideration the proceedings of the HSYK and HSK after the 16th of April 2017. The HSK (formerly known as the HSYK) assigns and dismisses the judges and the members of these courts and makes decisions on their careers, deciding, whether or not, they should be promoted.
3. Again, the HSK is the authority that gives permission to carry out disciplinary and criminal investigation concerning these judges. All disciplinary penalties against judges including dismissals are decided by the HSK. The members of the Court of Cassation and the Council of State are appointed by the HSK, too. **In summary, as it is stated in the Venice Commission report dated the 13th of March 2017, the power that controls the HSK can control the Turkish judiciary as well<sup>2</sup>.**

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<sup>1</sup> Regional Courts of Justice Criminal Chambers were enacted as of the 20<sup>th</sup> of July 2016.

<sup>2</sup> See the Venice Commission, “*Turkey - Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on the 21<sup>st</sup> of January 2017 and to be submitted to a national referendum on the 16<sup>th</sup> of April 2017*” (Opinion No. 875/2017), dated the 13<sup>th</sup> of March, 2016, para 114.

*An organ that is not impartial and independent particularly vis-à-vis the executive branch does not deserve the title of 'court' although it may be named as such (Beaumartin v. France – Chevrol v. France).*

4. As for the Court of Cassation, all members of this high court are assigned by the General Assembly of the HSK. The disciplinary investigations concerning the members of the Court of Cassation are carried out and resolved by the court's own bodies. The members of the Constitutional Court are chosen in accordance with the provisions of the Constitution, and all disciplinary and criminal investigations into the members including dismissals are carried out and resolved by the Constitutional Court.
5. Any individual charged with a crime within the scope of Article 6 of the ECHR has the right to a fair trial, one of the most important aspects of which is the right of access to a court. Such a charge may include not only an administrative penalty (Öztürk v. Germany) but disciplinary penalties (Engel and others v. The Netherlands), pecuniary penalties and imprisonment as well. All such trials fall within the 'criminal limb' of Article 6 of the ECHR.
6. Access to a court entails above all the availability of courts as per ECHR Article 6. Another sine qua non for a court is that it must be established previously by law (Coëme and others v. Belgium - Lavents v. Latvia) and must be impartial and independent (D.N. v. Switzerland - Nikolova v. Bulgaria, para. 49). **If there is no independent, impartial and pre-established court of law, the right of access to a court cannot be guaranteed because there is no 'court' to apply to in the sense the ECHR interprets it.** In such circumstances, it cannot be said that there is an effective remedy that can be exhausted in domestic law. None of the abovementioned domestic remedies has the quality of 'established by law' and/or 'independence and impartiality'. Therefore, first and second tier judiciary branches as well as the Court of Cassation and the Constitutional Court are ineffective in violations of access to court and fair trial in the broadest sense.
7. Also, for domestic remedies to be considered effective within the scope of Article 13 of the ECHR, courts must be independent, in particular from the executive (Kayaşu v. Turkey - Özpınar v. Turkey). The legal paths described in the domestic law are ineffective unless they are impartial and independent especially from the executive branch that is charged with the violation. **Ineffective, unworkable and inappropriate legal procedures that cannot possibly offer any remedy should not necessarily be exhausted before taking the cases to international tribunals such as the ECHR and the UN Human Rights Committee.**

*The members elected to the HSYK from the pro-government YBP list were in a relationship with the executive branch that conflicted with the principles of 'judicial independence and separation of power'.*

8. Whether courts are independent or not can be evaluated by considering several criteria such as the manner of appointment of judges, their term of office, existence of guarantees against outside pressures, and appearance of independence (Findlay v. The United Kingdom, § 73). According to the ECHR, the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (art. 6-1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence, provided that, it is in fact recognized, and that the other necessary guarantees are present” (Campbell and Fell v. The United Kingdom, § 80 - Lauko v. Slovakia, § 63). **Removing a judge from Office before his/her term of office violates judicial independence and the principle of rule of law.** As a general principle, judges may leave their post before their term of office if they are appointed to a higher court or if they make a request to do so. As for their removal as a result of disciplinary probes and dismissal from work, “Judges can be suspended or dismissed only if their incompetence or criminal behavior depends on very serious justifications and concrete findings and only after a fair trial.”
9. Any individual charged with a crime within the scope of Article 6 of the ECHR has the right of access to an independent and impartial court established by law. All these guarantees must be ensured by trials at first, second and third tiers of judicial organs as well as the Constitutional Court. **The data, findings and events below indicate that each of these courts lacks all the said qualifications and requires that the criteria for exhausting domestic remedy and the merits of the complaints should be reconsidered.**
10. We will deal first with issues that influence, or rather eliminate, the independence and impartiality of courts of first and second instances, which were related to the HSYK and now to the HSK, and then reveal facts that attest to the elimination of independence and impartiality of the Court of Cassation and the Constitutional Court.

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**FACTS REVEALING THAT NEITHER THE HSYK (HSK)  
NOR THE COURTS OF FIRST AND SECOND INSTANCES  
ARE INDEPENDENT**

11. The HSYK (now the HSK) appoints chief judges and members in the first and second tier criminal courts, decides on their promotion and dismissal, and holds the right to open disciplinary and criminal investigations and impose disciplinary penalties. If the HSYK, which governs courts of first and second instances, is not independent, then the independence of the courts is in serious jeopardy. For this reason, Article 159 of the Constitution states that, “*The High Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges.*” Therefore, the independence and impartiality of the courts of first and second instances must be evaluated with respect to the actions of the HSYK, which affect first instance judges (including those in administrative courts) and second instance judges (including those in regional administrative courts). To summarize, a serious action by the HSYK against a judge working in any court in the first two instances (such as dismissal because of a decision) will be of particular concern to all other judges in the same levels. Therefore, the actions of the HSYK related to judges in both the first and second tier judicial organs (criminal justice-administrative justice) should be taken into account as a whole.

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**THE FORMATION OF THE HSYK AFTER THE  
ELECTIONS OF THE 13TH OF OCTOBER 2014**

12. With the Constitutional Amendment that went into effect after the referendum dated 12.09.2010, the structure of the 7-member HSYK was changed to include 22 members. The amended Article 159 stipulated that the majority of HSYK members be elected from among judges in trial courts and higher courts by the same judges and the HSYK elections be held every four years. Of the 22 members, 10 were elected by judges and prosecutors in the first instance courts, 3 from among the Court of Cassation and 2 from among members of the Council of State. Four members were appointed by the president, and 1 by the Turkish Justice Academy General Assembly. The Minister of Justice chairs the board and the Ministry of Justice Undersecretary is a natural member of the board.

13. When the terms of the members from the elections dated 13.10.2010 came to an end, a new election was held by members of the judiciary in the first instance courts on the 13th of October 2014 to choose 10 members. Before the elections, the allegedly pro-government Platform for Unity in the Judiciary (YBP) announced their group of candidates from among judges and prosecutors.
14. Immediately before the elections, Mahir Ünal and Mustafa Şentop, parliamentary group deputy chairmen of the AKP, announced that **they would not recognize the results** if the candidates on the YBP lists lost the elections<sup>3</sup>. Moreover, the Minister of Justice, Bekir Bozdağ declared that **the salary of judges and prosecutors would be increased by 1,000 TL if the candidates on the YBP lists won the elections.**
15. The bureaucrats in the Ministry of Justice who used to be judges and prosecutors were officially appointed to provincial courts to run campaigns for the candidates on the YBP lists. The ministry officials visited the judges and prosecutors in courthouses and demanded that they vote for the YBP candidates. During these campaigns, they used state-owned vehicles and enjoyed the advantages provided by provincial governments.
16. On the 4th of October 2014, the Prime Minister, **Ahmet Davutoğlu hosted YBP representatives in his office, revealing his support for the group.** Following their meeting with the Prime Minister, the YBP representatives announced that they “*would be working in harmony with the executive*”, **raise the salary of judges and prosecutors by 1,000 TL, issue a pardon for judges and prosecutors** who had received disciplinary penalties and thus grant a complete pardon for about 1,500 members of the judiciary<sup>4</sup>, and increase the number of members in the Court of Cassation and the Council of State. These promises, all of which required legislative action, took place before the eyes of the public.
17. The YBP candidates, who promised to work in harmony with the executive, got 8 of the 10 seats in the HSYK elections. On the night of the 13th of October 2014, Justice Minister Bekir Bozdağ expressed his

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[www.cumhuriyet.com.tr/.../AKP\\_demokrasisi\\_Kazanirsak\\_mesru\\_kaybederse\\_kaybederse\\_kaybederse\\_gayrimesru.html](http://www.cumhuriyet.com.tr/.../AKP_demokrasisi_Kazanirsak_mesru_kaybederse_kaybederse_kaybederse_gayrimesru.html)

<sup>4</sup> [www.memurlar.net/haber/482227//](http://www.memurlar.net/haber/482227//).



satisfaction with the election results in front of the Ankara Facilities for Judges. Four members were appointed by the president and one by the Justice Academy. Including the Minister of Justice and his Undersecretary, **15 of the 22 members of the HSYK were members who either promised to work in harmony with the executive or were appointed directly by it.**

18. Following the HSYK elections on the 13th of April 2014, a new law concerning disciplinary pardon was enacted by the lawmakers of the governing party. The records of about 1,500 judges were wiped clean. **Among those who received a pardon were Ekrem Aydiner, the Istanbul prosecutor who closed the corruption files of the 17th – 25th December 2013 that involved several ministers by deciding on non-prosecution and Uğur Kalkan, the member of the Tarsus High Criminal Court who arrested 4 prosecutors and a colonel who were carrying out the MIT Trucks probe dated the 19th of January 2014.** Uğur Kalkan was later rewarded by the HSYK by being appointed to the Bakırköy 2nd High Criminal Court which arrested judges Metin Özçelik and Mustafa Başer.
19. The 1,154-TL salary increase promised by the Minister of Justice and the YBP members was made possible with a new law enacted by the governing party lawmakers. The last promise which included increasing the number of members in the Court of Cassation and the Council of State was kept with another law that was published in the Official Gazette dated the 12th of December 2014.
20. Considering the fact that the promises made by YBP members required changing laws, which the HSYK was not entitled to do, and all these promises were kept thanks to the laws voted for by the governing party lawmakers, it is quite clear that the members elected to the HSYK from the pro-government **YBP list were in a relationship with the executive branch that conflicted with the principles of ‘judicial independence and separation of powers’.** If it were not for government support, the majority in parliament and its promises, the YBP members could not possibly have voiced such promises. Amendments concerning the promises were enacted soon after the HSYK elections with the votes from the governing party lawmakers. All these facts point to a partnership between the executive branch and the HSYK members elected from the YBP list.

21. The fifteen HSYK members, who promised to work in harmony with the executive branch and who were either nominated or appointed by the executive, voted in the same direction in all the decisions made by the HSYK General Assembly except for a few objections over transfers from the 13th of October 2014 to the day their term was over. Without exception, all the fifteen members voted in the same way in all the decisions including the elections for members of the Court of Cassation and the Council of State.
22. It must have been these hard facts that led the European Council organs to describe the Platform for Unity in Judiciary (which was later changed to the YBD- Association for Unity in Judiciary) as a ‘government-oriented’ organization.<sup>5</sup>
23. Turgay Ateş, member of both the Association for Unity in the Judiciary and the HSYK, said in a meeting in Malatya on 13.06.2016, *“Here’s what we saw: unfortunately, the judiciary won’t be able to rise from where it fell without cleansing the organization you well know in it. The number one priority of our HSYK is to make this possible with the support from the Association for Unity in the Judiciary. The HSYK certainly has various procedures with which to make this possible. These procedures take time to reach fruition within the scope of regulations. The process is prolonged. What can we possibly do for the fight that the State Supervisory Council asks from the HSYK? I along with other friends said that ‘we need new legislation, within the scope of which we can take serious action against this organization. Without such legislation, we will still fight these friends with the available regulations. When can we get results? Allah may know. But we will continue working every day with the same determination to carry out our duty as best as we can”*<sup>6</sup>. With this statement, Ateş confessed that an organ within the executive (the State Supervisory Council) demanded the HSYK to stage a fight, the HSYK obeyed the order and the HSYK was not independent from the executive.
24. The Ministry of Justice Deputy Undersecretary Yüksel Kocaman echoed Turgay Ateş’s words in the same meeting: *“As our honorable member has mentioned, the Justice Ministry, the HSYK, and our Association for Unity in Judiciary have been working in complete harmony.” We might*

<sup>5</sup> GRECO “Evaluation Report - Turkey”, dated 12-16 October 2015, p. 31.

<sup>6</sup> <http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz>

*not get the requested targets quickly. But this is a process. Everybody is well-intended and doing their best. But there's the legislation part. There are things for the HSYK to do. There are things for our ministry to do. They are cooperating fully. We are aware of the setbacks, the problems. This is a process. We hope we'll get better results soon"*<sup>7</sup>. Kocaman's speech was another confession of the cooperation between the YBD, the HSYK and the Ministry of Justice (the executive) and the influence under which the HSYK worked. The view that the YBD was organized and supported by the Ministry of Justice was thus confirmed.

25. According to the Turkish Constitution, the HSYK *"shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges (a. 159/1)." Another sine qua non for judicial independence is the irremovability of judges before their term is over. Still, the memberships of five HSYK members who had nothing to do with the coup were discontinued before twelve hours had passed after the 15th of July coup attempt, without any preliminary investigation, without taking statements from them, and without letting them complete their terms. Although they were not caught in the act of a severe crime, all legal guarantees were violated and the five members were detained by an unauthorized prosecution and then arrested by an unauthorized court. The memberships of four substitute members who would legally replace them were also cancelled on the same day. Consequently, after the dismissals of 16.07.2016, almost all the HSYK were composed of members who either promised to work harmoniously with the executive or were appointed directly by it.*
26. A concrete manifestation of the HSYK's flagrant violation of the principles of independence of the courts and the security of the tenure of judges is the immediate cancellation of the memberships of five HSYK members and four members who were to replace them without any due process. Judges cannot be relieved of duty at a court they have been appointed to unless: they make a personal request, are appointed to a higher court, or run out of tenure. They cannot be relieved of duty without an investigation carried out beforehand and a due judicial process, nor can they be dismissed from duty. These principles are prerequisites for the independence of courts and security of judges. All

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<sup>7</sup> <http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz>

these facts are concrete evidence that the HSYK is neither independent nor impartial.

27. The HSYK members are entitled to choose members of the Court of Cassation and the Council of State. **All the memberships of the Court of Cassation were cancelled with a law published in the Official Gazette on 23.07.2016, and new members were elected. 267 members of the Court of Cassation were elected on 25.07.2016 by the HSYK, the design of which was made up as explained above. On the same day, the HSYK also determined 75 members of the Council of State, where all memberships had been cancelled with the same law, and 25 members were appointed directly by the President. Thus, two high courts were re-formed ten days after the coup attempt.**

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#### THE COMPOSITION OF THE HSYK AFTER AMENDMENT DATED THE 16TH OF APRIL

28. Some articles of the Constitution were amended according to the referendum on the 16th April 2017. The name of the 22-member HSYK was changed to the Council of Judges and Prosecutors (HSK), the number of departments were reduced from three to two and the number of members were decreased to 13. Of these members, six – including the Minister of Justice and the undersecretary – are appointed directly by the President (hence they are no longer neutral) and seven are appointed by the parliament. **Considering the fact that governing party lawmakers make up the majority of the parliament and the governing party is chaired by the President, it is clear to see that President is authorized to elect almost all the members of the HSK.** With the amendment in question, the memberships of all the HSYK members whose tenure was due to end in 2018 were cancelled and new HSK members were appointed in May 2017. It is evident that an organization that manages judges and prosecutors cannot be independent if previous memberships can be cancelled with an amendment before the tenure of the members is completed. All the members of the new HSK are made up of pro-government members, with the exception of the Nationalist Movement Party (MHP) chairman's lawyer.
29. Before the referendum concerning the constitutional amendment on the 16th of April 2017, the Venice Commission published a report on the 13th of March 2016 addressing this issue. An advisory body in the Council of Europe, the commission expressed views about the proposed

Special courts called Criminal Peace Judgeships were formed to fight the organization that the government named the “Parallel State” which carried out the corruption operations.

amendments (Opinion No. 875/2017) and said that the Turkish Judiciary would fall under the control of the executive (President). According to the commission, *“the constitutional amendment which runs the danger of transforming into a one-person presidential system is against a democratic regime based on the separation of powers. Considering the chronic concerns that the Turkish Judiciary is not independent, the judiciary’s power to control the executive will further weaken with the HSYK, almost half of whose members will be directly appointed by the President.”* In brief, the Turkish judiciary, over which concerns linger about its independency, will virtually fall under the full control of (a non-neutral, partisan) President. The power that controls the HSYK will control all the judges and prosecutors, and the judiciary will thus lose its independence.<sup>8</sup>

30. The European Council of Human Rights Commissioner, Nils Muiznieks said on 07.06.2017, *“The New Council of Judges and Prosecutors does not offer adequate safeguards for the independence of the judiciary.”*<sup>9</sup>

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## CONCRETE FACTS SHOWING THAT THE COURTS OF FIRST AND SECOND INSTANCES HAVE LOST THEIR INDEPENDENCE AND IMPARTIALITY

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### -COURTS OF FIRST INSTANCE

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31. A critical indicator of independency of courts is the irremovability of judges from their posts during their term of office. Judges cannot be removed from their court during their tenure unless they are appointed to a higher court or they make a personal request. This principle is a sine qua non for judicial independence (See Campbell and Fell v. The United Kingdom, § 80 - Lauko v. Slovakia, § 63).

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<sup>8</sup> The opinions of the Venice Commission dated 13 March 2016 “Turkey - Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017” (Opinion No. 875/2017), paras. 119, 128, 129, 133.

[www.venice.coe.int/webforms/documents/default.aspx](http://www.venice.coe.int/webforms/documents/default.aspx)

<sup>9</sup>

<https://www.facebook.com/CommissionerHR/posts/806253422883903>.<https://twitter.com/CommissionerHR/status/872468324013223936>

32. Since the beginning of 2014, thousands of judges and prosecutors have been transferred to other courts although they have not been elected to a higher court, they have not made a request and their tenure is not over. Moreover, some judges were dismissed because of their decisions and appointed elsewhere. **When it was seen during the trial that he or she would issue a release, a judge was suspended within a few hours and then dismissed.** Dozens of judges were dismissed from their jobs because of their judicial decisions, taken into custody and then arrested. **Furthermore, between the 15th of July 2016 and the 15th of March 2017, more than 4,000 judges and prosecutors were arbitrarily purged without being given the right to defend themselves.** Below are examples of judges who were relieved of duty before their tenure ended and arbitrarily purged from the profession.
33. There are other signs that courts of first and second instance are not independent. Judges have no guarantee whatsoever against outside pressure and in particular pressure from the executive branch. For all these reasons, Turkey does not present an appearance of independence and impartiality (Findlay v. The United Kingdom, § 73). Below, you will find some actual incidences and examples.

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#### -FIRST INSTANCES OF THE ATTACK ON JUDICIAL INDEPENDENCY

34. Following the 17th - 25th December 2013 corruption operations, two members of the 1st chamber of the HSYK, where appointments of judges and prosecutors were made, were changed by a proposal by the Minister of Justice on the 15th of January 2014. After this change, it was alleged in the media that the government had seized the majority<sup>10</sup> in this chamber and could appoint any judge and prosecutor as it pleased. Soon the judges and prosecutors involved in the said corruption investigations were relieved of duty and appointed to other provinces. Evidence such as millions of dollars found in shoe boxes during the corruption investigations was overlooked, and the investigations were described as a coup attempt, which was ascribed to the 'Parallel State' purported to be run by civil servants within the judiciary and the police force.
35. **Special courts called Criminal Peace Judgeships were formed to fight the organization that the government named the 'Parallel State' which**

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<sup>10</sup> The opinion of the Venice Commission on the Criminal Judgeships of Peace dated 13 March 2017, *Opinion No. 852/2017*, para. 49.

carried out the corruption operations. With the legislation published in the Official Gazette dated 28.06.2014, the limited number of criminal peace judgeships, whose judges were specifically appointed, worked in a closed circuit whereby they became the sole authority in issues such as arrests, decisions over objections, searches, seizures, appointment of trustees and disclaimer trials.<sup>11</sup>

36. The 1st Chamber of the HSYK appointed many judges as criminal peace judges on the 16th July 2014 and sent six of them to Istanbul. Referring to the operations against the police, the Prime Minister Erdogan said in the Ordu Province on the 20th of July 2014, *“Legal procedures start soon and criminal peace judgeships will carry the day”*<sup>12</sup>. In another statement on the same day, he said, *“You know, the appointments have been made concerning Criminal Peace Judgeships... in order to fight the ‘Parallel State’. They will all start working tomorrow. We are going to watch and see what will happen in the police and the judiciary”*<sup>13</sup>. It is certainly impossible, when there is a judge openly appointed by the executive, for a campaign to be independent and impartial or to present an appearance of independence and impartiality.
37. Criminal Peace judges began work on the 21st of July 2014. A Criminal Peace judge examined 106 folders, seven hard drives, wire-tapping documents belonging to 238 suspects and 1,292 pages of CDs along with other documents and issued search and seizure warrants the same day for more than 100 police officers alleged to be affiliated with the ‘Parallel State’. In the early hours of 22.07.2014, at around 1.30 am, search procedures began, the officers were detained and dozens of them were arrested.

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<sup>11</sup> The PACE report dated 6.6.2016 *“The functioning of democratic institutions in Turkey”* (Doc. 14078, paras. 5 and 69). This report was accepted with some amendments at the PACE session dated 22.6.2016 (Resolution 2121(2016). Available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22957&lang=en>

<sup>12</sup> <http://www.internethaber.com/yarginin-yeni-hakimlerinden-ilk-icraat-cemaate-1227131y.htm>

<sup>13</sup> <http://haber.star.com.tr/politika/basbakan-erdogan-paralel-yapiyla-mucadele-etmeyen-bedelini-agir-oder/haber-915819>

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-REASSIGNMENT OF JUDGES BEFORE THE END OF THEIR TERM OF OFFICE

38. As stated above, one of the prerequisites of independent courts is that judges cannot be removed from duty before the end of their tenure unless they are assigned to a higher court or make a personal request (Campbell and Fell v. The United Kingdom, § 80 - Lauko v. Slovakia, § 63).
39. Elections were held across Turkey for the vacancies in the HSYK on 13.10.2014. With the emergency decree dated 27.11.2014, candidates who competed against the HSYK members who won the elections and got high votes were assigned to other provinces without making any such request before the end of their tenure. For example, Judge Ayşe Neşe Gül, who had been working at the Ankara Courthouse for less than a year, ran for the HSYK as an independent candidate, got 4,816 votes, but was then appointed to the Edirne province without her request or consent.
40. Judges and prosecutors who complete their term of office are normally appointed to other courts in January or November. However, an emergency decree was issued on the 15th of January 2015 and 888 judges and prosecutors were re-assigned in the middle of winter to different cities without their request or consent.
41. With the decree dated the 12th of June 2015, 2,665 judges and prosecutors were appointed to other provinces. While about 1,600-1,700 judges and prosecutors are traditionally appointed with each summer appointment decree, this time about 900 more judges and prosecutors were appointed to other cities without their request or consent. **Some judges were re-assigned several times in the same year. For instance, Judge Bahaddin Aras was forced to move five times in one year.**
42. A similar implementation was carried out with the summer appointment decree dated the 6th of June 2016. The places of duty of 3,228 judges and prosecutors, which is almost twice as many as the normal figure, were changed without their request and before the end of their term of office. **The vice president of YARSAV, Judge Murat Aydın and his wife Judge Gülay Aydın were appointed from Karşıyaka (Izmir) to Trabzon without their request or consent. Murat Aydın was the judge who applied to the Constitutional Court for the cancellation of Article 299 of the Turkish Penal Code which regulated insults against the President on the grounds that it was unconstitutional.** In contrast, Hulusi Pur, the



Criminal Peace judge who released Reza Zarrab's collaborator Abdullah Hapmani, the CEO of Halkbank Süleyman Aslan and four other men who were detained for the corruption investigation dated the 15th of December 2013, was rewarded and appointed to the Istanbul Chief Office of High Criminal Court. The CHP lawmaker Mahmut Tanal evaluated the 2016 summer appointment decree as follows: *“Many judges and public prosecutors were transferred without their request or consent before the end of their tenure. Now, judicial decisions are evaluated by grudge bearing and hatred. It's as though they are keeping records of the decisions that judges are making. Judges and prosecutors who take decisions that are favorable to the government will be rewarded. The judges who released Reza Zarrab's men were rewarded. The judges and prosecutors who made decisions that were not much liked by the government were suspended, faced investigations and were jailed.”*

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#### JUDGES WHO HAVE BEEN RESHUFFLED DUE TO THE DECISIONS THEY HAVE GIVEN

43. In terms of judicial independence, what is more worrisome than the removal of judges from office before the end of their tenure is their removal for their decisions. If judges are relieved of their duties due to their decisions, or face disciplinary proceedings and sanctions, this fact constitutes a clear indication that the judiciary is devoid of any tangible impartiality. Over the past few years, dozens of judges have been dismissed from office, transferred to other courts or even suspended for the disciplinary actions stacked against them. Here are some cases that corroborate this fact.
44. Kemal Karanfil, the Criminal Judge of Peace in the Eskişehir province, who was referred to the Constitutional Court on the grounds of his reasoned refusal to accept that Criminal Peace Judgeships are devoid of independence and impartiality and lack legal judicial processes, was appointed to the Zonguldak province on the 15th January 2015 only 6 months after his instatement in his office.
45. The 7th Assize Court Judges İsmail Bulun and Numan Kılınc who dismissed the case regarding the illegal wiretapping of the Prime Minister's office, were removed from their posts shortly after their decision on the basis of the HSYK decree dated the 25th July 2015. Judge Fatma Ekinci,

who released the defendant Hasan Palaz, was appointed to another court after her decision.

46. Judges Hülya Tıraş, Seyhan Aksar, Hasan Çavaç, Bahadır Çoşlu, Yavuz Kökten, Orhan Yalmanlı, Deniz Gül, Faruk Kırmacı are the first Criminal Peace judges who were appointed to the Ankara Courthouse with the HSYK decree dated the 16th July 2014. Within the time span of just one year, between the 16th of July 2014 - 28th of July 2017, seven out of eight Criminal Peace judges (with the exception of the judge of the 8th Criminal Court of Peace) were dismissed. Firstly, Judges Yavuz Kökten and Süleyman Köksaldı were removed from office because of their decisions to acquit some police officers inculpated by the ruling party. Judge Orhan Yalmanlı was dismissed from his court because of his refusal to arrest some police officers on the 1st of March 2015. Hasan Çavaç, who dismissed the motions concerning Judge Orhan Yalmanlı's decision and Seyhan Aksar, who had released the officers earlier, were dismissed on the 9th of March 2015. The Judge of the 8th Criminal Court of Peace Hülya Tıraş who released 110 officers who had been under arrest for 110 days was relieved of her duty two weeks after her decision. Judges Yaşar Sezikli and Ramazan Kanmaz were dismissed for the same reasons on the 23rd of July 2015. Judge Osman Doğan, who did not arrest 18 officers who were detained within the scope of the illegal wiretapping investigation, was also relieved of his duty due to the same reasons. Similar practices have been observed in other provinces, especially in Istanbul and Izmir.
47. Nilgün Güldalı, judge at the Bakırköy 2nd Assize Court who voted for the release of the arrested judges Mustafa Başer and Metin Özçelik during the monthly detention evaluation on the 24th of July 2015, was appointed to a Labor Court only one day later by the HSYK decree.
48. The 4th Administrative Court Chief Judge Cihangir Cengiz, who granted a motion for stay of execution regarding the TIB's (Turkey's Presidency of Telecommunication and Communication) decision to ban access to YouTube, was appointed to the Konya Administrative Court before the end of his tenure.
49. The chief of the 4th Istanbul Administrative Court and two members were transferred to other cities owing to the fact that they adopted a motion for stay of execution regarding the environmental impact

If judges are relieved of their duties due to their decisions, or face disciplinary proceedings and sanctions, this fact constitutes a clear indication that the judiciary is devoid of any tangible impartiality.

assessment report for the Istanbul Third Airport and the demolition of the 16/9 towers that spoil the Istanbul skyline.

50. The Chief Judge of the Istanbul 10th Administrative Court Rabia Başer and associate judge Ali Kurt, who repealed the Gezi Park & Taksim Square Projects, were appointed to different courts and different cities after their decision, before the end of their term.
51. Judge Cemil Gedikli, who issued the verdict of detention for the suspects of the corruption investigation dated the 17th of December 2013, was appointed first to Erzurum, then to Kastamonu within a year, without his request or consent.
52. The Judge of the Bakırköy 2nd Criminal Court of First Instance Osman Burhaneddin Toprak, who admitted the indictment that the news appearing in pro-government newspapers that assassination allegations against Sümeyye Erdoğan was slander, was appointed to Konya without his request or consent before the end of his tenure on the 15th of October 2015.
53. A while before the general elections held on the 1st of November 2015, some TV channels were arbitrarily removed from Digiturk. The Judge of the 1st Consumer Court of Mersin Province Mustafa Çolaker, who ruled in favour of these channels, namely STV and Bugün TV in a court case filed against the Digiturk platform, was appointed to the Çorum Province and also disciplinary procedures under the supervision of an inspector were launched.<sup>14</sup>
54. The Court of Cassation prosecutor Mazlum Bozkurt, who upheld the decision for the conviction verdict issued by the court of first case for the defendants Colonel Hüseyin Kurtoğlu and the other five military officers at a court of first case, was suspended on the 1st of December 2015 by the HSYK.

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<sup>14</sup> <http://www.baroturk.com/hsyk-begenmedigi-kararlari-veren-hakimleri-cezalandirmaya-devam-ediyor-15115h.htm>

55. The Judge at the Ankara Criminal Court of Peace Süleyman Köksaldı, who issued a rebuttal decision for the news about the cancellation of Fetullah Gülen's passport and spying allegations at the TIB, was appointed as the Ankara 21st Labor Court Judge without his request or consent before the end of his term.<sup>15</sup>
56. The Pro-government daily newspaper Sabah ran the headline, '**Power fine-tuning for wavering judge**' on the 26th of July 2015. The news reads as follows: '*Judges who take a firm stand against the parallel structure are appointed as members of the Assize Court, whereas ambivalent judges who are indecisive about the parallel structure are demoted to family courts or courts of first instance*'<sup>16</sup>. Thus, the guidelines for the unfair promotion of judges were craftily hinted at. The criminal judge of peace Hulusi Pur is quintessential in this regard. After a series of pro-government decisions, he was appointed as the Chief Judge of the High Criminal Court. He released six suspects of the 17th December Corruption Investigation on the 14th of February 2014. Later, he issued search and seizure warrants for more than 100 police officers who were carrying out the 17-25 December corruption investigation in two separate lawsuits; moreover, he got some of the alleged police officers arrested.
57. Two judges who rendered a verdict for stay of execution regarding the operating permit of a mine in Artvin were appointed to different provinces. The operation licence for the said mine was given to the ProGovernment businessman Mehmet Cengiz<sup>17</sup>

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CONCRETE EVIDENCES REGARDING THE FACT THAT THE  
JUDICIARY IS NOT INDEPENDENT FROM THE EXECUTIVE

58. In a public speech given in Gaziantep on the 7th August 2014 concerning the detention of the police officers carrying out the 17-25 December Corruption Operation, Erdogan, the then Prime Minister, lashed out saying, "*We said that we will enter their dens; Have we not? We will*

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<sup>15</sup> <http://www.halkinhabercisi.com/suleyman-aslani-birakan-hakime-odul>

<sup>16</sup> <http://t24.com.tr/haber/sabah-paralelle-mucadelede-kararsiz-hakimlerin-yetkileri-alindi,304066>

<sup>17</sup> @farukmercan 28.02.2016 14:06

*keep on raiding their lairs.*” Thus, the true adjudicator of the verdicts became evident. Similarly, when a trustee was appointed by a judge of the Criminal Court of Peace to the daily newspaper, Zaman, President Erdoğan addressed the public on the 4th of March 2016 with the same narrative *“What did I say? We would enter their dens; Haven’t we? Are we continuing to do so?”*<sup>18</sup> He overtly manifested who was the real decision-making body behind the appointment of a trustee to a daily newspaper.

59. After being elected as President of the Republic of Turkey, he stated that he would declare the Gülen Movement a terrorist organization in the National Security Policy Document (MGSB or Red Book), and accordingly after chairing a few National Security Council (NSC) meetings, he declared that Gülen Movement was included as a terrorist organization by the National Security Council in the National Security Policy Document. On the 12th of May 2015, while he was on a flight from Belgium to Ankara, he remarked to the journalists on the presidential plane: **“From this day forth, the judiciary will make its decisions in accordance with the Red Book”**<sup>19</sup>. It means that, from that day forth, courts will not make their decisions based on Constitution, statutes and universal norms (Art. 138/1 of the Constitution); instead, they will make their decisions in compliance with an inaccessible, unforeseeable, official secret document – **the Red Book, the contents of which is unbeknownst to the public and the legal bodies**. After the President’s comments, courts started making decisions based explicitly on the Red Book. For instance, the Istanbul 5th Criminal Peace Judge based his reasoned judgement of 23.6.2015 for the detention order on the Red Book. The Istanbul Anadolu 3rd Criminal Peace Court expressed in his reasoned verdict (No. 2015/2983) on 8.9.2015 that: **“The advisory note MGSB defines the parallel state structure as (PYD/Pro-Gülen Terrorist Organization/FETÖ) in accordance with this advisory note and the decree of the council of ministers that avows these terrorist organizations and their financial supporters...”** Similar wordings and expressions were made at the Anadolu 9th Criminal Court Peace proceedings on the 7th of September 2015 (No: 2015/1291). It is possible to find more of these examples. These cases are clear evidence that the judiciary puts into effect the orders dictated by the ruling authority. Taking into account the dictum of the ruling body, ‘the judiciary will base their verdicts on the Red Book’, the independence and the impartiality of

<sup>18</sup> <http://www.milliyet.com.tr/cumhurbaskani-erdogan-burdur-gundem-2208110/>

<sup>19</sup> <http://www.habererk.com/siyaset/erdogandan-u-donusu/15294>

the judiciary evaporates and turns into a corollary body that acts upon the orders of the executive.

60. The Ankara 5th criminal peace judge who appointed trustees to 18 companies in the Koza Group, wrote his decision dated 26th October 2015 as follows: *“Appointing supervisory trustees to a company which supports a gigantic and intensive organization that aims to abolish and replace the constitutional order of the republic, to abolish the government or to prevent it, in part or in full, from fulfilling its duties by a terrorist group known as FETÖ/PDY is not adequate for the collection of evidence and finding the financial proof, let alone the prevention of committing crime.”* Precisely three months and fifteen days later, the Istanbul Anadolu 1st Criminal Peace Judge who appointed trustees to some companies, wrote in his decision dated 11th February 2016 these exact same sentences. *“Appointing supervisory trustees to a company which supports, a gigantic and intensive organization that aims to abolish and replace the constitutional order of the republic, to abolish the government or to prevent it, in part or in full, from fulfilling its duties by a terrorist group...”* It is evident that these occurrences are not mere coincidences but these verdicts, which were penned by some state officials, were submitted to ‘some’ judges for their signature and approval.
61. On the 12th of May 2015, while the President was flying back to Turkey from Belgium, he talked about the arrests of four prosecutors and one colonel related to the trucks being stopped in the National Intelligence Service (MİT) investigation as follows: *“The arrest warrants may continue with other (judges and prosecutors); it would seem<sup>20</sup>”*. After that, Süleyman Karaçöl who took part as a judge in the 17th of December corruption investigation was arrested on the 15th of September 2015<sup>21</sup>. An arrest warrant was issued dated 12th September 2015 for the prosecutor Muammer Akkaş in his absentia. Taking into consideration that judges shall issue arrest warrants only based on concrete evidence, how can the President know of these arrests in advance? These examples clearly show that these decisions were not made by judges, but they were first decided by the Executive before they were issued by judges. It shows that the judiciary is not independent of the executive. (See the Venice

<sup>20</sup> <http://www.aksam.com.tr/siyaset/paralel-yargiya-karsi-tutuklamalar-surecek/haber-404841>

<sup>21</sup> <http://www.trthaber.com/haber/turkiye/eski-hakim-suleyman-karacol-tutuklandi-203815.html>

Commission Declaration on Interference with judicial independence in Turkey, adopted on the 20th of June 2015).

62. On his return from the Ukraine visit on 23.3.2015 the President said, *“We are watching the judges who are ruling on the cases related to the parallel structure closely.”* In this way, he sent a message to the judges and the prosecutors implying that they should watch their step as their rulings were being closely monitored. Upon hearing this remark and knowing that 15 of the 22 members of the HSYK were known to be siding with or appointed by the government, a judge would not be able to rule without fear or hesitation on cases concerning the group in question.
63. The Criminal court of first instance Judges, Metin Özcelik and Mustafa Başer who released 62 police officers and a journalist allegedly linked to the ‘parallel structure’ were arrested on the 30th of April and the 1st of May 2015 (see the Turkish Constitutional Court Decision dated 20.01.2016, para. 135 and the justification of dissenting opinion). Without any concrete evidence other than their verdict, these two judges were arrested within five days of their decisions on the grounds of being members of an armed terrorist organization and of attempting to overthrow the government. The content of the President’s message was therefore understood.
64. The intervention of the executive did not cease with the detention of the two judges. Following the dismissal decision of 25.4.2015 concerning the said judges, the HSYK launched a disciplinary investigation against them. Nonetheless, President Erdoğan assessed the situation in his remarks as: *“the HSYK was late.”* In response to the President’s reprehensive remarks, the Head of the 2nd Chamber of the HSYK, Mehmet Yılmaz commented, *“Yes, we are late and apologize for it.”* In a press conference after the council of ministers held on 27.4.2015, the state spokesman **Bülent Arınç**, referring to the verdict given by the two judges, advertently pointed out, *“How dare they!”* Around that time, the Prime Minister at his public rally in the Gümüşhane Province made the following comments on the acquittal verdicts: *“Their release decisions should be regarded as a coup attempt against the government. We will never allow these verdicts to be put into effect.”* Referring to the two judges’ release decisions, the Head of the 1st Chamber of HSYK Halil Koç, made this press release in the daily newspaper, Sabah: *“There will definitely be reprisals for this.”* At that time, Kenan İpek who was Minister of Justice and the head of the HSYK noted: *“These actions and behavior have legal consequences ... there will be retribution for them within the framework of the law.”* As a result of the blatant pressure from the

government cadres, the release decisions dated 25th May 2015 were not enforced and worse, both judges were arrested only five days after their decisions. This incident alone would suffice to exemplify the overt executive coercion on the judiciary. (See the Venice Commission Declaration on Interference with judicial independence in Turkey, adopted on the 20th of June 2015).

The executive body has orchestrated all the mass detentions and coerced the judicial body to yield to its demands

65. The president of the Judicial Council Ismail Cirit stated that *“two judges acted without any jurisdiction”* on the 1st of May 2015. He deliberately made this remark knowing that they would be tried at the Court of Cassation. Four public prosecutors and a judge responsible for the 17-25 December Corruption Investigation were dismissed on the 12th of May 2015 by the HSYK. Just barely a day later, Ahmet Davutoğlu, remarked on this event: *“We have given back the 17-25 December operations to its perpetrators.”* It can be inferred that the alleged decision of the HSYK was in reality charted by the executive body.
66. On the 12th of June 2015, in his interview given to the daily newspaper, Yeni Şafak, the Secretary General of the HSYK, Bilgin Başaran stated that, *“... the Council would support the judges commissioned to the so called ‘parallel state’ cases, and, referring to judges Mustafa Başer and Metin Özçelik, he added that “in the event that a similar kamikaze judge attempt should be hatched or act out, the same measures will be taken.”* This remark is, also glaring proof of the fact that judges are not independent in the HSYK structure.
67. A confidential document was sent to the HSYK on the 20th of November, 2015 by the Ministry of the Interior (No: ... -2043.(31420) 152488 – Subject: Judicial decisions). This document entreated the HSYK to take actions against 78 administrative court judges who ruled against the Ministry. Thereupon, the 3rd Chamber of the HSYK immediately launched an enquiry against the listed judges, and the 2nd Chamber suspended the promotion process of 12 judges. Similar demands were submitted by many state governors such as Siirt, Sakarya, and Diyarbakır. The abovementioned governors entreated the HSYK to take steps to curb these judges who issued verdicts against them<sup>22</sup>. These examples show clearly that judiciary has been placed under the control of executive organs.

<sup>22</sup> [www.haberdar.com/gundem/bakanlik-aleyhimizde-karar-veriyorlar-diye-hakimleri-sikayet-etti-kurul-harekete-gecti-h17382.html](http://www.haberdar.com/gundem/bakanlik-aleyhimizde-karar-veriyorlar-diye-hakimleri-sikayet-etti-kurul-harekete-gecti-h17382.html)



68. On the 29th of May 2015, the journalist **Can Dündar**, then - Chief Editor of the daily newspaper, Cumhuriyet published a news story claiming that **MIT trucks halted in the Adana Province were transferring weapons to Syria on the 19th of January 2014**. Later, in a live-TV interview on TRT1 channel, **President Erdoğan** stated the following: *“I am under the impression that the person who covered this issue as special news will pay a heavy price for this. I will not let him go”*<sup>23</sup>. Without any further incriminatory evidence, Can Dündar was arrested and detained on the 26th of November 2015 by the 7th Criminal Peace judge in Istanbul.
69. In his response on a live TV program on the 6th of April 2017 to the Main Opposition Party leader **Kemal Kılıçdaroğlu**'s criticism of the so-called 15th of July 2016 insurgence as *‘a controlled coup attempt’*<sup>24</sup>, Erdoğan made the following comment: *“... Did you put them in prison? We are clearing them out of all echelons of the state and putting them behind bars, aren't we? We have arrested them and thrown them into jail, haven't we.”*<sup>25</sup> These statements indicate that 50,000 detentions after the 16th of July 2016 were enacted by judges following the orders of the state verbatim.
70. In his response at a meeting entitled, ‘the 15th of July Martyrs and Veterans on the 12th of April 2017 to the Main Opposition Party leader Kemal Kılıçdaroğlu's criticism of the so-called 15th of July 2016 insurgence as *‘a controlled coup attempt’*, Erdoğan made these additional comments: *“Currently there are thousands of incarcerated people. Which executive body put them behind bars? Did you do it? No, we did it! Are they on trial? They are standing trial. What will be the outcome? The courts will decide.”*<sup>26</sup> It can be understood from these remarks that the executive body has orchestrated all the mass detentions and coerced the judicial body to yield to its demands. In view of the 50,000 detention and arrest orders issued by the judicial body between the 15th of July 2016 and the 1st of June 2017, the travesty of justice in Turkey was made on the judiciary by the ruling authority. **Given the number of verdicts, it has become more evident that the whole legal system with its courts and judges was manipulated by the government.** Not taking directions from any authority is the cornerstone of judicial

<sup>23</sup> <http://www.sozcu.com.tr/2015/gundem/erdogandan-can-dundara-tehdit-846822/>

<sup>24</sup> <http://www.theglobepost.com/2017/04/03/opposition-leader-july-15-was-a-controlled-coup/>

<sup>25</sup> <http://t24.com.tr/haber/erdogan-hayir-diyenlere-terorist-demedik-onlari-da-anlayisla-karsilariz,397776>

<sup>26</sup> <http://video.haber7.com/video-galeri/88100-erdogandan-onemli-aciklamar-6>

independence (AY m. 138/2); hence, judges who became mere puppets of the government cannot be independent nor impartial.

Verdicts given under the climate of a state of emergency and fear of discharge cannot be in compliance with the essential features of the right to fair trial

### EVIDENCE THAT THE JUDICIARY IS NOT PROTECTED FROM OUTSIDE INFLUENCE

71. One of the indicators of judicial independence pertains to the immunity of judges to external interventions, pressures and effects. (Findlay v. The United Kingdom, § 73). This protective umbrella of impartiality shatters when judges diverge from the scope of the case and concrete evidence and let coercive factors play a part in their adjudication. There are numerous concrete findings that uphold the lack of security in the judiciary in Turkey. In fact, judicial malpractices enumerated in this report suffice to support this claim; yet more pertinent examples are specifically compiled in this chapter.
72. In a Twitter message sent to the Justice Minister on the 4th of April 2016, a pro-government journalist Fatih Tezcan wrote: *“Judge Ayşe Özel, Reg. No:100601 released a PKK terrorist, Ahmet U. in the Şırnak Province. Please look into the problem @bybekirbozdag<sup>27</sup>”*. The HSYK immediately launched an investigation against the judge<sup>28</sup>. On its own, this case shows just how much the Turkish judiciary is vulnerable and open to external pressure.
73. In his article on the 4th of April 2017 titled, *“Judges and Prosecutors who lack credence in Bylock”*, pro-government newspaper Akşam journalist Murat Kelkitoğlu noted this: *“4- At this juncture, I will share something with you. As you know, the National Intelligence Agency (MIT) came up with a lengthy list of Bylock users (..) 5- MIT didn’t laze about, it sent groups to courthouses and debriefed judges and prosecutors about Bylock and its users (..) 6- Yet, some judges and prosecutors kept voicing their concerns, “we still haven’t connected the dots between the Bylock App and FETÖ; that is why, it cannot be considered as evidence (..) 7- so, that is how all the release verdicts are issued. Oh, friends! Didn’t these traitors communicate through this program and attempt to occupy the country? Could there be any greater*

<sup>27</sup> <https://twitter.com/fatihtezcan/status/716883579821809664>

<sup>28</sup> <https://twitter.com/defnebulbul1/status/717698529762869248>

*evidence?”*<sup>29</sup> Apparently, the responsibility of lawful evidence gathering for legal proceedings or assessing the pertinence of evidence for the case at hand was taken over by the state-institution intelligence agency which fulfils the mandates and orders of the executive body. It is impossible to talk about the security and immunity of judges in a system where the ruling body have a vice-like grip over the lawful gathering, production and integrity of the assessment of the evidence. The above-mentioned shows a direct interference in the judicial structure and also shows the undermining of judicial security and impartiality.

74. During political cases, trials are monitored by Police and Intelligence officers; when a release verdict is issued, they interfere and arrest the released citizens in the yard in front of the courthouse. Legal documents are drafted for ousting the judges and prosecutors that rendered the release decision. All these practices have been rumored among judges as the order of the day. **The above quoted Kırşehir case is just an example of numerous similar incidents. In early 2017, when the defendants of a case in Balıkesir pointed to a police officer in the courthouse and claimed that they had been tortured by him, the police officer ran out the courthouse. Judges who are working under the iron fist of the government can not try or hear the cases or issue a release order since they are constantly overwhelmed by fear, anxiety and trepidation.**
75. During the iftar dinner program for the Home Guard Units on the 7th of June 2017 in Gölbaşı, **Erdoğan** referred to the detentions and the court trials of the same date and said, *“All my principal consultants are following the trials. Half of them are following the trials in Istanbul and the other half in Ankara. I receive their reports daily, I keep up with what is happening.”*

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**CONCRETE FACTS AFFECTING JUDICIARY  
INDEPENDENCE OCCURRED AFTER THE 15TH JULY  
2016 COUP ATTEMPT**

76. Article 139 of the Turkish Constitution has established guarantees for the independence of judiciary and security of tenure for judges; however, Article 3 of the Emergency Decree Law No: 667 enacted on the 23rd of July 2016 has suspended these key safeguards. Decree Law No: 667

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<sup>29</sup> @kelkitlioglumrt, 4/04/2017, 07:47, 07:48, 07:49, 07:50

stipulates that judges, prosecutors, and even Constitutional Court judges including the Constitutional Court may be permanently discharged through one-single unilateral decision without any legal investigation or proceeding. **One emergency decree abrogated and annulled all security strongholds for the judgeship.** Under Decree Law No: 667, more than 4,000 judges and prosecutors have been permanently removed from their office until the 15th of March 2017 without respecting minimum guarantees. However, *“judges can be suspended or removed only on serious grounds of misconduct or incompetence after fair trials”*<sup>30</sup>. Since the emergency decree no. 667 has extirpated judiciary independence and the guarantees of judgeship, it is improbable that any judicial integrity in Turkey during the state of emergency can be claimed. As long as Article 3 of the emergency decree no: 667 is in effect and hangs over the judges like the sword of Damocles, it would be absurd to talk about Turkish judicial independence. Since the abovementioned decree is applicable to the first and second-tier members of the justice system, the court of cassation, the council of state as well as the Constitutional court, none of the courts in Turkey can be claimed to be independent during emergency law in Turkey. In order for court decisions to be recognized as fair, courts must satisfy essential features of independence and impartiality. Therefore, verdicts given under the climate of a state of emergency and fear of discharge cannot be in compliance with the essential features of the right to a fair trial within the scope of the established case-law of the ECHR (Beaumartin v. France).

77. After the 15th of July coup attempt, more than 4,000 judges and prosecutors were arrested and more than 4,000 judges were permanently discharged without any legal action in blatant violation of Articles 129/2 and 139 of the Constitution; On top of this, **more than 2,500 judges and prosecutors were detained and arrested** in overt violation of Articles 159/9 and 2802 of the Constitution. Among the dismissed judges are 2 Constitutional Court judges, 140 Court of Cassation judges, 48 Council of State judges. Under Turkish Law, judges and prosecutors may only be arrested if there are circumstances which give rise to strong suspicion that they have committed a crime AND they have been caught in flagrante delicto. **Some judges were arrested during a hearing before their colleagues**<sup>31</sup>. It should not be expected that any judge who witnesses an

<sup>30</sup> *“Judges can be suspended or removed only on serious grounds of misconduct or incompetence after fair proceedings”* (@UNHumanRights - 27/7/16 - 09.00).

<sup>31</sup> UN Human Rights High Commissioner Zeid Ra'ad Al Hussein said on 8.3.2017 that in Turkey the reason behind the arrest of the journalists and the judges is not that they are members of a terrorist organization. In fact, critical journalists and judges were targeted.

unlawful arrest of a colleague can perform his or her duties in an independent or impartial manner.

78. The 8th high criminal court of Diyarbakır issued a release decision for the HDP deputy Idris Baluken who has been jailed, pending trial. Soon after the verdict, the chief judge Cem Boztaş was stripped of his titles and appointed as a normal judge and the said deputy was rearrested on the 21st of February 2017<sup>32</sup>.
79. In Kırşehir, during a trial held on the 7th February 2017, Judge Fatih Mehmet Aksoy, who had previously arrested the 39 prosecutors without any shred of evidence and jailed them, pending trial for charges of conducting weapon-loaded MIT trucks operations in Adana, blurted out, *“I cannot bear it any more, I will set all of them free.”* Upon hearing this remark, the case prosecutor threatened the judge: *“If you do that, I will have you arrested in two hours for using Bylock.”* Thousands of civil servants have been discharged solely for downloading and using a social media application Bylock<sup>33</sup>. Under the initiative of the Police Chief of the Kırşehir Province Veysel Murat Tuğrul, who had been observing the court proceedings and has a close friendship with Doğu Perinçek<sup>34</sup>, the judge was suspended in less than two hours.<sup>35</sup> Another mind-blowing incident that demonstrates the dimensions of how the judicial independence is usurped by the ruling authority and the vulnerability of the judges is the fact that a judge can be unseated during an ongoing trial from his office by a mere telephone call made by the police chief from Kırşehir to the Capital shatters any notion of judicial irremovability and independence. As for Judge Fatih Mehmet Aksoy, he was detained later that afternoon on the charge of using Bylock<sup>36</sup>.
80. On the 31st of March 2017, the chief judge İbrahim Lorasdağı and two associate judges Barış Cömert and Necla Yeşilyurt of the Istanbul 25th Assize Court, who decided to release 21 of the 26 journalists, and the

<sup>32</sup> <http://www.brusselschr.org/opinion-turkeys-politicized-judiciary/>

<sup>33</sup> Bylock is a smart phone application allegedly invented and used by the members of the Gülen Movement. For more information see <http://www.platformpi.org/opinion-arbitrary-use-bylock-instrument-false-accusation/>

<sup>34</sup> Doğu Perinçek, is the leader of an ultranationalist party, who publicly claims that he has a parallel structure in the judiciary, the police, the army and MIT (Turkish National Intelligence Service) under his control and who supports the government.

<sup>35</sup> @Demokkrasi, 5/3/2017

<sup>36</sup> [www.haberturk.com](http://www.haberturk.com), “The Judge was suspended while judging FETÖ members”, 02 February 2017, 02:53:34.

prosecutor proposing the release of these 8 journalists were suspended and faced a disciplinary proceeding solely for their verdict on the 3rd of April 2017. Thus, an extremely strong message was given to other judges that their decisions are being closely supervised by the HSYK and by the Executive.

81. Prior to their suspension, **pro-government journalists threatened the chief judge, and the two associate judges of the Istanbul 25th Assize Court and shared messages asking for their arrest**<sup>37</sup>. Referring to the release of 21 journalists, on the 1st of April 2017, at 00:17, the Undersecretary of the Ministry of Justice and member of the HSYK 1st Chamber, Kenan İpek made the following comment on his twitter account: *“The struggle conducted by the TURKISH JUDICIARY and the HSYK against the FETÖ/PDY armed terrorist organization will continue with the first day’s DETERMINATION and STABILITY.”*<sup>38</sup>. The HSYK 1st Chamber is the office where the appointments of judges and prosecutors are made. After this media pressure, the released 21 journalists were kept in a prison van while a detention and arrest order for them was issued. Then, they were sent back to prison without release.
82. According to the information released by the HSYK Vice President Mehmet Yılmaz and reflected in the media dated the 7th of April 2017, *“The HSYK has removed four members of the judiciary from the office on the grounds of failure to gather evidence, the incompleteness of the case file and the lack of a valid, lawful and reasoned basis for the release order... aroused indignation in society and harmed the people’s conscience.”*<sup>39</sup> Thus, a judicial decision was checked by the HSYK, the legal agents of the judicial system were suspended; this practice symbolized the death of judicial independence (See Cooper v The United Kingdom). Moreover, if court members are suspended under the pretext that, “it aroused indignation in society and harmed the people’s conscience”, this shows that judges in Turkey are not independent of the HSYK and extremely vulnerable to external influences. One of the indicators of the

<sup>37</sup> Ersoy Dede, a dedicated supporter of the government, shared a message on the 31<sup>st</sup> of March 2017, “This is not enough @cemkucuk55 ... the judges behind the release decision will be picked up one by one.” (@ersoydede, 31/03/2017, 21:46)

<sup>38</sup> @kenanipek53, 1/04/2017, 00:17

<sup>39</sup> <http://t24.com.tr/haber/21-gazeteci-hakkinda-tahliye-karari-veren-hakim-ve-savcilarin-aciga-alinma-gerekcesi-aciklandi,398039>

independence of the courts is that the judges are protected against external influences (Findlay v. The United Kingdom, para.73).

83. When the chief judge and two associate judges of the Istanbul 25th Assize Court were detained and forced through disciplinary proceedings due to their release order for the 21 journalists, Professor of Human Rights Law **Yaman Akdeniz** shared the following message on his Twitter account: *“It is improbable that any Turkish journalist or any FETÖ defendants can be tried fairly.”*<sup>40</sup>
84. The Antalya 2nd Assize Court decided on the 17th of March 2017, to release 20 policemen<sup>41</sup> and they released 8 more arrested people on the 30th of March 2017<sup>42</sup>. Immediately after these release decisions, the 2nd Assize Court President Yücel Dağdelen was unseated and assigned to the province of Manisa as an ordinary judge by the HSYK; the associate judge Saim Karakay was transferred to Siirt<sup>43</sup>; and the other two members Ayşegül Yıldız Kaya and Ali Emre Sula were assigned from the Antalya court to other courts on the 6th of April 2017<sup>44</sup>. The same governmental pattern of atrocity and oppression of the judiciary manifested itself in the form of expulsion without consent, abrogating their tenure rights and incriminating judges for their verdicts. Upon the objection of the attorney general for the release order, the 3rd Assize Court presided over by İbrahim Altınyanak ordered the arrest of the formerly released defendants. The Judge İbrahim Kaynak, who signed the arrest order, was appointed by the HSYK to Antalya on the 8th of April 2017 to the newly established 10th Assize court which handles political and terror-related crimes<sup>45</sup>.
85. During the trial on the 18th of March 2017, the Malatya Assize Court ruled for the release of Angun and the hearing of the Chief of the General Staff Hulusi Akar as a witness. Immediately after this ruling, the HSYK dismissed the chief of this court Vedat Koç and reinstated another chief. The prosecutor of the case was also changed after the release order. The

<sup>40</sup> @cyberrights, 3/04/2017, 20.19

<sup>41</sup> [http://www.cumhuriyet.com.tr/m/haber/turkiye/700771-FETÖ\\_davasinda\\_20\\_tahliye.html](http://www.cumhuriyet.com.tr/m/haber/turkiye/700771-FETÖ_davasinda_20_tahliye.html)

<sup>42</sup> <http://www.antalyakorfez.com/guncel/21362/2/gazetecileretahliye>

<sup>43</sup> <http://www.hsyk.gov.tr/Eklentiler/files/05-04-2017-Adli-Karar-517.pdf>.

<sup>44</sup> <http://www.hsyk.gov.tr/Eklentiler/Dosyalar/ca59fbb0-8c31-4687-8073-3bcbd6788370.pdfueileri>

<sup>45</sup> <http://www.ulusalkanal.com.tr/m/?id=153112>

new court presided over by the appointed chief and 3 members adjudicated the re-arrest of Colonel Avni Angun<sup>46</sup>.

86. On the 2nd of May 2017, the Ankara 14th Assize court ruled for the release of the journalist Ayşe Parıldak. This decision was harshly criticized by the pro-government journalists who have worked as the mouthpieces of the party in power. Ayşegül Parıldak has been detained for no apparent reason for 8 hours and rearrested by the same court. 6 days later, on the 8th of May 2017 the chief judge İsmail Ademoğlu was removed from duty and appointed as a member of a different court<sup>47</sup>.
87. Ironically, in the aftermath of the 15th of July 2016 coup, the judges who issued the verdict for the arrest of some judges and prosecutors were also tried and found guilty. These judges explained the witch hunt and shed some light on how they arrested the other judges as such: *“the public prosecutor ordered. ‘Arrest them all. Never mind the evidence and the file.’ We also believed that there was a FETÖ structure within the judiciary; hence we did what we had been told to do”*<sup>48</sup>
88. On the 20th of July, 2016, the Istanbul Anatolian Criminal Peace judge Hasan Akdemir ruled for the arrest of 60 judges and prosecutors one of whom was judge Osman Kandemir. Before the verdict was read, Judge Hasan Akdemir told him that: *“I will arrest you without taking your testimony. I am waiting for news from Ankara”*.<sup>49</sup> The Criminal Peace judge Hasan Akdemir was caught in the very act of taking a bribe of \$50,000 for the release of a businessman and was arrested on the 20th of April 2017.
89. In March of 2017, the Ministry of Justice, promulgated an urgent note for the offices of the chief public prosecutor demanding that all the details of the legal proceedings, hearings, and the updated and detailed records of trials be sent to the ministry. The rationale behind this demand was to scrutinize every step of the political investigations and prosecutions<sup>50</sup>. And so with this message, the ruling authority hinted to all prosecutors and judges that all legal records and verdicts are being traced in order to curb any challenge that would defy the will of political power.

The principle of a court established by law requires that the court must have been established before date of an alleged crime, it should be established by law and it cannot be established for a particular event.

<sup>46</sup> <http://www.brusselschr.org/opinion-turkeys-politicized-judiciary/>

<sup>47</sup> <http://www.brusselschr.org/opinion-turkeys-politicized-judiciary/>

<sup>48</sup> <http://justiceheldhostage.blogspot.de/2017/04/FETÖ-iddiasyla-tutuklama-yapan-yargclar.html?spref=tw>,

<sup>49</sup> @jhhturkey, 26/04/2017, 04:45

<sup>50</sup> @shaber\_com, 21/04/2017, 15:19



90. A similar directive was sent by the Kilis governorship, provincial directorate of security to the presidency of the Kilis Assize Court on the 1st of April 2017 (No: 23828302-67876-22105/2017/2547744). In this confidential directive: *“One certified copy of all interlocutory rulings and the opinion of the court documents showing the details of the release decisions for the suspects jailed pending trial who have been tried in connection with FETÖ investigations in your court during March is kindly to be sent to the anti-smuggling and organized crime department of the provincial directorate of security.”* In reality, it can be inferred that the directive is sent by the department of the provincial directorate of security, most probably to all Assize courts across the country, with the intention of monitoring the reasoned decision of the court cases. It is impossible for judges, who are well aware of the fact that all reasoned verdicts of release for the defendants are tracked by the police force, to be able to issue release decisions without feeling any fear or worry.
91. On the 6th of June 2017, the pro-government daily newspaper *Sabah* ran with a headline that overtly affirms the undermining of judicial independence: *“If there is no evidence, freedom with judicial control.”* The news reads as follows: *“A new criteria has been introduced for Bylock detentions in FETÖ cases. Criminal courts of peace can release farmers, workers, tradesmen and housewives whose case file consists only of Bylock as evidence, with the condition of judicial control. If the suspects are civil servants and charged with the same Bylock evidence, they can apply to the newly-issued law with the stipulation that they make concrete confessions about FETÖ in line with the effective remorse law. When drawing up the legal documents, the Democratic Union Party-PYD terrorist organization will be removed from the official documents; yet, FETÖ will be preserved. Thus, the emphasis on the terrorist organization will be highlighted. This initiative taken by the Ankara Office of the Chief Public Prosecutor aims to curb unjust suffering and victimization. Suspects’ confessions taken within the new judicial control, freedom to decode the structure of the FETÖ organization are stipulated to be congruous.”*<sup>51</sup> Obviously, the source of the news is the Ankara Office of Chief Public Prosecutor which dictates which evidence will be accepted and how it will be utilized in case proceedings. In the aftermath of the 15th of July 2016 coup, some judges confessed that they have issued arrest decisions at the behest of the chief public prosecutor; and, therefore, this information corroborates the claim

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<sup>51</sup> <http://www.sabah.com.tr/gundem/2017/06/06/baska-delil-yoksa-adli-kontrolle-serbestlik>

that arrest orders are issued to the courts. If the assessment of evidence is handed over to the Office of Chief Public Prosecutor and if the judges wield the power of justice by following the orders, it is literally a travesty of justice.

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**VIOLATION OF THE RIGHT TO A FAIR TRIAL BEFORE  
AN ‘INDEPENDENT AND IMPARTIAL COURT  
ESTABLISHED BY LAW’ BY SPECIAL ASSIZE PENAL  
COURTS AUTHORIZED TO HEAR TERRORISM AND  
POLITICAL CRIMES**

92. Article 6 of the ECHR clearly expresses the right to a fair trial by a court established by law. Similarly, Article 37 of the Turkish Constitution says, *“No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established.”*
93. According to the ECHR, *“in light of the principle of the rule of law inherent in the system of the Convention, ... a ‘tribunal’ must always be ‘established by law’, otherwise it would lack the legitimacy required in a democratic society to hear the cause of individuals” (Lavents v. Latvia, § 81)*. The principle of a court established by law requires that the court must have been established before the date of an alleged crime, it should be established only by law and it cannot be established for a particular event.
94. The principle of a court established by law means that the person who is tried knows and can predict which court and judge will hold the hearing well before there is any conflict. He or she can foresee a judicial organization where judges are not changed (frequently) and there is no room for coincidences. According to the ECHR, one of the most fundamental qualities of courts is their reliability. The establishment of a court by law is important with respect not only to independence and impartiality but also to reassuring the public, presenting legal security to people, predictability and hence securing the principle of rule of law. The most important prerequisites of courts established by law involve (1) establishing courts by legislation enacted by the parliament (courts, including rules of procedures, are established by law - Coeme and others v. Belgium), (2) forbidding trial by a court established after the crime is

committed, and (3) forbidding establishment of a court for a specific situation.

Specially assigned courts were created with specially appointed members so that no room would be left for coincidence in trying persons alleged to belong to a certain group which the government has viewed as dissidents.

95. Turkey recently experienced ‘State Security Courts’ authorized to hear terrorism and political crimes, ‘Special Assize Courts’ prescribed by the now abolished Article 250 of the CMK, and ‘Specially Assigned Assize Courts’ established by the now abolished Anti-Terror Law no. 3713. These courts were abolished because they did not offer a fair trial (by law no. 6352 dated 02/07/2012 and law no. 6526 dated 21/02/2014, respectively). During the parliamentary meetings for the bill that would abolish special assize courts, the **Minister of Justice** said, *“From now on, no one will be able to establish such special courts (and) anyone who is charged with a high crime will be heard in a regular High Criminal Court as per the natural judge principle.”*
96. Despite all the experiences, several criminal assize courts across the country and in particular, the 2nd assize criminal courts were assigned to hear terrorism and political crimes after the HSYK decision dated 17/02/2015 under the pretext of specialization. It should be noted that this assignment was not made by law, but by an administrative decision. Twelve days before these assignments, most of the chief judges and members of the criminal assize courts across the country were changed, and the former judges were taken from these courts before the end of their tenure. A newspaper article with the headline, *“New specially authorized courts arrive”* says, *“The HSYK had changed the chief judges and members (of Criminal Assize Courts) in almost all the courts it authorized as specialized courts with permanent authorization published February 5 (2015). The rumor is that the board made this decision to secure the courts that will hear cases concerning the Gülen movement.”*<sup>52</sup> As can be understood from the article, the chief judges and members were picked and appointed for a particular purpose in Criminal Assize Court<sup>53</sup>, which were specifically assigned to hear terrorism and political crimes just as it is in criminal peace judgeships, and these courts were authorized 12 days later to hear terrorism and political crimes. Such was the establishment of the special criminal assize courts whose chiefs and members were specifically appointed and it was done by an administrative decision.

<sup>52</sup> <http://www.sozcu.com.tr/2015/gundem/yeni-ozel-yetkili-mahkemeler-geldi-746185>.

<sup>53</sup> Please see the Venice Commissioner’s opinion dated 13 March 2017 and numbered 852/2016 “Turkey - Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships”.

97. These courts not only violated the principle of independence because their previous chiefs and members were relieved of duty before the end of their tenure and replaced by new chiefs and members but also violated the principle of establishment by law because they were assigned for a particular purpose. Moreover, considering that they heard cases alleged to be committed before 2015 (for instance, a donation to the Turkish charity, Kimse Yok Mu in 2011 provided grounds for abetting a terrorist organization), the Specially Assigned Assize Courts appointed with the HSYK decision dated the 17th of February 2015 lack the assurances for courts established by law because this principle ensures trial by a court which was authorized at the time the crime was committed.
98. In other words, the HSYK identified several courts across the country as specially assigned assize courts with its decision dated the 17th of February 2015, and appointed them under the pretext of specialization for certain terrorism and political crimes. These courts were not established by legislation, but assigned by an HSYK decision, which functioned under the executive branch. The chief and member judges of Assize Courts were changed 12 days before the decision dated the 17th of February 2015, and they were replaced by new chief and member judges, the majority of whom were members who had promised to *“work harmoniously with the executive.”* The principle of judicial independence was abolished and in the meantime courts were authorized by the HSYK’s administrative decision for a specific purpose. All this contradicts the constitutional Article 6 *“The formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law.”* According to the ECHR, even judicial organs cannot have the discretion to decide which court will have jurisdiction; otherwise, it would violate the principle of having a natural judge in the trial of a crime (Coeme and others v. Belgium). The ECHR defines the purpose of establishing courts by law and authorizing them as follows: *“the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament” (Zand v. Austria, No. 7360/76)<sup>54</sup>.*
99. To sum up, specially assigned courts were created with specially appointed chiefs and members in them so that no room would be left for coincidence in trying persons alleged to belong to a certain section of the society which

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<sup>54</sup> D.J. HARRIS, M. O’BOYLE, E.P. BATES & C.M. BUCKLEY, *Law of the European Convention on Human Rights*, 2014, p. 458.

the government has viewed as dissidents since 2014. Given that the HSYK is functionally within the executive branch and is organized as explained above, the specially assigned assize courts established after the 17th of February 2015 clearly contradict ‘courts established by law’.

100. The reason behind the HSYK’s assigning certain courts specifically on the 17th of February 2015 became apparent with the practices of the Bakırköy 2nd Assize Court, which arrested two judges (Metin Özçelik and Mustafa Başer) on the 30th of April and the 1st of May for allegations of terrorism although Article 88 of law no. 2802 clearly forbade this and there was no evidence of coercion or violence. As a rule, special courts have no jurisdiction over an investigation and so cannot in any way issue an arrest warrant; there is no practice in Turkey that could suggest the opposite. The judges who are claimed to have committed a crime can only be arrested by the assize court on duty. Still, the HSYK inspector demanded specifically that the Bakırköy 2nd Assize Court arrest the two judges although it was not the court on duty. This court was one of the specially assigned assize courts in the HSYK’s decision dated the 17th of February 2015 and thus arrested the two judges. While the arrest could be appealed to the next assize court, the HSYK intervened and the appeal was made to the Anadolu 2nd Assize Court (another specially assigned assize court) and no room was left for coincidence that the two judges’ detention might be discontinued. This incident is only one of the pieces of evidence that the members of the specially assigned 2nd Assize Court were picked for a specific end. Otherwise, it is hard to understand the fact that the two judges were arrested by specially assigned courts and the HSYK intervened in the process.
100. As can be understood from this discussion, the aim of the HSYK decision dated the 17th of February 2015 was contrary to the aim of the law that abolished special courts mentioned by the Minister of Justice: **the aim was to form specially assigned assize courts with members who were also specially appointed.** It is evident that these courts lack the guarantees of the natural judge principle as well as independence and impartiality because their panels were replaced 12 days previously by the HSYK and they were authorized to investigate crimes that were committed before they were established. **For all these reasons, the specially assigned assize courts which handle terrorism and political crimes were not established by law, lack guarantees for independence and impartiality and violate Articles 10 and 37 of the Turkish Constitution, Article 14 of the**

OHCHR and Articles 6/1 and 14 of the ECHR as well as relevant ECHR decisions.

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### COURTS OF SECOND INSTANCE (REGIONAL COURTS OF JUSTICE AND ADMINISTRATIVE COURTS)

101. Courts of Appeal in Turkey (Regional Courts of Justice and Administrative Courts) were made operational on the 20th of July 2016. As a rule, in accordance with the principle of being established by law, these courts can only inspect decisions by courts of first instance that are committed after they were established.
102. The states that uphold the ECHR have discretion over changing laws in their judicial organization. However, in these changes, legislation should comply with fundamental rights about judicial hearing such as the principle that courts must be established by law. In principle, changing laws relating to courts of second instance is part of a country's sovereignty. Yet in accordance with Article 6 of the ECHR the new courts should be able to try crimes committed after their establishment. Nevertheless, courts of second instance were formed contrary to the principle that courts must be established by law and the respective problem in the courts of first instance was not redressed. In short, the penal chambers of regional courts are authorized to try crimes committed after the 20th of July 2017; with respect to crimes before this date they violate the principle of establishment by law.
103. Also, regional courts of justice are the supervision authority over decisions by specially assigned assize courts, and their chief and member judges work under the HSK (former HSYK). Therefore, the problems that apply to the courts of first instance are also valid for judges of second instance. There have been important instances that show how these courts lost their independence although they started working only recently.
104. The Antalya Regional Court of Justice 2nd Penal Chamber reversed a 6-year-3-month prison sentence issued by the Denizli Assize Court on 04.04.2017 on the grounds that the investigation into the application called Bylock was insufficient. Pro-government daily newspaper Yeni Asır published news on 26.04.2017 about Şenol Demir, the chief judge of the

Antalya Regional Court of Justice 2nd Penal Chamber, that vilified him for his decision<sup>55</sup>. On 08.05.2017 the judge Şenol Demir was assigned by the HSYK to Konya province as a judge of first instance only after having been the chief judge of the penal chamber for 9 months and 18 days<sup>56</sup>. A judge assigned to courts of second instance normally have a tenure of at least four years.

105. The same situation occurred at the Gaziantep Regional Court of Justice. The Adana 11th Assize Court sentenced a deputy police chief on 20.01.2017 for being a member of a terrorist organization on the grounds that he **'used the mobile phone application called Bylock, sent his son to Işık Preparatory School between 2013-2015 and had an account in the bank called Bank Asya'**. The Gaziantep Regional Court of Justice 3rd Penal Chamber reverted this decision by a majority voting on 20.04.2017 on the grounds that, **'a sentence for membership to a terrorist organization cannot be based on Bylock records, the contents of which are not known (2017/286E – 2017/573K)**. After this reversal, the chief judge of the 3rd Penal Chamber Zafer Yarar was assigned by the HSK to the Kayseri Courthouse on 26.05.2017 as a judge of the first instance. Mustafa Tosun, a member of the 3rd Penal Chamber who voted like the chief judge, was assigned by the same HSK decision to the Istanbul Anadolu Courthouse as a judge of first instance. Bayram Korkmaz, the member who opposed the decision about Bylock, was rewarded and made the chief judge of the 3rd Penal Chamber. Hence, the two judges in Courts of Appeal, who reversed decisions in favour of defendants sentenced for their alleged links to the organization called FETÖ/PDY, were relieved of their duty in the Regional Assize Courts without their consent 10 months and 6 days into their four-year tenure and demoted to judges of first instance.
106. All these events attest to the fact that the judges in the courts of first and second instance work under the authority of the HSYK and hence are not independent.

<sup>55</sup> <http://www.yeniasir.com.tr/sürmanşet/2017/04/26/hakimden-skandal-bylock-karari>

<sup>56</sup> <https://twitter.com/aliaktas7/status/862022086059077635>.

(<http://www.adaletbiz.com/m/ceza-hukuku/bylock-kararina-bozma-h148726.html>)

## II- STRONG DATA SHOWING THAT THE COURT OF CASSATION IS NOT ‘AN INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW

107. The authority of review for decisions given by the penal chambers of regional assize courts is the Court of Cassation (third-tier judicial organ). For the reasons listed below, the Court of Cassation also lacks the characteristics of an ‘**independent, impartial court established by law**’ and cannot redress the insufficiencies of courts of first and second instance.
108. As stated above, one of the promises made by the members of the Platform for Unity in the Judiciary (YBP) during the 2014 HSYK elections was to increase the number of members in the Court of Cassation and the Council of State with a new legislation. Thanks to the YBP members’ promise, it was legislated by votes from governing party lawmakers. The law no. 6572 dated 02.12.2014, which increased the number of members in the Court of Cassation and the Council of State, became effective as of 12.12.2014. The HSYK General Assembly, composed mainly of members who promised to ‘work in harmony with the executive’, elected 144 judges as members of the Court of Cassation and 38 administrative judges as members of the Council of State.
109. **Ergün Özbudun**, Professor of Constitutional Law and former member of the Venice Commission, made the following statement in the Rule of Law Conference held in Istanbul in 2015: *“The area where our democracy received the greatest injury in recent years in the judiciary, judicial independence and rule of law... The main event that triggered the regression in the judiciary was the 17-25 December probes. A series of laws enacted to whitewash it, reset judicial independence in the end. The first attempt was the change in laws concerning the judicial police. Next came the famous HSYK law and then the law concerning criminal peace judgeships, which I believe inflicted the deepest of injuries... Finally, the law that aimed to change the composition of the two higher courts in favor of the government, aimed to fill these courts with their partisans. It seems that they have managed that. Moreover, we can say that control of the judiciary or the attempt to create a dependent judiciary has to a great extent been successful. This is what we saw in the HSYK elections. The group for which the government provided logistic support expressed its aim during the election process (of the HSYK on the 13th of October 2013) which was to work in harmony*

The Court of Cassation also lacks the characteristics of an independent, impartial court established by law and cannot redress the insufficiencies of courts of first and second instances.



*with the legislature and the executive. As far as I know, the duty of the judiciary is not to work in harmony with the legislature and the executive; but rather to monitor them. So, it seems as if the process of seizing control of the judiciary is complete except for the Constitutional Court.”*

110. A further legislative proposal was made in May of 2016 that included the termination and selection of memberships in the Court of Cassation and the Council of State. Before the proposal was enacted, Prof. Ergun Özbudun evaluated the likely outcome of the proposal in an interview: *“This is purely a purge law. It is a flagrant contradiction to the articles in the constitution on the rule of law, independence of the judiciary and guarantees for judges. According to our constitution, judges cannot be dismissed or retired until they are over 65... If the law is legislated, I believe the Constitutional Court will cancel it. It may even say it is not a cancellation but an annulment because it obviously has a political aim such as creating a perfectly harmonious judiciary. The Constitutional Court will discuss complete annulment. You are making appointments for part of that staff through the HSYK, which is under your control. This surely is a proposal that will inflict serious injury on judicial independence”<sup>57</sup>.*
111. The law that terminated all memberships in the Court of Cassation and the Council of State was enacted by parliament on 02.07.2016. It was published in the Official Gazette on the 23rd of July 2016, which made it effective, and two days later 267 members were elected by the HSYK for the Court of Cassation. Pursuant to the domestic law, the members of the Council of State and the Court of Cassation have the right to remain on duty until the compulsory age of retirement (65). Their membership cannot be terminated without their consent. In short, the law dated the 23rd of July 2016 ended all memberships to the Court of Cassation before retirement and held elections for new members, which eliminated the independence of the Court of Cassation as a whole. Moreover, a completely new Court of Cassation was formed after the 23rd of July 2106 and the principle of a ‘fair trial before a court established by law’ was violated with respect to the conflicts that arose before this date.

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<sup>57</sup> <http://www.haberdar.com/gundem/ergun-ozbudun-yargidaki-degisiklik-teklifi-tam-anlamiyla-tasfiye-kanunu-h29393.html>

112. On the 16th July 2016, Necip Cem İşçimen, the deputy-chief public prosecutor of Ankara, announced live on NTV at about 04:15 am that there were arrest warrants for members of the higher judiciary bodies including 140 members of the Court of Cassation. More than one hundred members of the Court of Cassation were quickly detained and arrested. The same procedures were repeated for 48 members of the Council of State and 2 members of the Constitutional Court. The procedures for investigations of the members of the Court of Cassation, the Council of State and the Constitutional Court are described in the constitution and other laws. An ordinary prosecutor is not authorized to open a file for and detain a member of the Court of Cassation, nor can a criminal peace judge issue an arrest warrant for that member, unless they are caught red-handed in the act of a severe crime. Offence detected in the act includes (1) a crime that is being committed at the moment, (2) a crime that has just been committed; and a crime committed by the individual arrested without a warrant by law enforcement authorities, by the victim or by others, after he has been chased immediately after the crime has been committed, (3) a crime committed by the individual who was arrested without a warrant with the movable goods or evidence which indicate that a crime has been committed (Turkish Code of Criminal Procedure, Art. 2). The arbitrary detention and imprisonment of 140 members of the Court of Cassation, 48 members of the Council of State and 2 members of the Constitutional Court, who clearly had no idea about the coup attempt, without observance of any legal guarantees by unauthorized persons will have a severe impact on the independence of all judges, including those in higher judicial bodies. These judges were soon dismissed from their professions with Article 3 of the emergency decree no. 667 and denied of even the minimum requirements for their security. The independence of all judicial bodies was eliminated when 190 higher judges were illegally detained by an unauthorized prosecutor, arrested by an unauthorized judgeship and then purged from the profession without having the proper right to defend themselves. It is virtually impossible for a member of the Court of Cassation to make free and bold decisions after seeing how his colleagues have been detained and arrested in full violation of the constitution and other laws. The same is true for the Constitutional Court and the Council of State.

It is virtually impossible for a member of the Court of Cassation to make free and bold decision after seeing how his/her colleagues have been detained

113. In an atmosphere of fear where thousands of academics such as Prof. İbrahim Kaboğlu and Prof. Yüksel Taşkın were accused of being members of a terrorist organization and thus purged from public service, there is no obstacle to arbitrary allegations, imprisonment and dismissal of a member of the Council of State or the Constitutional Court. The

independence of members of the Council of State or the Constitutional Court is out of the question when they have to work under the constant fear of being arrested or dismissed. **Given the frequency and recency of the actual examples, such an argument is not imaginary but is based on sound factual grounds.** A member, say, of the Court of Cassation who works under the risk of arrest for being a terrorist for some unlikely pretext cannot possibly make a decision that the government may not favor. Therefore, the Court of Cassation has lost its independence, and as long as Article 3 of the emergency decree no. 667 remains in effect, no judge can have guarantees for judges, including members of the Court of Cassation, the Council of State or the Constitutional Court.

The two members of the Constitutional Court were dismissed without due process in an act of denial of justice as they were not told what justification or hard facts proved their faults, criminal behaviours or inabilities.

114. **The Court of Cassation** made the following statement on the 21st of November 2016: “The EU’s Turkey Progress Report was published on 09/11/2016.... The report has created disappointment because of the comments and findings concerning the FETÖ/PDY Terrorist Organization and the disregard for the bloody coup attempt of the 15th of July 2016. Here’s how: 246 of our people were killed during the coup attempt staged against our democracy and rule of law by members of the FETÖ/PDY Terrorist Organization. ... It was known that the FETÖ/PDY Terrorist Organization, the perpetrator of the said coup attempt, had penetrated strategic institutions of the state including the army, the police and the judiciary and its members had attained important posts and there were investigations into them. ... It is sad that the report did not mention any such findings and acknowledge that this is a terrorist organization when the issue is so obvious.” The statement was not just made by the chairman, but by the institution of the Court of Cassation, so it was affiliated with the court as a whole. **When the statement was made, there had been no final court order issued by independent and impartial courts stating that the organization in question was a terrorist organization.** Those who governed the Court of Cassation know that all too well. They know that case files about these detentions will come before their court one day. The statement by the Court of Cassation and especially the expression ‘It is sad that the report did not ... acknowledge that this is a terrorist organization’ is a **clear violation of presumption of innocence.** Even more troubling is the fact that the statement was made in the name of the Court of Cassation. With this statement, the court revealed its bias against an issue the trial of which is not yet over. Impartiality entails being free of bias. Yet the statement shows that the Court of Cassation has obviously lost its impartiality in all the trials concerning the said organization.

115. For all the above reasons, the Court of Cassation does not have the fundamental characteristics of an independent and impartial court established by law; therefore, it cannot be defined as a ‘tribunal’ with respect to the right of access to trial and other relevant civil rights. Because a body that is not independent and impartial cannot be called a court (Beaumartin v. France), the right of access to a court cannot be guaranteed within the scope of Article 6 of the ECHR.

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### III. FACTS AND FINDINGS SHOWING THAT THE CONSTITUTIONAL COURT HAS LOST ITS INDEPENDENCE

116. The last domestic remedy to which every individual whose rights have been violated can resort after the Court of Cassation is the Constitutional Court. As noted above, two judges of the 17-member Constitutional Court experienced a period of illegal detention, arrest and dismissal. Although they were not caught in the act of an offence, they were detained in the early hours of 16.07.2016 by the prosecution for being members of a terrorist organization and were later arrested by a criminal peace judgeship that did not have the authority to do so. Two members of the highest court in the country were detained and arrested without any evidence and in full violation of constitutional guarantees. The two members were dismissed by the Constitutional Court with the decision dated 04.08.2016 as many principles had been violated such as the right of defense, adversarial proceedings, equality of arms and fair trial. Given 18 days after the detentions, the decision did not involve any mention of concrete evidence **but the reasons for the dismissals provided were information from social circles (obviously the result of earlier profiling) and perceptions and feelings (not hard facts) of the court members about the two judges.** Moreover, these were the justifications although the members had examined the evidence in the case file provided by the prosecutor. In other words, there was not any incriminatory evidence in the case files against the judges.
117. To reiterate, a sine qua non for judicial independence is the irremovability of judges before the end of their term of office. **“Judges can be suspended or dismissed only because of faults or offences for which there are serious reasons and hard facts or inability to perform their duties and only through fair trial.”** The two members of the

No member of the Constitutional Court has guarantees of a judge as long as Article 3 of Emergency Decree No. 667 is in effect.

Constitutional Court were dismissed without due process in an act of denial of justice as they were not told what justification or hard facts proved their fault, criminal behavior or inability.

118. Considering the evidence concerning the two judges in these actual cases, it is impossible to refer to some apparent faulty behavior or inability or plausible reason. There has been no investigation carried out beforehand or a finalized fair trial process. **The memberships of the judges of the Constitutional Court were arbitrarily terminated and two pro-government members were appointed to replace them.** The judges were dismissed before finishing their term of office, without their consent, in complete defiance of rules of positive law and with an emergency decree issued after the fact (Article 3 of emergency decree no. 667 dated 23.07.2016). The principles of legal security, rule of law, judge guarantees and judicial independence were thus eliminated. No member of the Constitutional Court has guarantees of a judge as long as Article 3 of emergency decree no. 667 is in effect. The article is conducive to arbitrary dismissals of all members of the judiciary including those of the Constitutional Court without having to provide reasons or right of defense.
119. It is impossible for the judges in the Constitutional Court to make decisions without any anxiety when they have witnessed two fellow judges who expressed a minority opinion in some decisions being detained, arrested and denied of all legal rights. As long as Article 3 of emergency decree no. 667 among others remains in effect, there is no power that can prevent other members from experiencing the same end. It is impossible to talk about independence of a member judge when he or she cannot make decisions without fear and anxiety. For all these reasons, the Constitutional Court has lost its independence.
120. Moreover, in its decision dated 04.08.2016 which terminated the membership of two judges without due process, the Constitutional Court referred to what the Council of Europe or European Union documents named 'the Gülen Movement' as an 'armed terrorist organization' without using any expression such as 'alleged' or 'so-called' and thus declared the said group an armed terrorist organization

The declarations and threats to the Constitutional Court clearly violated the fundamental values of the Council of Europe namely democracy, rule of law, and protection of human rights and freedoms.

The decision in question was made by a unanimous vote in the plenary session, and all the members violated presumption of innocence by expressing their biases and thus lost their impartiality in cases related to the Gülen Movement.

69 times in total<sup>58</sup>. In fact, there was no legal decision issued by a court of law and finalized ('by default', Art. 38/4 of the Constitution) until this decision was announced or even when the report was written. The Constitutional Court is limited in its jurisdiction and cannot hold criminal procedures; it cannot make a decision in an area where it does not have jurisdiction. Even if we assumed that it could, no person or persons could possibly be declared guilty in 18 days without any proceedings and hearings. No one can 'exercise state authority that does not emanate from the Constitution' (Art. 6 of the Constitution). Because it was made without observing any principles such as adversarial proceedings, equality of arms and fair trial, the decision dated 04.08.2016 cannot be defined as a 'judicial decision'. A decision made by an organ called a 'court' does not necessarily mean that it is a judicial order. Only decisions made in accordance with fundamental judicial guarantees are judicial decisions. The decision in question was made by a unanimous vote in the plenary session, and all the members violated presumption of innocence by expressing their biases. Therefore, all the members of the Constitutional Court have lost their impartiality in cases related to the Gülen Movement.

121. The concrete evidence that the Constitutional Court is not independent and impartial are not limited to the above. One of the essential aspects of independence of the courts is that the members of the court should be protected from external pressures. The following findings show that the Constitutional Court is not protected against external pressures. Statements of the members of the executive body about the judiciary may lead to legitimate doubt about the principle of independence and impartiality of the courts. In the case of *Sovtransavto Holding v. Ukraine* (No: 48553/99, 25.7.2002), the president of Ukraine stated that the High Board of Arbitration must protect the interests of the state, and the ECHR assessed it as 'legitimate doubt about the independence and impartiality of the arbitral tribunal' regardless of whether the litigation was affected as an outcome.
122. After the news published by Can Dündar, the President said in a live interview on the 31st of May 2015, "*The unfounded allegations about the National Intelligence Agency, the illegal operation that was carried out (and) this in a way are acts of espionage. This newspaper also got*

<sup>58</sup> <http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/717f7c20-b696-4379-84f6-dfb568f8844a?excludeGerekce=False&wordsOnly=False>

*involved in this espionage activity ... The person who made this news will I believe pay dearly for it; I won't let him be.<sup>59</sup>*" Can Dündar was arrested on the 26th of November 2015 for the same reasons.

123. Can Dündar was released after 92 days of detention upon the Constitutional Court's decision favouring his application. However, the President said on the 28th of February 2016, *"This incident has nothing to do whatsoever with freedom of speech; this is a case of espionage. I believe the media cannot have infinite freedom.... The Constitutional Court might have given a decision in this way. I will remain silent about the decision made by the Constitutional Court. ... But I'm not in a position to accept it and I won't abide by its decision. This is a decision for release. In fact, the court who made the decision could have objected to the decision. If it had, the Constitutional Court's decision would be null and void or the persons who are released now would go to the ECHR. The result they'll get from there is clear. Steps taken in this way are not the right steps."*
124. At the Embassy of Turkey in Nigeria, President Erdoğan said on the 4th of March 2016: *"The President of the Constitutional Court says, 'the decision of the Constitutional Court has binding force; everyone is under obligation to obey it'. Yes, in constitutional amendments, it is binding, but you cannot suggest anything like that about individual applications. If it is binding, he should not go to a court of first instance again. There is no decision that the Constitutional Court can make if the district court upholds a previous decision. Where does this go? If these persons want, they may go to the ECHR. If the ECHR decides in the way the Constitutional Court did, it is only binding in terms of compensation. The State shall also object to compensation or pay the compensation. Forgive me but you cannot pull it off if trial-without-arrest is applied to persons who put confidential state secrets in danger.'<sup>60</sup>*
125. In a speech he made in Burdur on the 11th of March 2016, President Erdoğan said, *"The Constitutional Court has disregarded the constitution and put itself in the position of the court. ... What is the rush? ... Look at this statement: The Constitutional Court was*

<sup>59</sup> <http://www.sozcu.com.tr/2015/gundem/erdogandan-can-dundara-tehdit-846822/>

<sup>60</sup> <http://www.milatgazetesi.com/uygunsuz-kararlarin-altindan-kalkamazsiniz-haber-79417>

*requested to lift their detention order ‘on the grounds that there is no strong evidence for criminal suspicion’. In this regard, the Court made a decision beyond its jurisdiction, although it was not authorized. ... The first-instance court could have upheld its decision. Do it, and let’s see what the Constitutional Court will do. Let’s see that as well. ... This matter is in no way connected to judicial independence. ... I take a stand against those who exceed the limits of their authority. If the Constitutional Court moves on such a path, I will not hesitate to express my objections to it on behalf of the nation. ... The Constitutional Court has not hesitated to make a decision against the country and the nation in a matter which is a concrete example of one of the biggest attacks against Turkey in recent years – by the members of the Court, including the President of the Constitutional Court. What did I say about an institution that does not respect its own country and her interests? I said, I don’t accept this ruling. I hope that the Constitutional Court won’t resort again to such ways that would open up its own existence and legitimacy to discussion.’<sup>61</sup>*

126. Soon after these statements, the Venice Commission issued a declaration dated the 16th of March 2016 titled, ‘the Declaration by the Venice Commission on undue interference in the work of the Constitutional Courts in its Member States’. In summary, the Commission stated that they were seriously concerned about the statements made by politicians and that the declarations and threats to the Constitutional Court clearly violated the fundamental values of the Council of Europe (namely, democracy, the rule of law and the protection of human rights and fundamental freedoms)<sup>62</sup>.
127. According to the news in the Cumhuriyet daily newspaper dated the 26th of April 2016, President Erdoğan met the president of the Constitutional Court (Zühtü Arslan) and its members. Erdoğan said to them reproachfully, *“Your decision is wrong because the issue (news about the MIT Trucks case) is a national security issue for us, and we expected you to make the right decision.”* President Arslan showed the dismissal of applications about the curfews declared in many parts of the Southern part of Turkey as evidence of the court’s adherence to Erdoğan’s words about being sensitive to national security issues. Arslan continued by

<sup>61</sup> <http://www.gazete8.com/politika/cumhurbaskani-erdogan-burdurda-anayasa-mahkemesi-baskanini-elestirdi-h157253.html>.

<http://www.milliyet.com.tr/cumhurbaskani-erdogan-burdur-gundem-2208110/>

<sup>62</sup> <http://www.venice.coe.int/webforms/events/?id=2193>



saying that the curfews might be seen as a violation of rights if there was growing opinion concerning their implementation with orders from state officials and added, *“but we did not consider the curfews within this context and made a decision within the framework of the state’s national security policy.”*<sup>63</sup> This news was not refuted until this application was made.

128. For all these reasons, the Constitutional Court also lost the characteristics of independence and impartiality within the scope of Article 6 of the ECHR, and the deficiencies of the Court of Cassation in matters of independence and impartiality cannot be redressed by the Constitutional Court. In fact, the Constitutional Court is not a fully-authorized court in criminal cases because it cannot hold official hearings.

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#### IV. OTHER FINDINGS ABOUT INTERFERENCE IN JUDICIAL INDEPENDENCE

129. Finally, apart from what’s been stated above, there are some facts and findings that affected the overall independence of the judiciary. The following items are just a few of the many examples.
130. **Galip Ensarioglu**, an influential member of the AKP, was a guest speaker at a program called ‘Arka Plan’ (The Background) on A Haber news channel on the 5th of April 2016. Defending the presidential system, Ensarioğlu said, *“The parliamentary system is to our advantage. We have the legislature, the executive and the judiciary. Can we, I mean the parliament, have a (duty) such as inspecting the AKP government?”* Thus, he admitted that the judiciary is under government control. In the same program, **Burhan Kuzu**, an AKP lawmaker for the last three terms and a professor of constitutional law who presided over the Constitutional Committee of Parliament, made similar statements: *“The son is ours; the daughter is ours; why should we inspect it?”* When the statements were criticized by the public, the journalist Yavuz Oğhan asked Galip Ensarioglu on a radio program whether it was a slip of the tongue.

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[http://www.cumhuriyet.com.tr/haber/siyaset/522133/Sizin\\_isiniz\\_Guvenlik\\_bizim\\_isimiz\\_Ozgurluk.html](http://www.cumhuriyet.com.tr/haber/siyaset/522133/Sizin_isiniz_Guvenlik_bizim_isimiz_Ozgurluk.html)

Ensarioğlu said, *'I didn't say it by mistake.'*<sup>64</sup> These two figures were on the executive board of the AKP when they made these statements, so their words reflect the party's stand.

131. After the National Security Council (MGK) meeting held on the 26th of May 2016, **President Erdoğan** made a speech in Kırşehir on the 27th of May 2016 and said, *"Yesterday, we took a new decision (in the MGK). We called it (the Gülen Movement) an illegal terrorist organization with a legal front. We made a council recommendation that it should be called pro-Fethullahist terrorist organization and sent this recommendation to the government. Now, we are waiting for the government to make a cabinet decision. We will register them as a terrorist organization. They will be tried as a terrorist organization, in the same category as the PKK, PYD and YPG."* This statement clearly shows that courts in Turkey comply with the resolutions of the MGK in rulings when the Gülen Movement<sup>65</sup> is concerned and they are not independent from the executive. At this meeting, the presidents of the Court of Cassation and the Council of State were also sitting in the front rows and they applauded after some of the statements made by the President, which made news headlines in the media.
132. After the meeting of the Council of Ministers dated the 30th of May 2016, the Deputy Prime Minister and Government Spokesman **Numan Kurtulmuş** said: *"At the previous MGK (NSC) meetings, it was stated that combating the parallel state structure (PDY) on all fronts is a state policy. With the recommendation of the MGK, the new phase of the struggle has been launched against this parallel structure. Pursuant to the MGK recommendation decision, PDY was described as a terrorist organization for the first time and the next phase of the campaign assumed a wider framework of fighting with a terrorist organization. Therefore, all the requirements of this battle will be fulfilled by both the Government and the judicial organs and this practice will continue without interruption."* There is no doubt that this statement was made on behalf of the executive body and binds the entire executive. It is understood from these statements that all the state apparatuses, including the judiciary, are waging a war against the Gülen movement and the judiciary will carry out its part whatever it takes. Thus, the executive body

<sup>64</sup> <http://www.hurriyet.com.tr/galip-ensarioglu-agzimdan-kacirmadim-40083231>

<sup>65</sup> Until the date this report was written there hadn't been any jurisdiction by independent and impartial courts, so the 'Gülen Movement' was used as a respect for presumption of innocence.

has officially declared that the decisions taken by the MGK and the Council of Ministers have been carried out by judicial organs. A judicial structure which merely implements such decisions of the MGK and the Council of Ministers cannot be considered as independent; not even a court (Beaumartin v. France).

133. On the 22nd of April 2017, the Minister of Justice Bekir Bozdağ remarked in his Twitter account regarding the cases to be filed against the dismissal of petition for the annulment of the referendum dated the 16th of April 2017 by the Supreme Electoral Council: *“No court including the Council of State and the Constitutional Court can be applied to, to reverse the decision issued by the Supreme Electoral Council. In the case that an application is made, the Council of State and the Constitutional Court has no option but to deny the case file.”*<sup>66</sup>. In this social media message, a top-ranking official of the judiciary, so to speak, give directions to 2 high courts, **“No decision except denial can be taken.”**
134. During the iftar dinner programme for the Home Guard Units including the Gendarmerie and the Police Force on the 7th of June 2017 in Gölbaşı, **Erdoğan** referred to the detentions and the court trials of the same date and said, *“All my principal consultants are following the trials. Half of them are following the trials in Istanbul and the other half in Ankara. I receive their reports daily, I keep up with what is happening. These bloody murderers will not escape from the sorrowful doom that awaits them. The indecency and lewdness (refers to court pleas) that they staged in courthouses will not avail them when they are rotting in prison cells. Even if they serve their time and get out, our nation will mete out the necessary punishment on the streets. They will spit in their faces, and they will drown in spittle. Our fight will go on until we eradicate each and every FETÖ member.”*<sup>67</sup> These remarks are a direct violation of the presumption of innocence. Besides, these remarks voiced by the President who has liability to appoint 6 out of the 17 members of the HSYK and is the head of the ruling party with majority seats in the National Assembly that appoints the remaining 7 members. A judge who is cognizant of the fact that his files and records are being monitored by the President who elects the majority of the HSYK cannot rule impartially and independently. Even if the defendant’s innocence is

A judge who is cognizant of the fact that his files and records are being monitored by the President who elects the majority of the HSYK cannot rule impartially and independently.

<sup>66</sup> @bybekirbozdag, 22/04/2017, 09:58)

<sup>67</sup> See the Anadolu Agency internet site, 07.06.2017, “Cumhurbaşkanı Erdoğan: FETÖ davalarının günbegün rapolarını alıyorum”.

corroborated by hard facts, the political pressure rules out any possibility for court members to issue any release decision without any anxiety. After all, when the President's speech is taken into account, the verdicts of conviction have already been delivered and their doom in prison cells has already been declared.

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## CONCLUSION

135. From all these concrete findings, the courts of first and second instances, the Court of Cassation, the Council of State and the Constitutional Court, which can be applied to under domestic law, are devoid of any securities of a court or tribunal 'previously established by law, independent and impartial' within the scope of Article 6 of the Convention.
136. The evaluations regarding the prevalent lack of independence and impartiality of the judiciary in Turkey are not immaterial apprehensions but based on concrete evidence. This situation is reflected in numerous reports which have been published since the beginning of 2014 by various international organizations<sup>68</sup>.
137. In the light of all these points, it should be concluded that there is not a single independent and impartial body in the Turkish judiciary and hence no 'court' within the context of Article 6 of the ECHR. Accordingly, there is no effective domestic remedy (independent courts) which has to be exhausted in the case of violation of civil rights and no right of access to a court in particular.



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<sup>68</sup> [www.yargiicinadalet.biz](http://www.yargiicinadalet.biz), the application to the ECHR for judges and prosecutors (dismissal), Appendix 6, International Reports.

**Platform for Peace and Justice (PPJ)** is a platform that monitors and reports the developments in the fields of peace, justice, democracy, the rule of law and human rights, with a special focus on Turkey.

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