

A COMPREHENSIVE REPORT ON THE ABOLITION OF  
THE RULE OF LAW IN TURKEY  
2018

NON-INDEPENDENCE AND NON-  
IMPARTIALITY OF THE TURKISH  
JUDICIARY



*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 the concrete evidence that there is no effective domestic remedy in relation to applications to the ECHR and other international organizations with respect to the ECHR Articles 6 and 10.*

**A COMPREHENSIVE REPORT ON THE ABOLITION OF THE RULE OF LAW IN  
TURKEY: NON-INDEPENDENCE AND NON-IMPARTIALITY OF THE TURKISH  
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## EXECUTIVE SUMMARY

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This report takes a comprehensive look at the non-independence and non-impartiality of the Turkish judiciary. A neutral judicial system plays a vital role in the promotion of democracy and the rule of law. However, this has been abolished in Turkey, with the judiciary becoming increasingly pro-government, effecting all levels of society.

The first section of this report examines the Turkish Judicial Council (HSYK/HSK). The independency and impartiality of the first and second instance courts should be evaluated within the context of the HSK, which assigns and dismisses judges and gives permission to carry out disciplinary and criminal investigations against them. The Supreme Courts, which are the third instance, also have its members assigned by the HSK, with investigations carried out by the court's own bodies. It has been noted that "The power that controls the HSK can control the Turkish judiciary as well"<sup>2</sup>. Members of the Constitutional Court are chosen in accordance with the Constitution, and investigations carried out by the Constitutional Court. Sections two, seven, eight and nine of this report scrutinise these courts respectively.

Whether courts are independent can be evaluated by criteria such as the appointment of judges, irremovability during their term of office, existence of guarantees against outside pressures, and appearance of independence (*Findlay v. The United Kingdom*, § 73). The judiciary must also be independent of the executive; this is explored in section three, whilst section four looks at outside pressures more generally. It is argued that Turkey's judiciary has become increasingly non-independent and non-impartial since 2013, however this has been exacerbated by the July 15<sup>th</sup>, 2016 coup attempt. Section five of this report details the effects of this event, and section six looks at the re-establishment of Assize Courts to deal with terrorism and political crimes. Finally, section ten outlines other various other findings about interference in judicial independence.

Overall, the data, findings and events in this PPJ report indicate that all the four layers of Turkey's courts are not independent or impartial, nor do they meet the provisions of the European Convention on Human Rights. It cannot be said that there is an effective remedy that can be exhausted in domestic law, which is needed for international intervention such as tribunals before the European Court of Human Rights or the United Nations Human Rights Council. PPJ recommends that the merits of complaints to these courts should be reconsidered.

Highlights from this report:

## IMPARTIALITY AND INDEPENDENCY OF THE HSYK/HSK

- HSYK member elections were influenced by the AKP and Ministry of Justice. For example, in 2014 they campaigned for pro-government members, with the Minister of the latter declaring, amongst other promises, that the salary of judges and prosecutors would be increased if they won. These promises were kept when 15/22 HSYK members elected were pro-government.
- Five non-pro-government members of the HSYK were unfairly dismissed within twelve hours preceding the July 15<sup>th</sup> coup attempt. Within ten days after, memberships of the Court of Cassation and the Council of State were cancelled, and new members were elected by the HSYK.
- The April 2017 referendum saw changes to the HSYK - now the HSK - including reducing the members to thirteen. Six are now appointed directly by the President, and seven by Parliament of which the AKP has majority. Members were once more dismissed with an entirely new HSK appointed in May 2017.

## IMPARTIALITY AND INDEPENDENCY OF THE COURTS

- Since 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; the only instances in which they can be removed.
- This report examines specific cases of such judges and prosecutors. For example, those removed following the 2013 corruption operations, those removed after competing with pro-government HSK candidates for election, and those removed because their decisions did not align with government desires.
- Evidence of decisions made by the state officials and executed by judges was also found, alongside evidence that the judiciary is not protected from external pressure.
- Abolished due to a lack of fair trial in 2012, special courts authorized to hear terrorism and political crimes were reestablished as Assize Courts in 2015 via administrative decision rather than law. Members were chosen by the impartial HSK, and they hear cases which occurred retrospectively.

IMPARTIALITY AND INDEPENDENCY OF THE  
CONSTITUTIONAL COURT

- The Constitutional Court is the last domestic remedy for individuals whose rights have been violated. 2/17 judges of the Constitutional Court experienced a period of illegal detention, arrest and dismissal after the July 2016 coup attempt. It is now impossible for fellow judges to make an unfavorable decision without fear of repercussion.

- The Constitutional Court has referred to the Gulen movement as a 'armed terrorist organization', removing presumption of innocence and thus impartiality in cases related to the movement.
- Judges have also faced external pressures and interference by the government. A prime example is the case of journalists Şahin Alpay and Mehmet Altan.

#### THE JUDICIARY FOLLOWING THE JULY 2016 COUP ATTEMPT

- Emergency decrees enacted in the aftermath of the July 2016 coup attempt remove guarantees for the independence of the judiciary and security of tenure for judges. I.e., Decree Law No: 667 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.
- 4,463 judges and prosecutors have been dismissed, with over 2,500 detained and arrested since the coup attempt. Again, this report examines specific cases, such as those dismissed for using the ByLock messaging application, or for releasing journalists or alleged FETO members.
- The government and Ministry of Justice have been closely scrutinizing every step of the political investigations and prosecutions. This had been communicated to all judges and prosecutors, implying repercussions if they were to challenge political willpower.

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## INTRODUCTION

1. This report was written based on concrete evidences and 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-instance judiciary system: Criminal and Assize Courts of First Instance (First Instance), Regional Courts of Justice Criminal Chambers<sup>1</sup> (Second Instance), and the Court of Cassation (Third Instance). 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 instance 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 16<sup>th</sup> of April 2017 and which has 13 members. Therefore, independency and impartiality of the first and second instance courts should be evaluated taking into consideration the proceedings of the HSYK and HSK after the 16<sup>th</sup> 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 against 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 13<sup>th</sup> 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 (Beumartin 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 characteristics of 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 and impartial court that was previously established by law, the right of access to a court cannot be guaranteed because there is no 'court' within the meaning of Article 6 of the ECHR.** In such circumstances, it cannot be said that there is an effective remedy that can be exhausted in domestic law. As explained below, none of the abovementioned domestic remedies has the quality of being 'established by law' and/or having 'independence and impartiality'. Therefore, first and second instance judicial 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 (Kayasu 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 instances 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 instance 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 instance 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 the 12<sup>th</sup> of September 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<sup>th</sup> of October 2010 came to an end, a new election was held by members of the judiciary in the first instance courts on the 13<sup>th</sup> 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 sent on the pretext of official duties 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 4<sup>th</sup> 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 an amnesty 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.

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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//).

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 13<sup>th</sup> of October 2014, Justice Minister Bekir Bozdağ expressed his 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 13<sup>th</sup> of April 2014, a new law concerning disciplinary amnesty was enacted by the lawmakers of the governing party. The disciplinary misconduct of about 1,500 judges and prosecutors were hence forgiven under this enactment. **Among those who received an amnesty were Ekrem Aydın, the Istanbul prosecutor who closed the corruption files of the 17<sup>th</sup> – 25<sup>th</sup> of 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 19<sup>th</sup> 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 12<sup>th</sup> 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 13<sup>th</sup> 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 Council of Europe 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<sup>th</sup> of June 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 in violation of Article 159/1 of the Constitution. This was a clear illustration that the HSYK was not independent from the executive.

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<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>

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 the Judiciary have been working in complete harmony.” We might 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”*. 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 (Art 159/1).”* One of the sine qua non characteristics of 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<sup>th</sup> of July 2016, almost all the HSYK were composed of members who either promised to work in harmony 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

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

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 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<sup>rd</sup> July 2016, and new members were elected. 267 members of the Court of Cassation were elected on 25<sup>th</sup> of July 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 16<sup>th</sup> of 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.

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.

29. Before the referendum concerning the constitutional amendment on the 16<sup>th</sup> of April 2017, the Venice Commission published a report on the 13<sup>th</sup> of March 2016 addressing this issue. An advisory body in the Council of Europe, the Commission expressed views about the proposed 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 Council of Europe Human Rights Commissioner, Nils Muiznieks said on 7<sup>th</sup> of June 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

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

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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>



to a higher court or they make a personal request. “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 § 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 recognized in fact and that the other necessary guarantees are present” (See Campbell and Fell v. The United Kingdom, § 80 - Lauko v. Slovakia, § 63).

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, since 15<sup>th</sup> of July 2016, 4,463 judges and prosecutors have been 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, Turkish judiciary 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 17<sup>th</sup> - 25<sup>th</sup> of 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 of the Minister of Justice on the 15<sup>th</sup> 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

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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.

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. In the case of U.S. v. Hakan Atilla whereby the same issues were the subject matter of a trial at New York Federal Court of Southern District in late 2017, the attorneys who were paid by the Turkish government in stark contrast stated that “the then Director General of Halkbank and some politicians shamelessly received bribe,” and also Reza Zarrab stated that he paid 50 million Euro bribe to the then Economy Minister.

35. **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.** With the legislation published in the Official Gazette dated 28<sup>th</sup> of July 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 16<sup>th</sup> of 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 20<sup>th</sup> of July 2014, *“Legal procedures start soon and criminal peace judgeships will carry this function.”*<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.

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<sup>11</sup> The PACE report dated the 6<sup>th</sup> of June 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>

37. Criminal Peace judges began work on the 21<sup>st</sup> 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 the 22<sup>nd</sup> of July 2014, at around 01.30am, search procedures began, the officers were detained and dozens of them were arrested.

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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 the 13<sup>th</sup> of October 2014. With the decree dated the 27<sup>th</sup> of November 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 June and November. However, an emergency decree was issued on the 15<sup>th</sup> 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 12<sup>th</sup> 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 of the 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 6<sup>th</sup> 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 17<sup>th</sup> 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 referred a case to the Constitutional Court on the grounds of his reasoned refusal to accept that Criminal Peace Judgeship is a tribunal established by law which are independent and impartial was appointed to Zonguldak province on the 15<sup>th</sup> of January 2015 only 6 months after his instatement in his office.
45. The 7th Assize Court Judges İsmail Bulun and Numan Kılınç 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 25<sup>th</sup> of 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 16<sup>th</sup> of July 2014. Within the time span of just one year, between the 16<sup>th</sup> of July 2014 - 28<sup>th</sup> of July 2017, seven out of eight Criminal Peace judges (with the exception of the judge of the 8<sup>th</sup> 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 1<sup>st</sup> 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 9<sup>th</sup> of March 2015. The Judge of the 8<sup>th</sup> 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 23<sup>rd</sup> 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 2<sup>nd</sup> Assize Court who voted for the release of the arrested judges Mustafa Başer and Metin Özçelik during the monthly detention evaluation on the 24<sup>th</sup> 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 4<sup>th</sup> 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 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 10<sup>th</sup> 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 17<sup>th</sup> 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 2<sup>nd</sup> 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 15<sup>th</sup> of October 2015.
53. A while before the general elections held on the 1<sup>st</sup> 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

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.

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 instance for the defendants Colonel Hüseyin Kurtoğlu and the other five military officers was suspended on the 1<sup>st</sup> of December 2015 by the HSYK.
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 21<sup>st</sup> 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 26<sup>th</sup> 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 17<sup>th</sup> of December Corruption Investigation on the 14<sup>th</sup> of February 2014. Later, he issued search and seizure warrants for more than 100 police officers who were carrying out the 17<sup>th</sup> -25<sup>th</sup> of 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

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

<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>

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 7<sup>th</sup> of August 2014 concerning the detention of the police officers carrying out the 17<sup>th</sup> -25<sup>th</sup> of December Corruption Operation, Erdogan, the then Prime Minister, lashed out saying, *“We said that we will enter their dens; Have we not? We will 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 4<sup>th</sup> 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 12<sup>th</sup> 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,

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<sup>17</sup> @farukmercan 28<sup>th</sup> of February 2016 14:06

<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 Istanbul 5<sup>th</sup> Criminal Peace Judge based his reasoned judgement of the 23<sup>rd</sup> of June 2015 for the detention order on the Red Book. The Istanbul Anadolu 3<sup>rd</sup> Criminal Peace Court expressed in his reasoned verdict (No. 2015/2983) on the 8<sup>th</sup> of September 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 9<sup>th</sup> Criminal Court Peace proceedings on the 7<sup>th</sup> 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 the judiciary evaporates and turns into a corollary body that acts upon the orders of the executive.

60. The Ankara 5<sup>th</sup> criminal peace judge who appointed trustees to 18 companies in the Koza Group, wrote his decision dated the 26<sup>th</sup> of 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 11<sup>th</sup> of 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 12<sup>th</sup> 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 (MIT) investigation as follows: *“The arrest warrants may continue*

*with other (judges and prosecutors); it would seem<sup>20</sup>*. After that, Süleyman Karacöl who took part as a judge in the 17<sup>th</sup> of December corruption investigation was arrested on the 15<sup>th</sup> of September 2015<sup>21</sup>. An arrest warrant was issued dated the 12<sup>th</sup> of 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 Commission Declaration on Interference with judicial independence in Turkey, adopted on the 20<sup>th</sup> of June 2015).

62. On his return from the Ukraine visit on the 23<sup>rd</sup> of March 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 30<sup>th</sup> of April and the 1st of May 2015 (see the Turkish Constitutional Court Decision dated the 20<sup>th</sup> of January 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 the 25<sup>th</sup> of April 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

<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>

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

President's reprehensive remarks, the Head of the 2<sup>nd</sup> 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 the 27<sup>th</sup> of April 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 release decisions: *"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 the 25<sup>th</sup> of April 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 20<sup>th</sup> of June 2015).

65. The president of the Judicial Council Ismail Cirit stated that *"two judges acted without any jurisdiction"* on the 1<sup>st</sup> 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<sup>th</sup> - 25<sup>th</sup> of December Corruption Investigation were dismissed on the 12<sup>th</sup> of May 2015 by the HSYK. Just barely a day later, Ahmet Davutoğlu, then Prime Minister, remarked on this event: *"We have given back the 17<sup>th</sup> - 25<sup>th</sup> of 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 12<sup>th</sup> 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 20<sup>th</sup> 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 3<sup>rd</sup> Chamber of the HSYK immediately launched an enquiry against the listed judges, and the 2<sup>nd</sup> 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.
68. On the 29<sup>th</sup> 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 19<sup>th</sup> 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 26<sup>th</sup> of November 2015 by the 7<sup>th</sup> Criminal Peace judge in Istanbul.
69. In his response on a live TV program on the 6<sup>th</sup> of April 2017 to the Main Opposition Party leader **Kemal Kılıçdaroğlu**’s criticism of the so-called 15<sup>th</sup> 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 15<sup>th</sup> of July 2016 were enacted by judges following the orders of the state verbatim.
70. In his response at a meeting entitled, ‘the 15<sup>th</sup> of July Martyrs and Veterans on the 12<sup>th</sup> of April 2107 to the Main Opposition Party leader Kemal

<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)

<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>

Kılıçdaroğlu's criticism of the so-called 15<sup>th</sup> 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 15<sup>th</sup> of July 2016 and the 1<sup>st</sup> 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 independence (The Constitution, art. 138/2); hence, judges who became mere puppets of the government cannot be independent nor impartial.

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

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 4<sup>th</sup> 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 @bybekirbozdog*"<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.

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

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

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

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

73. In his article on the 4<sup>th</sup> 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 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 7<sup>th</sup> 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*

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

*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 23<sup>rd</sup> of July 2016 has suspended these key safeguards. Decree Law No: 667 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 judgship. Under Decree Law No: 667, more than 4,000 judges and prosecutors have been permanently removed from their office until the 15<sup>th</sup> 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 judgship, 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-instance 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).

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<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).

77. After the 15<sup>th</sup> 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 unlawful arrest of a colleague can perform his or her duties in an independent or impartial manner.**
78. The 8<sup>th</sup> 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 21<sup>st</sup> of February 2017<sup>32</sup>.
79. In Kırşehir, during a trial held on the 7<sup>th</sup> of 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

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<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.

<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/>



proceedings and has a close friendship with Doğu Perinçek<sup>34</sup>, the judge was suspended in less than two hours on the allegation that he used Bylock.<sup>35</sup> This incident demonstrates how the judicial independence is usurped by the ruling authority and how vulnerable the judges are. It also shows how 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, which shatters any notion of judicial irremovability and independence. As for Judge Fatih Mehmet Aksoy, he was detained later that afternoon on charge of using Bylock<sup>36</sup> and was then arrested.<sup>37</sup> Judge Aksoy, who had been suspended from duty on the 2<sup>nd</sup> of February 2017 on ground of using Bylock, was reinstated to his duty on the 31<sup>st</sup> of December 2017 almost a year later after having been ascertained that he was not a Bylock user.<sup>38</sup>

80. On the 31<sup>st</sup> of March 2017, the chief judge İbrahim Lorasdağı and two associate judges Barış Cömert and Necla Yeşilyurt of the Istanbul 25<sup>th</sup> Assize Court, who decided to release 21 of the 26 journalists, and the prosecutor proposing the release of these 8 journalists were suspended and faced a disciplinary proceeding solely for their verdict on the 3<sup>rd</sup> 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. Soon after the release decision, pro-government journalist Cem Küçük shared the following tweet from his @cemkucuk55: “10- If these traitors were not rearrested, some people would pay a heavy price. I am knowingly saying this. Things will get shattered.” (6:39 PM – 31<sup>st</sup> of March 2017), “13- Bekir Bozdağ (Minister of Justice) must urgently convene HSYK this evening and actions must be taken concerning some judges. This is the demand of the nation.” (6:50 PM – 31<sup>st</sup> of March 2017), “Every judge and prosecutor who releases the known persons from FETÖ shall be dismissed. This is the final decision of the STATE. Let everybody know this.” (7.08 PM – 31<sup>st</sup> of March 2017). “15- The proprietor of these courts and the state is the nation. No release shall be issued in defiance of the nation. No one must muscle in the patience of the nation and

<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> @Demokrrasi, 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.

<sup>37</sup> <http://www.kirsehirhaberturk.com/agir-ceza-mahkemesi-baskani-tutuklandi.html>

<sup>38</sup> <https://www.yenisafak.com/gundem/o-hakim-de-mor-beyin-magduru-2940916>

the state.” (10:09 PM – 31<sup>st</sup> of March 2017). “Our Ministry of Justice and HSYK have taken action. The traitors shall not be released God willing”. (31/03/2017, 21: 40).”

82. Pro-government journalist Ersoy Dede made the following statement from Twitter: “This is not enough @cemkucuk55.. all the judges undersigning the release decisions shall be collected one by one.” (@ersoydede, 31/03/2017, 21:46) (Appendix 13).
83. Pro-government journalist Fatih Tezcan made the following statement in the same evening: “all the members of the court panel, who released the bastard who made a show with a halter in live broadcast saying “Tayyip Ergoĝan shall be be killed,” must be arrested on ground of FETÖ.” (@fatihtezcan, 31/03/2017, 20:35). (Appendix 14).
84. Pro-government journalist Ömer Turan shared the following tweet from his @omerturantv Twitter account on the 31<sup>st</sup> of March 2017 at around 23.50: “HSYK must urgently convene tonight and must dismiss the prosecutors and judges who released the people from FETÖ. These names must later be arrested on ground of FETÖ.” (Appendix 15)
85. A few hours after these publications, the Under-Secretary of the Ministry of Justice and the member of HSYK, Kenan İpek, made the following explanation from his twitter account: “the ongoing fight by the TURKISH JUDICIARY and HSYK against FETÖ/PDY armed terrorist organization shall continue with the same RESOLUTION and DETERMINATION of the first day.” (@kenanipek53, 1/04/2017, 00.17). Following these messages, 21 persons who were released were kept waiting inside the prison vehicles and new custody and arrest warrants were issued against them and were sent back to prison without actually never being released.
86. HSYK Deputy President Mehmet Yılmaz explained the reasoning of the suspension decision on the 7<sup>th</sup> of April 2017 as follows: HSYK suspended four members of the judiciary from office on the ground that “the evidence has not been collected; the file has not been finalized; the release decision is not based on reasonable, logical and valid reasons; it is not consistent and far from legality; and the release decision issued without taking into account the principle of proportionality has caused public indignation and wounded public conscience.”

([www.hukukihaber.net](http://www.hukukihaber.net), 7 April 2017). Thus, a judicial decision was reviewed legally by HSYK which is an administrative organ and the judges is delivering a judicial decision were suspended and it has been put an end to the independence of the judiciary in terms of the courts of first and second instance who are under the control of HSYK (Cooper v. the United Kingdom). Further, if the members of a court can be suspended relying on the ground that *a decision of the court has caused public indignation and wounded public conscience*, this suggest that the judges in Turkey are profoundly without any protection from external pressures. One of the indicators of the independence of the courts is the fact that they enjoy protection against external pressures (Findlay v. the United Kingdom, para. 73).

**87.** Prior to their suspension, **pro-government journalists threatened the chief judge, and the two associate judges of the Istanbul 25<sup>th</sup> Assize Court and shared messages asking for their arrest<sup>39</sup>**. Referring to the release of 21 journalists, on the 1<sup>st</sup> 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>40</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 until a detention and arrest order for them was secured. Then, they were sent back to prison without release.**

**88.** According to the information released by the HSYK Vice President Mehmet Yılmaz and reflected in the media dated the 7<sup>th</sup> 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>41</sup>* Thus, a judicial decision was checked by the HSYK, the

<sup>39</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>40</sup> @kenanipek53, 1/04/2017, 00:17

<sup>41</sup> <http://t24.com.tr/haber/21-gazeteci-hakkinda-tahliye-karari-veren-hakim-ve-savcilarin-aciga-alinma-gerekcesi-aciklandi,398039>

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

89. When the chief judge and two associate judges of the Istanbul 25<sup>th</sup> 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>42</sup>
90. The Antalya 2<sup>nd</sup> Assize Court decided on the 17<sup>th</sup> of March 2017, to release 20 policemen<sup>43</sup> and they released 8 more arrested people on the 30<sup>th</sup> of March 2017<sup>44</sup>. Immediately after these release decisions, the 2<sup>nd</sup> 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>45</sup>; and the other two members Ayşegül Yıldız Kaya and Ali Emre Sula were assigned from the Antalya court to other courts on the 6<sup>th</sup> of April 2017<sup>46</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 3<sup>rd</sup> 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 8<sup>th</sup> of April 2017 to the newly established 10<sup>th</sup> Assize court which handles political and terror-related crimes<sup>47</sup>.

<sup>42</sup> @cyberrights, 3/04/2017, 20.19

<sup>43</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>44</sup> <http://www.antalyakorfez.com/guncel/21362/2/gazetecileretahliye>

<sup>45</sup> <http://www.hsyk.gov.tr/Eklentiler/files/05-04-2017-Adli-Karar-517.pdf>

<sup>46</sup> <http://www.hsyk.gov.tr/Eklentiler/Dosyalar/ca59fbb0-8c31-4687-8073-3bcbd6788370.pdfueileri>

<sup>47</sup> <http://www.ulusalkanal.com.tr/m/?id=153112>

91. During the trial on the 18<sup>th</sup> 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 new court presided over by the appointed chief and 3 members adjudicated the re-arrest of Colonel Avni Angun<sup>48</sup>.
92. On the 2<sup>nd</sup> of May 2017, the Ankara 14<sup>th</sup> 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 8<sup>th</sup> of May 2017 the chief judge **İsmail Ademoğlu was removed from duty and appointed as a member of a different court**<sup>49</sup>.
93. Ironically, in the aftermath of the 15<sup>th</sup> of July 2016 coup, some of the judges who issued the verdict for the arrest of other 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>50</sup>
94. On the 20<sup>th</sup> 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>51</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 20<sup>th</sup> of April 2017.

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>48</sup> <http://www.brusselschr.org/opinion-turkeys-politicized-judiciary/>

<sup>49</sup> <http://www.brusselschr.org/opinion-turkeys-politicized-judiciary/>

<sup>50</sup> <http://justiceheldhostage.blogspot.de/2017/04/FETÖ-iddiasyla-tutuklama-yapan-yargclar.html?spref=tw>,

<sup>51</sup> @jhhturkey, 26/04/2017, 04:45

95. All these concrete events demonstrate that the judges of the courts of first and second instances who are working under the authority of HSYK have lost their independence.
96. 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>52</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.
97. A similar directive was sent by the Kilis governorship, provincial directorate of security to the presidency of the Kilis Assize Court on the 1<sup>st</sup> 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.
98. On the 6<sup>th</sup> 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*

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<sup>52</sup> @shaber\_com, 21/04/2017, 15:19

*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>53</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 15<sup>th</sup> 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 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.

99. 11 human rights defenders gathering for a workshop in July 2017 in Büyükada including German human rights defenders such as Peter Frank Steudtner<sup>54</sup> and the officials of Amnesty International were arrested with the accusation of "organizing the continuation of 15 July coup attempt,<sup>55</sup> and being spy, agent and terrorist." They were released by the High Criminal Court consisting of three members on the 25<sup>th</sup> of October 2017 at the first hearing of the criminal trial lodged against them. One day after this decision, it was reported by the German media that "the arrestees of Büyükada trial were released as a result of secret meeting the former German Chancellor Gerhard Schröder had with the President Erdoğan"<sup>56</sup> and this news

<sup>53</sup> <http://www.sabah.com.tr/gundem/2017/06/06/baska-delil-yoksa-adli-kontrolle-serbestlik>

<sup>54</sup> Peter Frank Steudtner stated that the same methods that have become a routine after 15 July 2016 were also applied to him as in the following: "I was detained and not informed of my rights all day. I was subjected to an informal, threatening 1.5 hour interrogation" (@andrewgardner, 24 October 2017). Steudtner assessed the evidence against him as follows: "Some of the evidences against me is fabricated, the rest is unrelated to the charges: none of it links me to terrorism" (@DALhuisenJJ, 25 October 2017). This assessment as a matter of fact summarizes the characteristics of the evidence used in the great majority of arrests and prosecutions in the post 15 July 2016 period.

<sup>55</sup> The President made the following statement on 8 July 2017 on the human rights defenders who were put under custody on the ground that they convened a meeting in Büyükada: "They came together for a meeting which is virtually a continuation of 15 July. They were put under custody on the basis of intelligence received. A judicial process from this may follow." (<http://www.gazetevatan.com/erdogan-o-toplanti-15-temmuz-un-devami-icindi-1083037-siyaset/?f=mobil>)

<sup>56</sup> See in particular "Fall Peter Steudtner: Altkanzler Schröder vermittelte bei Erdogan" (@spiegel.de - Oct 26, 2017) - "It has been revealed that the former German Chancellor

was also confirmed by the German Government.<sup>57</sup> It may be inferred from these news that the release decision issued by the three-judge High Criminal Court is not issued by this court and that the judges have implemented the political instruction given to them.

100. Following the bilateral talks to resolve the crisis between the two countries arising after the arrests of some officials working in the diplomatic missions of the USA in Turkey and stopping by the USA of its visa services, the USA Ankara Embassy made the following statement on the 6<sup>th</sup> of November 2017: “Embassy of the United States - Ankara, Turkey, “*Re-opening of limited visa services – November 6, 2017: We have received initial high-level assurances from the Government of Turkey that there are no additional local employees of our Mission in Turkey under investigation. We have also received initial assurances from the Government of Turkey that our local staff will not be detained or arrested for performing their official duties and that Turkish authorities will inform the U.S. government in advance if the Government of Turkey intends to detain or arrest a member of our local staff in the future. ...*”.<sup>58</sup>

101. Turkish-German dual national Die Welt Newspaper Turkey representative Deniz Yücel was put under custody at İstanbul Police Directorate on the 14<sup>th</sup> of February 2017 and arrested on the 27<sup>th</sup> of February 2017. The President Erdoğan summarized the accusations on Yücel following his arrest as follows: “He is not a correspondent; he is a terrorist. ... This person hid in German consulate for a month as a representative of PKK, as a German spy. We have recordings, everything; This is the very spy terrorist” (@NecdatG - 2:35 - Feb 16, 2018). Despite the alleged evidence that was claimed to have existed, no indictment had been prepared on Yücel, and his release requests had been refused each time with the same cliché reasoning. On the 15<sup>th</sup> of February 2018, Prime Minister Binali Yıldırım made an official visit to Germany. In his speech to a German TV channel one day prior to this visit, Prime Minister stated, on the detention

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Schröder acted as mediator in the release of Peter Steudtner,” (p.dw.com/p/2mXRL @dw\_turkce) - “Steudtner's Haftentlassung: Schröder soll vermittelt haben“ (tagesschau.de/ausland/steudt...#Steudtner #Turkey - @tagesschau - Oct 26, 2017).

<sup>57</sup> “#Turkey – German gov't confirms that ex chancellor Gerhard Schröder made a deal with Erdogan to free Peter Steudtner – what was the price?” (@NordhausenFrank - Oct 26, 2017 - 11:51 AM).

<sup>58</sup> See @USEmbassyTurkey, 5:00 PM - Nov 6, 2017. (Statement from the U.S. Mission to Turkey on Re-opening of Limited #Visa Services in #Turkey.). After this declaration, it was commented that “US Embassy acknowledges that #judiciary in #Turkey is no more independent or impartial, but under control of GOV (@GokturkYilmaz).



of Yücel, that “I think that a development will take place soon.” During the joint press briefing on the 15<sup>th</sup> of February 2018 following the meeting with German Chancellor Merkel, Turkish Prime Minister, on the same issue, stated that “*what is necessary shall be done within the scope of the rule of law; what is required of us is to clear the way for the courts. ... I hope that the trial will take place within a short time and a result will be achieved.*” (@sputnik TR - 5:39 PM - Feb 15, 2018). One day after this statement, Turkey’s Official Press Agency Anadolu Ajansı released on the 16<sup>th</sup> of February 2018 that an indictment was being prepared on Yücel and a sentence of up to 18 years of imprisonment was sought (@AACanli - 16/02/2018 - **14:07**). Anadolu Ajansı stated, **one minute after this tweet**, that İstanbul High Criminal Court accepted the said indictment and issued the release of Deniz Yücel (@AACanli - 16/02/2018 - **14:08**). Despite the high sentence of up to 18 years of imprisonment having been sought about Yücel, as no international travel ban was ever imposed on Yücel, he flew to Germany in the evening hours on the same day on board of a private plane (@cumhuriyetgzt - 7:24 PM - Feb 16, 2018). Whereas almost all the suspects who were later released following arrest in the aftermath of the 15<sup>th</sup> of July 2016 were released with international travel bans. All these facts reveal that Deniz Yücel was released by a higher criminal court comprising of three judges with no international travel ban ever having been imposed in conformity with the political instructions issued. A judiciary which receives instructions from the executive cannot be independent; an organ which is not independent cannot enjoy the qualification of being “court” (ECtHR, *Beaumartin v. France*).

102. In a statement Deniz Yücel made on the 16<sup>th</sup> of February 2018 just after his release, he commented on the detention and release decisions delivered on him as follows: “*It was given a document while I was being freed from prison today. It is a ruling by the 3<sup>rd</sup> Criminal Peace Judgeship, dated February 13, 2018. The Judge had, in fact, ruled for the continuation of my pre-trial detention. I received this decision today when I was released. But I am free despite this (decision). I don’t know why I was imprisoned a year ago, and why I was released today. Isn’t it strange? Anyway, it doesn’t matter. After all, I know that neither my jailing, more precisely my being taken as a hostage a year ago, nor my release today is in accordance with the rule of law at all. I know this very well.*” (@TurkeyPurge, 6:45 AM - Feb 17, 2018)

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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

103. 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.”*
104. 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.
105. 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.
106. Turkey recently experienced ‘State Security Courts’ authorized to hear terrorism and political crimes, ‘Special Assize Courts’ prescribed by

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.

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 2<sup>nd</sup> of July 2012 and law no. 6526 dated the 21<sup>st</sup> of February 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.”*

107. Despite all the experiences, several criminal assize courts across the country and in particular, the 2<sup>nd</sup> assize criminal courts were assigned to hear terrorism and political crimes after the HSYK decision dated the 17<sup>th</sup> of February 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>59</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>60</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.

108. 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

<sup>59</sup> <http://www.sozcu.com.tr/2015/gundem/yeni-ozel-yetkili-mahkemeler-geldi-746185>.

<sup>60</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”.

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 17<sup>th</sup> 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.

109. In other words, the HSYK identified several courts across the country as specially assigned assize courts with its decision dated the 17<sup>th</sup> 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 17<sup>th</sup> 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>61</sup>.*

110. 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 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**

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<sup>61</sup> D.J. HARRIS, M. O’BOYLE, E.P. BATES & C.M. BUCKLEY, *Law of the European Convention on Human Rights*, 2014, p. 458.

established after the 17<sup>th</sup> of February 2015 clearly contradict ‘courts established by law’.

111. The reason behind the HSYK’s assigning certain courts specifically on the 17<sup>th</sup> of February 2015 became apparent with the practices of the Bakırköy 2<sup>nd</sup> Assize Court, which arrested two judges (Metin Özçelik and Mustafa Başer) on the 30<sup>th</sup> of April and the 1<sup>st</sup> 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 2<sup>nd</sup> 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 17<sup>th</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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.
112. As can be understood from this discussion, the aim of the HSYK decision dated the 17<sup>th</sup> 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)

113. Courts of Appeal in Turkey (Regional Courts of Justice and Administrative Courts) were made operational on the 20<sup>th</sup> 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.
114. 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 20<sup>th</sup> of July 2017; with respect to crimes before this date they violate the principle of establishment by law.
115. 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.
116. The Antalya Regional Court of Justice 2<sup>nd</sup> Penal Chamber reversed a 6-year-3-month prison sentence issued by the Denizli Assize Court on the 4<sup>th</sup> of April 2017 on the grounds that the investigation into the application called Bylock was insufficient. Pro-government daily newspaper Yeni Asır published news on 26<sup>th</sup> of April 2017 about Şenol Demir, the chief judge of the Antalya Regional Court of Justice 2<sup>nd</sup> Penal Chamber, that vilified him for his decision<sup>62</sup>. On the 8<sup>th</sup> of May 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

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<sup>62</sup> <http://www.yeniasir.com.tr/sürmanşet/2017/04/26/hakimden-skandal-bylock-karari>

days<sup>63</sup>. A judge assigned to courts of second instance normally have a tenure of at least four years.

117. The same situation occurred at the Gaziantep Regional Court of Justice. The Adana 11<sup>th</sup> Assize Court sentenced a deputy police chief on the 20<sup>th</sup> of January 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 3<sup>rd</sup> Penal Chamber reverted this decision by a majority voting on the 20<sup>th</sup> of April 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 3<sup>rd</sup> Penal Chamber Zafer Yarar was assigned by the HSK to the Kayseri Courthouse on the 26<sup>th</sup> of May 2017 as a judge of the first instance. Mustafa Tosun, a member of the 3<sup>rd</sup> 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 3<sup>rd</sup> 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.
118. 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.

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

119. The authority of review for decisions given by the penal chambers of regional assize courts is the Court of Cassation (third-instance judicial organ). For the reasons listed below, the Court of Cassation also lacks the

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<sup>63</sup> <https://twitter.com/aliaktas7/status/862022086059077635>.  
<http://www.adaletbiz.com/m/ceza-hukuku/bylock-kararina-bozma-h148726.html>

characteristics of an ‘independent, impartial court established by law’ and cannot redress the insufficiencies of courts of first and second instance.

120. 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 the 2<sup>nd</sup> of December 2014, which increased the number of members in the Court of Cassation and the Council of State, became effective as of the 12<sup>th</sup> of December 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.
121. **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<sup>th</sup> -25<sup>th</sup> of 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 13<sup>th</sup> of October 2013) which was to work in harmony 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.”*
122. 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**

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.



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>64</sup>.*

123. The law that terminated all memberships in the Court of Cassation and the Council of State was enacted by parliament on the 2<sup>nd</sup> of July 2016. It was published in the Official Gazette on the 23<sup>rd</sup> 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 23<sup>rd</sup> 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 23<sup>rd</sup> 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.

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

124. On the 16<sup>th</sup> 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

<sup>64</sup> <http://www.haberdar.com/gundem/ergun-ozbudun-yargidaki-degisiklik-teklifi-tam-anlamiyla-tasfiye-kanunu-h29393.html>

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.

125. 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.

126. **The Court of Cassation** made the following statement on the 21<sup>st</sup> of November 2016: **“The EU’s Turkey Progress Report was published on the 9<sup>th</sup> of November 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 15<sup>th</sup> 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.
127. The process of changing the number of members of the Court of Cassation and Council of State has not been confined to those outlined above. Finally, the number of members of these two supreme courts have been increased once again with the Emergency Decree Law (ELD) No. 696 of the 24<sup>th</sup> of December 2017. It is decreed that 100 new members to the Court of Cassation and 16 new members to the Council of State be appointed within 6 months of the publication of the ELD. CHP MP Ömer Süha Aldan made the following statement a short while ago from this change: *“Now the nationalists and the leftists are in the majority in the Court of Cassation and the Council of State in terms of the members’ ideology. ... In order to capture the higher*

*judiciary completely, it was planned to increase the number of members of the Court of Cassation and the Council of State with an Emergency Law Decree.”<sup>65</sup>*

128. 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.

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

129. 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 the 16<sup>th</sup> of July 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 the 4<sup>th</sup> of August 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.

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

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[http://www.cumhuriyet.com.tr/haber/siyaset/887097/MHP\\_den\\_hukumete\\_KHK\\_itirazi.html#](http://www.cumhuriyet.com.tr/haber/siyaset/887097/MHP_den_hukumete_KHK_itirazi.html#)

130. 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 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.
131. 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 the 23<sup>rd</sup> of July 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.
132. 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.
133. Moreover, in its decision dated the 4<sup>th</sup> of August 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

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.

organization' without using any expression such as 'alleged' or 'so-called' and thus declared the said group an armed terrorist organization 69 times in total<sup>66</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 the 4<sup>th</sup> of August 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.

134. 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.

135. After the news published by Can Dündar, the President said in a live interview on the 31<sup>st</sup> of May 2015, "*The unfounded allegations about the National Intelligence Agency, the illegal operation that was carried out*

<sup>66</sup> <http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/717f7c20-b696-4379-84f6-dfb568f8844a?excludeGerekce=False&wordsOnly=False>

*(and) this in a way are acts of espionage. This newspaper also got 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>67</sup>*" Can Dündar was arrested on the 26<sup>th</sup> of November 2015 for the same reasons.

- 136.** Can Dündar was released after 92 days of detention upon the Constitutional Court's decision favouring his application. However, the President said on the 28<sup>th</sup> 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."*
- 137.** At the Embassy of Turkey in Nigeria, President Erdoğan said on the 4<sup>th</sup> 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>68</sup>*
- 138.** In a speech he made in Burdur on the 11<sup>th</sup> 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 requested to lift their*

<sup>67</sup> <http://www.sozcu.com.tr/2015/gundem/erdogandan-can-dundara-tehdit-846822/>

<sup>68</sup> <http://www.milatgazetesi.com/uygunsuz-kararlarin-altindan-kalkamazsiniz-haber-79417>

*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>69</sup>*

139. Soon after the above statements of the President, 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>70</sup>.
140. According to the news in Cumhuriyet daily newspaper dated the 26<sup>th</sup> 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 saying that the curfews

<sup>69</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>70</sup> <http://www.venice.coe.int/webforms/events/?id=2193>



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>71</sup> This news was not refuted until this application was made.

- 141.** The Constitutional Court on the 11<sup>th</sup> of January 2018 accepted the application of the journalists Şahin Alpay and Mehmet Altan on their pre-trial detention and decided that the freedom of expression and the right to liberty and security of the two journalists have been violated. Upon this decision, Deputy Prime Minister and Government Spokesperson Bekir Bozdağ expressed the following statement from his twitter account: *“4- The Constitutional Court has overstepped the border drawn up by the constitution and laws with its Alpay and Altan decision (according to the statement of the court published) and undertook a review of facts and evidence positioning itself as the court of first instance, and evaluated the formation of the crime and nature of the evidence.”*<sup>72</sup> Alpay and Altan decisions of the Constitutional Court were not implemented by a total number of six different courts of first instance with almost the same reasoning expressed in Government Spokesperson Bekir Bozdağ’s opinions. The detention of the two journalists are continuing despite the decision of the Constitutional Court. Thus, the implementation stated above by the President has been realized and the courts of first instance have resisted against the decisions of the Constitutional Court and not implemented the decisions of the supreme court. However, Article 153(1) and (6) of the Constitution provides that *“The Decisions of the Constitutional Court are final and bind the legislative, executive and judicial organs as well as the administrative authorities, natural and legal persons.”*
- 142.** 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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[http://www.cumhuriyet.com.tr/haber/siyaset/522133/Sizin\\_ismiz\\_Guvenlik\\_bizim\\_ismiz\\_Ozgurluk.html](http://www.cumhuriyet.com.tr/haber/siyaset/522133/Sizin_ismiz_Guvenlik_bizim_ismiz_Ozgurluk.html)

<sup>72</sup> <http://www.bbc.com/turkce/haberler-turkiye-42659391>

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

143. 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.
144. **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 5<sup>th</sup> 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. Ensarioğlu said, *"I didn't say it by mistake."<sup>73</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.
145. After the National Security Council (MGK) meeting held on the 26<sup>th</sup> of May 2016, **President Erdoğan** made a speech in Kırşehir on the 27<sup>th</sup> 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>74</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

<sup>73</sup> <http://www.hurriyet.com.tr/galip-ensarioglu-agzimdan-kacirmadim-40083231>

<sup>74</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.

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.

146. After the meeting of the Council of Ministers dated the 30<sup>th</sup> 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 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).
147. The Court of Cassation delivered a judgment on the 26<sup>th</sup> of October 2017 which states that: *“actions such as having only sympathy for the organization or adopting the aims, values and ideology of the organization, or reading and possessing publications in this connection, having respect for the leader of the organization are not sufficient for the membership of an organization.”* (Court of Cassation, 16. Criminal Chamber, Case No. 2017/1809 - Decision No. 2017/5155). Ankara Chief Public Prosecutor Yüksel Kocaman making a statement on the 15<sup>th</sup> of November 2017 in relation to this judgment used the following expressions: *“In this process where our fight with the organization continues, I am of the opinion that the decision of 16<sup>th</sup> Criminal Chamber of the Court of Cassation is not right. ... (This decision) shall not affect us at this stage. We will continue to fight against FETÖ with determination.”*<sup>75</sup> The prosecution office, which is under a duty to discover the material truth by also collecting evidence in favor of the defendant under Turkish law, has expressly stated with this statement that it has taken

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<sup>75</sup> [www.gazeteduvar.com.tr](http://www.gazeteduvar.com.tr), “Başsavcıdan Yargıtay’a “FETÖ” eleştirisi” (FETÖ Criticism from Chief Prosecutor to Court of Cassation), 15 November 2017 - 13:09.

the duty *“to fight”* assigned by the National Security Council (NSC) and the Council of Ministers.

148. As pointed out above, the Under-Secretary of the Ministry of Justice and the member of HSYK, Kenan İpek, made the following explanation from his twitter account: “the ongoing fight by the TURKISH JUDICIARY and HSYK against FETÖ/PDY armed terrorist organization shall continue with the same RESOLUTION and DETERMINATION of the first day.” (@kenanipek53, 1/04/2017, 00.17).
149. Minister of Justice Bekir Bozdağ made the following statement from his twitter account on the 22<sup>nd</sup> of April 2017 in connection with the law suits to be filed against the rejection decisions of YSK (Supreme Electoral Board) on the application for the annulment of the referendum dated on the 16<sup>th</sup> of April 2017: “2) *No application shall be made against the decisions of YSK to any courts/authorities including the Council of State and the Constitutional Court.* 3) *In the event of any application in defiance of this, the Constitutional Court and the Council of State shall have no choice but issue “REFUSAL” decision.*” @bekirbozdog, 22/04/2017, 09:58). With this posting, an influential member of the executive organ issues an order to the two supreme courts which virtually means that “you cannot give any decisions other than refusal decisions.”
150. Prime Minister Binali Yıldırım, making explanations to BBC correspondent Lucy Hockings on the 27<sup>th</sup> of April 2017 in London, stated that “We do not keep any persons locked without evidence; Turkey is a country of the rule of law.” According to the Criminal Procedure Code, individuals can only be detained with a decision of a judge.<sup>76</sup>
151. During the iftar dinner programme for the Home Guard Units including the Gendarmerie and the Police Force on the 7<sup>th</sup> of June 2017 in Gölbaşı, **Erdogan** 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*

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>76</sup> @Birgun\_Gazetesi, 1:07 PM – April 27, 2017

*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>77</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 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.

152. Following the military operations launched by Turkey in January 2018 against Afrin region of Syria, the Central Council of the Turkish Union of Doctors (TTB) declared on the 24<sup>th</sup> of January 2018 that it is against the operation with its press release which stated that *“war is a matter of public health.”*<sup>78</sup> After this statement, the President accused the said doctors as “terrorist lovers” and thereafter 11 TBB Council members were put under custody on the 30<sup>th</sup> of January 2018 on ground of “terrorist propaganda.” Human Rights Lawyer Dr. Kerem Altıparmak made the following statement on these custody decisions: *“Whenever the President Erdoğan calls someone “terrorist, spy, traitor”, prosecutors and courts receive his speech as an order. The last victims of this routine are 11 members of the Turkish Medical Association Central Council who were detained this morning”.* (@KeremALTIPARMAK, 8:38 AM – 30 January 2018).

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<sup>77</sup> See the Anadolu Agency internet site, 07.06.2017, “Cumhurbaşkanı Erdoğan: FETÖ davalarının günbegün rapolarını alıyorum”.

<sup>78</sup> Human Rights Commissioner of the Council of Europe Nils Muiznieks stated on 30 January 2018 from his official Twitter account that the TTB press release did not contain any criminal content in the following words: *“The contents of the 24 Jan statement of the Turkish Medical Association calling for peace are clearly covered by freedom of expression. Their targeting and today's arrests are unacceptable. @ttborgtr”* (@CommissionnerHR, 2:22 PM – 30 January 2018).

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## CONCLUSION

153. From all these concrete findings, the courts of first and second instances, which can be applied under domestic law in criminal proceedings as well as the Court of Cassation and the Constitutional Court, are devoid of any guarantees of a court or tribunal “previously established by law, independent and impartial” within the scope of Article 6 of the European Convention on Human Rights.
154. The evaluations regarding the prevalent lack of independence and impartiality of the judiciary in Turkey do not comprise of immaterial apprehensions and abstract allegations but are based on concrete evidence. This is reflected in numerous reports which have been published since the beginning of 2014 by various international organizations.<sup>79</sup>
155. In the light of all the above explanations, it should be concluded that there is not a single independent and impartial body in the Turkish judiciary and hence no domestic ‘court’ available within the context of Article 6 of the ECHR. Accordingly, there is no effective domestic remedy (independent courts) which has to be exhausted in case of violation of fundamental human rights.



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<sup>79</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 & JUSTICE

**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.

PPJ is currently an online intellectual medium ( [www.platformpj.org](http://www.platformpj.org) ) undertaking its work by generating and disseminating news, articles, op-eds, and reports as well as by organizing activities and initiating campaigns.

PPJ is an initiative of a group of dedicated scholars, lawyers, journalists and civil society activists.

PPJ's work is primarily based on democratic and human rights principles enshrined in the international human rights instruments and understood through the prism of the European best practices.

PPJ strongly believes that a worldwide peace and justice can only be achieved through the advancement of these values and principles across the borders.

### **Mission**

PPJ aims to promote peace, justice, democracy, the rule of law and human rights in the world, particularly in Turkey, through;

raising awareness and sensibility for upholding these values and principles,

monitoring and reporting human rights violations,

generating and diffusing knowledge on conducive policies and practices,

defending basic human rights and democratic principles against infringements,

campaigning against human rights violations affecting individuals and groups,

serving as a common and open platform for advocating human rights and democratic principles,

strengthening respect for human dignity and civil right consciousness,

encouraging good policies and practices for building peace among people and nations.

### **Vision**

PPJ's vision is to become a prominent civil society organization for defending and fostering universal democratic and human rights principles in Europe striving for peace and justice for all.

Reach us via [director@platformpj.org](mailto:director@platformpj.org)

