The violent police crackdown on lawyers in Istanbul courthouse on april 2, 2015

TURKEY'S DESCENT INTO ARBITRARINESS: THE END OF RULE OF LAW

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Stockholm Center for Freedom (SCF) is an advocacy organization that promotes the rule of law, democracy and fundamental rights and freedoms with a special focus on Turkey, a nation of 80 million that is facing significant backsliding in its parliamentary democracy under its autocratic leaders.

SCF, a non-profit organization, was set up by a group of journalists who have been forced to live in self-exile in Sweden against the backdrop of a massive crackdown on press freedom in Turkey .

SCF is committed to serving as a reference source by providing a broader picture of rights violations in Turkey, monitoring daily developments on fact-based investigative journalism and documenting individual cases of the infringement of fundamental rights. The founders of SCF are top-notch journalists who had managed national dailies in Turkey and worked for leading media outlets before they were forced to leave. They have the expertise, human resources and network on the ground to track events in Turkey despite serious challenges.

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Introduction

A growing consensus among jurists and analysts who have observed the rapid democratic backsliding in Turkey, a member of the Council of Europe (CoE), is that the rule of law has been effectively suspended under the renewed emergency rule and that the courts are practically controlled by the authoritarian regime of President Recep Tayyip Erdoğan, who does not hesitate to abuse the criminal justice system to persecute his critics and opponents.

Over 200 journalists have been jailed in Turkey, most in pre-trial detention, on trumped-up charges of terror, coup plotting or espionage, while some 50,000 people including judges, prosecutors, teachers, doctors and union workers have been arrested in the last eight months alone. The government has purged approximately 140,000 public employees without any effective administrative investigation or judicial probe.

It is almost impossible to seek a remedy in Turkish courts, including the Constitutional Court, which has a mandate to hear individual complaints on fundamental rights violations. The government has also made it very difficult to exhaust domestic remedies by slowing down process, suspending applications to judicial and administrative bodies and simply letting pending cases linger indefinitely. Many who had to flee Turkey to avoid persecution and wrongful detention have no access to the Turkish justice system to file motions through powers of attorney because Turkish consular services refuse to grant such documents.

Yet, the European Court of Human Rights (ECtHR), whose judgements are binding on Turkey, a contracting state to the European Convention on Human Rights (ECHR), has so far rejected several complaints from Turkish applicants, citing non-exhaustion of domestic remedies. It is understandable that the court abides by the principle of subsidiarity, which means that the primary responsibility for protecting human rights lies with member states and that an applicant can seek justice at the Strasbourg court only after exhausting domestic remedies. The case law of the ECtHR shows that the court can make an exception when it determines that domestic remedies are ineffective or if it would be too dangerous or not feasible for other reasons for victims to first apply to domestic courts.[1]

The ECtHR has reiterated in so many cases that the purpose of the rule on the exhaustion of domestic remedies is to afford the contracting states the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the court.[2] Clearly, the Turkish government has shown no willingness to remedy violations but instead continues to escalate its persecution of critics and opponents. Referring to Article 35, the Strasbourg court said an applicant should have normal recourse to the remedies likely to be effective, adequate and

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1] The case of Chiragov and Others v. Armenia (2015, 16 June) http://hudoc.echr.coe.int/eng#{"fulltext":["Chiragov%20judgment"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-155353"]}

2] For example cases Remli v. France, (1996, 23 April) http://hudoc.echr.coe.int/eng#{"fulltext":["Remli%20v.%20France"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57983"]} and Selmouni v. France (1999, 28 July) http://hudoc.echr.coe.int/eng#{"fulltext":["Selmouni%20v.%20France"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58287"]}

accessible.[3] The court underlines in its case law that the existence of domestic remedies must be sufficiently certain, not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.[4] Moreover, the court referred to "generally recognized rules of international law" and said there may be special circumstances that relieve applicants of the obligation to exhaust the domestic remedies at their disposal.[5]

Victims of human rights violations in Turkey are unlikely to have the benefit of a fair trial if the case involves the persecution, or rather witch-hunt, that Erdoğan publicly declared he would pursue against members of the Gülen movement. The copy-paste indictments in the form of political manifestos as dictated by the government often lack any evidence to support serious charges leveled against suspects. The judges and prosecutors just toe the government line as they are afraid of being dismissed and arrested on trumped-up charges, as happened in the case of over 3,000 judges and prosecutors who were dismissed and arrested and whose assets were frozen.

The Stockholm Center for Freedom (SCF) believes the ECtHR should spare victims of mass persecution in Turkey from having to seek remedies in domestic courts that have been turned into kangaroo courts under the repressive regime run by Islamist rulers.

The problems and crises stemming from the lack of a fair and independent judiciary in Turkey as well as a host of systematic human rights violations resurfaced during the efforts to cover up a graft scandal in December 2013 that implicated Erdoğan and his inner circle. He orchestrated moves to dismiss judges, prosecutors and police investigators who uncovered massive corruption in the billions of dollars. These problems skyrocketed in the wake of a failed coup d'état on July 15, 2016 that appears to have been either staged or controlled by Erdoğan to set up his critics for mass persecution. All these developments have brought the subsidiary and supervisory role of international legal mechanisms to the forefront.

In this context, this report provides examples suggesting that the rule of law is no longer applicable in Turkey and that domestic remedies have been rendered ineffective. It cites politicized rulings in the courts of first instance that do the government's bidding, the government control of the high judiciary in the appeals process and serious problems faced by the defense including the lack of unhindered access to lawyers. The Ombudsman institution and the ad-hoc commission to be set up by decree-law numbered 685 to review well over 100,000 cases of abrupt dismissals from government jobs are not capable of addressing human rights violations in the current environment in Turkey.

3] Sofri and Others v. Italy (2003, March 4) http://hudoc.echr.coe.int/eng#{"appno":["37235/97"],"itemid":["001-44254"]}

4] Dalia v. France, (1998, February 19) http://hudoc.echr.coe.int/eng#{"fulltext":["Dalia%20v.%20France,%2019%20February%201998"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58130"]}
Aksoy v. Turkey (1996, December 18)
http://hudoc.echr.coe.int/eng#{"fulltext":["Aksoy%20v.%20Turkey,%2018%20December%201996"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58003"]}

5] Aksoy v. Turkey (1996, December 18) http://hudoc.echr.coe.int/eng#{"fulltext":["Aksoy%20v.%20Turkey,%2018%20December%201996"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58003"]}

The three crucial components of what constitutes a fair trial, namely the defense, the prosecution and the courts, have all collapsed in Turkey in recent years, turning the judicial system into merely an extension of the political authority that thwarts an effective defense and employs partisan and loyalist prosecutors and judges. The indictments that were filed against critics and opponents read more like a political manifesto and parrot the government line without offering any evidence to back up absurd claims. As a result, the criminal justice system leads to a severe violation of human rights and is abused by the political authorities to punish dissidents.

1. LAWYERS UNDER THE CRACKDOWN

The defense is entitled to be part of all processes in equal standing with the prosecution in the courtroom in accordance with the basic legal principle of equality of arms as developed by ECtHR jurisprudence. In recent years, defense lawyers have been increasingly stripped of valuable tools to defend their clients under the pretext of counterterrorism efforts. In the wake of the failed coup attempt of July 15, 2016, the government has practically redefined defense as a crime. Over 1000 lawyers have been detained and 411 have been arrested during the last eight months. The accusations raised against these lawyers range from membership in certain social groups and associations to alleged complicity in the crimes with which their clients are charged. In some cases, they are even being questioned why they vigorously defended their clients in the courtrooms.

The arrested lawyers reportedly face tortuous pressures as they are forced to testify against their clients, violating attorney-client privilege. Given the fact that hundreds of lawyers have gone abroad to escape a similar fate, the right to a defense is currently being violated on a mass scale in Turkey. Many suspects and defendants are waiting helplessly, deprived of their right to a defense for failing to find lawyers to defend them.[6] A Parliamentary Assembly of the Council of Europe (PACE) report titled "Securing access of detainees to lawyers" took note of the worrisome situation in Turkey in the aftermath of the coup attempt. In the report, rapporteur Marietta Karamanlı of France said, "Against the background of extremely serious allegations of torture and the inhuman or degrading treatment of detainees, the lack of access to a lawyer is all the more worrying."[7]

Furthermore, lawyers generally ask for attorney fees that are up to 10 times more than usual if they want to take on the cases of people who were targeted by the government's witch-hunt. This makes the situation all the more bleak as all possessions and properties of many suspects and defendants have been seized or confiscated without bothering to wait for a conviction. It has been routine practice for lawyers to be beaten in prisons when they go to visit their clients and forced to wait for hours before they can see their clients even for a brief period of time.[8]

6] http://www.haberler.com/feto-nun-izmir-deki-avukat-yapilanmasi-cokertildi-8702295-haberi/
http://www.hurhaber.com/siirt-baro-baskani-feto-den-tutuklandi-haberi-199838.html
http://t24.com.tr/haber/trabzon-baro-baskani-fetoden-tutuklandi,361878

7] Securing access of detainees to lawyers, (2017, February 15) http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23244&lang=en

8] 50 bin sanıklı davalar geliyor,(2016, December 27), http://www.sozcu.com.tr/2016/yazarlar/saygi-oz-turk/50-bin-sanikli-davalar-geliyor-1587652/

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Most worrisome of all is the existence of lawyers who work against their own clients. Many victims who believe their lawyers have filed an individual application with the Constitutional Court on their behalf get a rude awakening after learning that their lawyers haven't even made the application within the legally allotted time. The victims who ask their lawyers to present their petitions and associated receipts are put off and made to lose time. In many cases where victims of human rights violations are unable to find lawyers to represent them, applying to the Constitutional Court or other courts in Turkey remains a mirage.

1.A. IDEOLOGICAL BARRIERS

One of the factors undermining the ability of defendants to exercise their right to a defense is that many lawyers and bar associations have a certain ideological bias that can hardly be reconciled with their profession. Most rather want to toe the line of the government as opposed to providing legal counsel to victims who are accused of serious charges by the government. For instance, Mehmet Sarı, president of the Jurists Association (Hukukçular Derneği), a pro-government group, publicly said tens of thousands of people who were accused of coup plotting by the government do not have the right to a defense. He said: "Many people are trying to find private lawyers for their relatives who were arrested on coup charges. What we call the right to a defense stems from the fact that people are beings who can think. In the Western literature, this is called human dignity. However, for coup perpetrators to benefit from human dignity, they have to be human beings. And as we don't regard them as human beings, we don't accept the demands and reject them."


PKK'ya yakın avukatların protestosu tepki çekti. Grup, Kocasakal'ın konuşmasını provoke etmeye çalıştı.

KOCASAKAL GENEL KURULDA AÇIKLADI:

FETÖ avukat istedi vermedik

İSTANBUL Barosu'nun dün başlayan genel kurulunda mevcut başkan Ümit Kocasakal, FETÖ ile ilgili bilinmeyenleri açıkladı. FETÖ'cülerin barodan avukat talep ettiği-

The outgoing president of the Istanbul Bar Association Ümit Kocasakal exhibited a similar attitude. "They asked us to send lawyers, but we didn't send them. 'Do you think we are fools?' we told them," he said.

Sarı even went further by rejecting the law that requires courts to appoint lawyers in the event the suspect is unable to find one, according to the CMK (Code on Criminal Procedure). The bar associations are obligated to provide a lawyer when a court requests a defense lawyer before proceedings in the courtroom. "We believe that they should not be defended in the context of the CMK as well," Sarı remarked.[9]

9] Avukatlar darbecileri savunmak istemiyor, (2016, August 2), http://m.karar.com/gundem-haberleri/avukatlar-darbecileri-savunmak-istemiyor-206052

Delivering a speech during a ceremony at which he handed over chairmanship of the Istanbul Bar Association, Ümit Kocasakal exhibited a similar attitude. "They asked us to send lawyers, but we didn't send them. 'Do you think we are fools?' we told them," he said.[10] These remarks by an outgoing head of the world's largest bar association with 26,000 lawyers came as a shock to many. These developments should be registered as concrete evidence for the elimination of the right to a defense to a great extent. A significant proportion of the lawyers who the bar associations are legally required to appoint are withdrawn, leaving defendants without representation in trials. This move is attributable partly to ideological barriers and partly to pressure.[11]

1.B. LAWYERS POWERLESS TO STOP TORTURE

The torture cases in Turkey's detention centers cited in a New York-based Human Rights Watch (HRW) report titled "A Blank Check: Turkey's Post-Coup Suspension of Safeguards against Torture"[12] include several incidents in which lawyers were prevented from stopping the torture of their clients while in police custody.

In one incident, a lawyer who was assigned a high-ranking officer as a client in the first few days after the coup attempt told HRW that when she first saw her client at Ankara Security Directorate headquarters, he had marks and injuries on his forehead and neck, scratches on his arms, bruises from handcuffs and scratches and bruises on the top of his feet. She said he also had a wound on his leg that looked like a piece of flesh was missing. The lawyer's request to have a private meeting with her client was denied, a copy of the medical report was not provided and police threatened the lawyer with detention as well. The client told the court how he was tortured while in detention before the judge ruled to formally arrest him. Police whispered to a judge as the hearing was in progress and threatened the lawyer with arrest during a break.

In another case reported by HRW, a lawyer recounted how her client was repeatedly beaten by police while in detention. The police whipped her client with plastic strips that are normally used as handcuffs and punched him with their fists in the head and his upper body. He couldn't do anything to protect himself as he was handcuffed. The lawyer tried to intervene to stop the beating, but to no avail. She said: "At some point, I just turned away. I don't know how many times they hit him. I couldn't look at it anymore. I knew I couldn't do anything to stop it. In the end he gave a statement…" The lawyer told Human Rights Watch that she would normally refuse to sign an interrogation report given under such conditions, or would make a note of the conditions on the report, but that she was too afraid to do either.

"I was the only lawyer there at the time. There was violence everywhere and the police were not happy to see me there, saying, 'What do these people need a lawyer for?'" The lawyer said the officer did not mention the ill-treatment during the court hearing that sanctioned his arrest and

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10] Sözcü Newspaper (2016, 22 October)

11] İzmir'de FETÖ davası: 30 avukat çekildi, (2017, January 31) http://www.hurriyet.com.tr/izmir-feto-davasi-30-avukat-cekildi-40352133 & Avukatlar FETÖ'cülere müdafi olmak istemiyor, (2016, August 3) http://ajansurfa.com/tr-tr/haberler/4730/avukatlar-fetoculere-mudafi-olmak-istemiyor)

12] A Blank Check: Turkey's Post-Coup Suspension of Safeguards Against Torture (October 24, 2016), https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture

One of the lawyers who in December 2016 were exposed to violence in custody is Turgay Bek, a human rights advocate who is the head of the Adana Bar Association's Prisons Committee.

sent him to pre-trial detention. The lawyer has since refused to accept new clients as a legal aid lawyer.

1.C. CASES OF LAWYERS WHO ARE ASSAULTED

The cases of lawyers who were physically assaulted by the police is another part of an intimidation campaign conducted by the Turkish government against lawyers and human rights defenders. One of the lawyers who in December 2016 were exposed to violence in custody is Turgay Bek, a human rights advocate who is the head of the Adana Bar Association's Prisons Committee. Adana Bar Association President Veli Küçük indicated that Bek had been assaulted by some 40 officers who beat him with fists and kicks while on the ground and forcibly handcuffed him from behind with insults and curses.[13]

Lawyers who are members of the Contemporary Jurists Association (Çağdaş Hukukçular Derneği, or ÇHD) wanted to make a public statement in front of the Istanbul Courthouse in Çağlayan in March 2016 ahead of a criminal case in which some lawyers were tried. The police attacked the lawyers who were determined to make a statement. The lawyers were dragged on the ground by the police, and lawyer Zeycan Balcı suffered a lower back injury due to a kick from a police officer.[14]

Lawyer İbrahim Eren Çakıroğlu was beaten and handcuffed from behind by the police after he asked if they had a search warrant during a police raid on the offices of his clients in the southern province of Antalya. Çakıroğlu recounted that he was interrupted by some 10 police officers who forced him to lie on the ground, pressing on his head with their feet and handcuffing him from behind.[15]

Under Article 13 of the Law on Duties and Powers of the Police, a person can be handcuffed only if there is the likelihood of his/her running away or attacking. The default practice is not to handcuff anyone. Given the fact that even most of those who

Lawyer Zeycan Balcı suffered a lower back injury due to a kick from a police officer.

13] Avukat Tugay Bek, ters kelepçe takılarak darp edildi (2016, December 15) http://t24.com.tr/haber/avukat-tugay-bek-ters-kelepce-takilarak-darp-edildi,377163

14] Çağlayan'da ÇHD üyelerine polis saldırısı: Bir avukatın beli kırıldı (2016, March 30) http://www.diken.com.tr/caglayanda-chd-uyelerine-polis-saldirisi-bir-avukatin-beli-kirildi/

15] Antalya'da avukat İbrahim Eren Çakıroğlu'na ters kelepçenin görüntüleri ortaya çıktı (2015, December 29) http://www.antalyaburada.com/antalya-da-avukat-ibrahim-eren-cakiroglu-na-ters-kelepcenin-goruntuleri-ortaya-cikti-haberDetayi-27-haberNo-49541.html#.WKYufNKLTIU

were taken into custody on charges of membership in the Islamic State in Iraq and the Levant (ISIL) were not handcuffed, handcuffing lawyers from behind runs counter to normal practice in Turkey and is seen as a type of pre-trial punishment.

1.D. RESTRICTIONS INTRODUCED UNDER EMERGENCY RULE

As if these attacks on the right to a defense that have dealt a blow to due process and fair trial protections were not enough, the government has brought forward more restrictions by introducing decree-laws that are equally important to mention. Even if you can overcome the above-mentioned barriers to strike a deal with a lawyer, this does not solve your problem. Indeed, many changes were introduced to legislation to tie lawyers' hands and prevent them from doing their job effectively. Here are some of these changes made with decree-law No.676.[16]

According to the new changes, there is no longer privacy during meetings between lawyers and their clients. The authorities are allowed to record the meetings and ensure that an official attends them. Limitations on meeting times and periods have been introduced. The authorities have been permitted to block any exchange of documents and seize them. The authorities may prohibit prisoners from meeting with the lawyers they choose. Lawyers who are being investigated or prosecuted may be banned from defending their clients.[17]

Not only has it become easier to launch investigations into lawyers, but the legal provisions that equip lawyers with immunity are also not being implemented. Thus, a lawyer is deprived of his/her right to offer legal counsel by launching a contrived investigation into him/her. Legal provisions have been introduced to facilitate the way the police can raid the offices of lawyers and take them into custody. Defense counsels are no longer allowed to examine case files and retrieve copies of them. A person in custody can be prevented from seeing his/her lawyer for five days.

When arrested, a person can be prohibited from seeing his/her lawyer for six months. Moreover, he or she can also banned from hiring their lawyer of choice by the authorities. Thus, the freedom of suspects/inmates to choose their lawyers is restricted. The requirement for the reading of indictments in court has been abolished. Thus, defendants have been deprived of their right to learn about the charges leveled against them even in court. For instance, during a hearing in a trial with 270 defendants held on Jan. 31, 2017 in İzmir, some defendants indicated that they were not given the indictment in advance and in response, the presiding judge read out the 14-page summary of the 1,300-page indictment.[18]

16] 676 sayılı Kanun Hükmünde Kararname, (2016, October 29) http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2016/10/20161029.htm

17] Müvekkilleri ile görüşmek isteyen avukatlara KHK engeli, (2016, December 16) http://demokrasi2.com/2016/12/16/muvekkilleri-ile-gorusmek-isteyen-avukatlara-khk-engeli/

18] İzmir FETÖ davası (2017, January 31) http://www.hurriyet.com.tr/izmir-feto-davasi-30-avukat-cekildi-40352133

The well-established associations of legal professionals have been shut down by a decree-law without a court decision. Heavily armed police broke down the doors of these associations and in some cases beat the lawyers inside after the closure decision.

1.E. INTERNATIONAL ADVOCACY GROUPS AND BAR ASSOCIATIONS CRITICIZED TURKEY

The pressure on and intimidation campaign against lawyers have been on the agenda of international professional organizations that are mobilized to issue statements of concern and letters calling on the Turkish government to halt the crackdown on lawyers and release jailed lawyers. In a memorandum published in October 2016, Council of Europe Commissioner for Human Rights Nils Muiznieks condemned the drastic restrictions on access to lawyers as well as limitations on the confidentiality of the client-attorney relationship.[19]

Council of Bars and Law Societies of Europe (CCBE) President Michel Benichou sent a letter to President Recep Tayyip Erdoğan about the detention of Contemporary Jurists Association Vice President Münip Ermiş and 22 lawyers.[20] Benichou called on the Turkish government to take effective steps to insure that jailed lawyers are released and able to represent their clients in court. In addition, the letter said the CCBE asked Turkey "to guarantee in all circumstances that all lawyers in Turkey are able to perform their professional duties without fear of reprisal, hindrance, intimidation, or harassment."

The German Federal Bar Association exhibited a harsh reaction to the detention of Turkish law practitioners; President Ekkehart Schafer sent an open letter to Justice Minister Bekir Bozdağ expressing his concerns over the closure of civil law associations and the detention of lawyers.[21] A letter sent by Andrea Mascherin, the president of the National Council of Bar Associations, having 250,000 lawyers as members and branches in 139 cities across Italy, to Justice Minister Bekir Bozdağ lambasted the unlawful practices targeting lawyers.[22]

In the letter the council strongly condemned the way Turkish authorities kept Italian lawyer Barbara Spinelli at Sabiha Gökçen Airport for 17 hours as well as the closure of certain law associations and the detention of many of their colleagues in Turkey. Spinelli had been detained and deported after she entered Turkey in order to attend an international conference titled

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19] The Commissioner publishes a memorandum on the human rights implications of the emergency measures in Turkey (2016, October 7) http://www.coe.int/cs/web/commissioner/-/the-commissioner-publishes-a-memorandum-on-the-human-rights-implications-of-the-emergency-measures-in-turkey

20] Re: Concerns regarding the situation of Turkish lawyers, including Münip Ermiş, vice president of the Progressive Lawyers Association, 2016, Sept.12) http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey_-_Turquie/2016/EN_HRL_20160912_Turkey_Concerns_regarding_the_situation_of_Turkish_lawyers__including_Muenip_Ermis__Vice_president_of_the_Progressive_Lawyers_Association.pdf

21] Letter of the German Federal Bar Association to Turkish Ministry of Justice, (2017, January 18) http://www.brak.de/w/files/newsletter_archiv/berlin/2017/170118-letter-to-minister-bozdaaeg-from-president-schaefer.pdf

22] Letter of the Italian Bar Association to Turkish Ministry of Justice, (2017, January 31) http://www.consiglionazionaleforense.it/documents/20182/315569/2017.01.31+Oper_Letter_Minister_Turchia.pdf/e436d7d4-b3fc-4b26-a693-b75bdd559a4f

"Turkish Judicial System under the State of Emergency," held Jan. 14-15, 2017.[23]

In the joint letter the Law Society of England and Wales, the Bar of England and Wales, the Law Society of Scotland, the General Council of the Bar, the Faculty of Advocates of Scotland, the Law Society of Northern Ireland, the Bar of Northern Ireland, the Law Society of Ireland and the Council of the Bar of Ireland delivered their concerns over the dismissal of 4,000 judges and prosecutors and the arbitrary arrests and detentions of lawyers and dismissed judges and prosecutors.[24] The English lawyers cited the "UN Basic Principles on the Independence of the Judiciary" and the "UN Basic Principles on the Role of Lawyers" and asked for the immediate reinstatement of the dismissed judges and prosecutors and also for the release of the lawyers, judges and prosecutors under arrest.

2. JUDGES AND PROSECUTORS UNDER PRESSURE

The practice of widespread dismissals and the arrest of judges and prosecutors as well as the ensuing atmosphere of pressure is another important development that has undermined the right to a fair trial in Turkey. This has thwarted the resolution of complaints under domestic remedies as well. Over 4,300 judges and prosecutors were dismissed from office permanently, and two-thirds of them were disbarred on July 16, 2016, the day after the attempted coup d'état. Their salaries and bank accounts were confiscated. Even before they were officially treated as suspects, their names were publicly announced by the government so that they were portrayed as guilty before any charges were leveled, let alone an indictment or a conviction.

As further persecution of judges and prosecutors en masse, their spouses were also fired from their jobs if they were employed by the government. Their savings and property acquisitions were seized. The judicial immunity that is granted to members of the judiciary was annihilated. The prosecutors who would not demand the harshest prison terms for defendants and the judges who would not hand down arrest decisions in line with the expectations of the government were treated as traitors.

Several hours after the coup attempt, the Supreme Council of Judges and Prosecutors (HSYK) published a list of 2,745 judges and prosecutors who were temporarily suspended from duty on charges of membership in what the government described as the "Gülenist Terror Organization/ Parallel State Structure" (FETÖ/PDY). The police started to take the judges and prosecutors mentioned on the list into custody. Then, the number of judges and prosecutors so listed rose to over 4300. All of those on the list who were found were arrested. According to Interior Minister Süleyman Soylu's statement on April 2, there are currently 2,575 judged and prosecutors are jailed pending trial as part of alleged links to Gülen movement. The dismissed judges and prosecutors represent 30 percent of all members of judiciary which stood at 14,661 in total on May 2016 before the mass purge was kicked off in late July 2016 . Those who were arrested represented 17.6 percent

23] Yabancı konukların OHAL konferansına katılımı engellendi, (2017, January 14) https://www.evrensel.net/haber/304048/yabanci-konuklarin-ohal-konferansina-katilimi-engellendi

24] (2017, March 13) http://communities.lawsociety.org.uk/download?ac=24273

of all judges and prosecutors employed in Turkey.

That prompted an international outcry. United Nations experts Mónica Pinto, UN special rapporteur on the Independence of judges and lawyers; Christof Heyns, special rapporteur on summary or arbitrary executions; Juan E. Méndez, UN special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; David Kaye, UN special rapporteur on the promotion and protection of the right to freedom of opinion; and Sètondji Roland Jean-Baptiste Adjovi, current chair-rapporteur of the UN Working Group on Arbitrary Detention have called on Turkey to respect the independence of the judiciary and the principles of the rule of law, including in times of crisis. In particular, these experts have urged the authorities to guarantee detainees access to the lawyer of their choice.[25]

On Dec. 12, 2016, Justice Minister Bekir Bozdağ announced that legal actions had been brought against 3,820 judges and prosecutors and that 2,430 of them were still in prison.[26] In their place 3,940 judges and prosecutors were freshly appointed in a fast-tracked training program according to partisan criteria set up by the government to subordinate the judiciary to itself. [27] Previously, special judges called penal judges of peace had been introduced, and hand-picked judges had been assigned to specific cases. In all these new assignments, many people who had formerly worked for the Justice and Development Party (AKP) were hired as judges and prosecutors, thereby trampling the principle of the independence and impartiality of judges and prosecutors. As penal judges of peace are duly authorized for investigations, lengthy detentions prove punitive.

There are currently thousands of people who are in pre-trial detention and waiting behind bars without even seeing the indictments against them despite the lack of complexity of their cases. The government is abusing pre-trial detention and uses it as a sort of punishment without conviction. In many cases, when an indictment is filed, pre-trial detention would not be possible due to the short sentences demanded. For this reason, there are deliberate delays in preparing indictments for those suspects who are expected to be punished with lighter sentences.

NO FLAGRANTE DELICTO

A wholesale and arbitrary enforcement of the law without individual reasoning or specific evidence has been applied to members of the judiciary although they are supposed to enjoy more extensive protection than ordinary civil servants because of their profession. Normally, extra guarantees are introduced regarding the dismissal of judges and prosecutors from office in order to minimize the interference of the government with ongoing judicial processes. This is called the security of tenure of judges, a basic legal principle that has been trampled in Turkey.

25] UN experts urge Turkey to respect the independence of the judiciary and uphold the rule of law (2016, July 19) http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E

26] Adalet Bakanı: FETÖ'cü hakimlerin geçmiş kararlarıyla ilgili düzenleme kaosa yıl açar (2016, December 10) http://t24.com.tr/haber/adalet-bakani-fetocu-hakimlerin-gecmis-kararlariyla-ilgili-bir-duzenleme-hukuk-kaosuna-yol-acar,376025

27] Atanan hakim ve savcıların listesi (2016, November 29) http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2016/11/20161129.htm&main=http://www.resmigazete.gov.tr/eskiler/2016/11/20161129.htm

Judicial and administrative procedures have not been respected. The right to a defense has not been upheld. Many judges feel obligated to arrest or refuse to release their colleagues in order not to suffer from the same fate. During their interrogation, they are not asked about the charges leveled against them. A list of judges and prosecutors sent by the HSYK judicial council is treated as sufficient reason for arresting the suspects. Even judges and prosecutors cannot find any lawyer to defend them.[28]

Mehmet Yılmaz of Turkey's judical council HSYK acts as if gov't commiser.

A statement by HSYK Deputy President Mehmet Yılmaz is proof that the arrest and dismissal of judges were unlawful: "I made this statement [that the judges and prosecutors who become informants may be returned to their posts] solely to encourage informants, and I have been very successful. Indeed, there was not a single informant before that time, but there has been a surge in the number of informants in the wake of my statement. Thanks to more than 200 informants, we had evidence that 2,400 judges and prosecutors were identified as members of FETÖ." This statement clearly suggests that members of the judiciary were profiled based on the testimony of informants who were encouraged to come forward in exchange for a lighter sentence and reinstatement. Yet Yılmaz later said none of the judges and prosecutors dismissed on FETÖ charges would be reinstated, contrary to his earlier remarks.[29]

Yılmaz also admitted that there is no evidence that any member of the judiciary was involved in the failed coup bid. "As for the coup attempt, we are unable to benefit from this law. We will only be able to try them as members of an armed terrorist organization as we have been unable to ascertain that any member of the judiciary was involved in the coup. We have not been able to prove any such involvement. Our current investigation regarding the judiciary is related to the charge of membership in an armed terrorist organization," he said.[30] In other words, Yılmaz not only admitted that the judges and prosecutors under arrest had nothing to do with the coup but also that their alleged membership in an armed terrorist group was not proven at the time of their arrest.

Under Turkish Law No. 2802 on Judges and Prosecutors, members of the judiciary can be arrested only in the event of aggravated felony in flagrante delicto. Yet, they were arrested the day after the failed coup, but there is still no evidence of their involvement in the coup. Furthermore, when they were arrested, there was no evidence that they were members of a criminal organization. Five months later, such evidence appears to have been fabricated based

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28] FETÖ'ye avukat aranıyor! (2017, March 25) Retrieved from http://www.halkinsesi.com.tr/m/zonguldak/fetoye-avukat-araniyor-h29261.html

29] HSYK Başkanvekili Mehmet Yılmaz: İtirafçı hâkim-savcılar mesleğe dönemeyecek, (2016, December 29), http://www.haberturk.com/gundem/haber/1342282-hsyk-baskanvekili-mehmet-yilmaz-itirafci-hkim-savcilar-meslege-donemeyecek

30] HSYK Başkanvekili Mehmet Yılmaz: Niyetim itirafçılığı teşvik etmekti. (2016, December 28) http://www.haberturk.com/yazarlar/sevilay-yilman-2383/1341844-hsyk-baskanvekili-niyetim-itirafciligi-tesvik-etmekti.

mostly on statements obtained during the detention of suspects amid widespread torture claims.

In short, the arrests of judges and prosecutors were completely unlawful as there was no case of flagrante delicto and no separate evidence was provided for the offense charged in each individual case. Article 95 of Law No. 2802 states that the judicial procedures regarding the civil servants in this category must be expedited. Thus, an indictment has to be prepared within five days after a judge or prosecutor is arrested and the trial must be concluded in no longer than three months. Yet, no indictment has been drafted in the eight months since the arrest of the judges and prosecutors.

Turkish President Recep Tayyip Erdoğan.

3. JUDGES FACE CARROT AND STICK

There is a near unanimous consensus among Turkey watchers that the judiciary in Turkey is under heavy pressure from the government in general and from President Recep Tayyip Erdoğan in particular as confirmed in various reports by advocacy groups, nongovernmental organizations and intergovernmental organizations. When judges render decisions that displease Erdoğan, judges are expeditiously targeted with punishment, the least of which is abrupt reassignment. Likewise, the judges who render decisions in line with Erdoğan's wishes are rewarded.

Returning from a visit to Ukraine on March 20, 2015, President Erdoğan said, "We are closely monitoring the judges who make decisions in [criminal] cases against the parallel structure [a derogatory term he uses to describe the Gülen movement]." On July 26, 2015, the Sabah newspaper, a media organ controlled by the family Turkish President Erdoğan, published a news story titled "Curbing powers and authorities of judges who refuse to take a firm stance against the parallel structure."[31] The news story read: "The judges who adopt decisive attitudes regarding parallel structure investigations have been promoted to high criminal courts, while those who are ambivalent have been demoted to family courts or criminal courts of first instance." In fact many presiding judges in high criminal courts who ruled against Erdoğan and his associates in various cases were demoted in a new circular issued by the HSYK in June 2015 that reassigned 2,664 judges and prosecutors.[32]

31] HSYK'dan yargıya "yetki" ayarı, (2016, July 26), http://www.sabah.com.tr/gundem/2015/07/26/hsykdan-yargiya-yetki-ayari

32] Hakim ve Savcılar tayin şoku yaşadılar !, (2016, June 13), http://www.balikesirhaberajansi.com/haber-3770--hakim-ve--savcilar-tayin-soku--yasadilar-.html

Judges Metin Özçelik and Mustafa Başer were arrested because of their rulings.

On May 12, 2015, the HSYK disbarred one judge and four public prosecutors who were in charge of the graft probes of Dec. 17 and 25, 2013 that rattled the government, incriminated Erdoğan and his family members and led to the resignation of four ministers. "We have returned Dec. 17 and 25 to their owners," Prime Minister Ahmet Davutoğlu said on May 13, 2015, referring to the disbarred judges and prosecutors.[33]

On May 29, 2015, Cumhuriyet newspaper Editor-in-Chief Can Dündar published a report about Syria-bound trucks belonging to the National Intelligence Organization (MİT) that were intercepted on Jan. 29, 2015 while allegedly transporting weapons to the Islamic State in Iraq and the Levant (ISIL) in Syria. After the publication of this news story, President Erdoğan said the following during a live program on TRT 1 TV, on May 31, 2015: "The person who wrote this news story as a special report will pay a heavy price for reporting this. I will not let him go [unpunished]."[34] Deputy Chief Prosecutor İrfan Fidan, an Erdoğan loyalist, referred Dündar and his colleague Erdem Gül to court for arrest. They were arrested by a decision of the Istanbul 7th Penal Court of Peace on Nov. 26, 2015.

Judges Altar Gökçimen and Ersin Öğütalan, who handed down a decision against mining operators who are close to Erdoğan in the case of Carettepe, in Artvin, were sent to other cities as a demotion.[35] The case involved the licensing of mining operations for gold and copper in one of the most beautiful green landscapes in Turkey's northeast. Despite the outcry and protests from locals over concerns of environmental damage, the government has pushed forward with allowing pro-Erdoğan businessmen to start mining operations. The case was eventually brought forward to the court, which issued a decision against the mining, but the bench was replaced by Erdoğan to secure a favorable result.

Judges Metin Özçelik and Mustafa Başer were arrested on April 30 and May 1, 2015, respectively, for rendering decisions to release 63 suspects in pre-trial detention including journalist Hidayet Karaca, the head of the Samanyolu Broadcasting Group. Their wives, a physician and an academic, respectively, lost their jobs as part of the government-escalated intimidation campaign against independent judges and prosecutors. Speaking in the wake of a Cabinet meeting held on April 27, 2015, government spokesperson Bülent Arınç said, referring to the two judges' decisions, "How dare they?"[36]

33] 17-25 Aralık'ı sahiplerine iade ettik (2015, May 5) http://www.yenisafak.com/gundem/17-25-araliki-sahiplerine-iade-ettik-2141195

34] Erdoğan Can Dündar'a sert çıktı: Bedelini ağır ödeyecek (2015, January 6) https://tr.sputniknews.com/turkiye/201506011015746756/

35] Cerattepe'de madene "DUR" diyen hakimlere tenzili rütbe, (2016, February 27) http://www.radikal.com.tr/cevre/cerattepede-madene-dur-diyen-hakimlere-tenzili-rutbe-1518808/

36] Arınç: Gözükaralıpın bu kadarına pes denir, (2015, April 27), http://m.gazetevatan.com/amp/hukumet-sozcusu-arinc-gozu-karaligin-bu-kadarina-pes-denir--784671-gundem/

Addressing his voters at a rally in Gümüşhane at the time, then-Prime Minister Ahmet Davutoğlu claimed that the judicial decision in question amounted to a "coup d'état against the government" and stated that they would "never allow this decision to be implemented."[37] Referring to the release decision in question, Halil Koç, president of the HSYK's first chamber, which deals with the appointment of judges and prosecutors, told the Sabah newspaper, "Of course, there will be certain retribution for it."[38]

Judge Murat Aslan, former president of the Judges and Prosecutors Association.

As a result of these pressures, the decision to release dated April 25, 2015 was not implemented, and the two judges who rendered that decision were arrested five days after the fact. This event is one of the most obvious examples of the apparent pressures exerted by the executive on the judiciary. The Council of Europe's Venice Commission expressed concerns on the arrest of judges Özçelik and Başer, saying that "not only were these release orders, although they were legal and valid, not implemented but, two days later, on 27 April 2015 the judges were suspended by the High Council of Judges and Prosecutors, which authorised their arrest." The commission also lambasted the president of the second chamber of the HSYK, who stated that "I apologize to the public. Our ruling was delayed due to the weekend."[39]

During the monthly arrest review session held on July 24, 2015 for judges Özçelik and Başer, Bakırköy 2nd High Criminal Court Judge Nilgün Güldalı voted for the release of the judges and one day later, she was assigned to another court.[40]

Istanbul 2nd Penal Judge of Peace Hulusi Pur was promoted from an ordinary judge to the presiding judge of the Istanbul 17th High Criminal Court after handing down a release decision for six people, including former General Manager of Halkbank Süleyman Aslan, who was arrested in connection with the graft and bribery scandals that went public on Dec. 17, 2013, as well as Abdullah Happani, who was working for Iranian businessman Reza Zarrab, who was involved in the same scandal and who is now in pre-trial detention in the US, on Feb. 14, 2014. Pur is the judge who sentenced famed pianist Fazıl Say to 10 months in prison on charges of "insulting religious values" for Say having quoted lines from one of Omar Khayyam's poems on Twitter.

Istanbul Public Prosecutor Mehmet Demir was promoted to Bakırköy deputy chief public prosecutor after launching an investigation into main opposition Republican People's Party leader Kemal Kılıçdaroğlu for reading aloud voice recordings concerning the corruption investigation that became public on Dec. 17/25, 2013 when President Erdoğan's son Bilal Erdoğan filed an official complaint against him. Despite Kılıçdaroğlu's parliamentary immunity, prosecutor

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37] Davutoğlu: Yargıda darbe yapmaya kalktılar, (2015, April 26), http://www.gazetevatan.com/davutoglu-yargi-da-bir-darbe-yapmaya-kalkistilar-784177-gundem/

38] Hukuksuz yapı, (2015, April 27), http://m.sabah.com.tr/gundem/2015/04/27/hukuksuz-bir-yapi

39] Venice Commission Declaration on Interference with Judicial Independence in Turkey (2015, June 20) http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf

40] HSYK'dan paralele nokta atışı, (2015, July 26), http://www.kontrgerilla.com/m/mansetgoster-mob.asp?haber_no=7060

Demir had summoned him to testify as a suspect.[41]

Murat Aydın, a judge in Karşıyaka and the vice president of the Judges and Prosecutors Association (YARSAV), was reassigned and exiled to Trabzon after he applied to the Constitutional Court for the annulment of the legal article concerning "insulting the president."[42]

YARSAV, the only legal association in Turkey with international accreditation, was shut down and its president, Judge Murat Aslan, was arrested since YARSAV was the greatest rival to the pro-Erdoğan Unity in the Judiciary Platform (YBP) through which the government controls the judiciary.[43]

Ankara 7th High Criminal Court judges İsmail Bulun and Numan Kılınç, who acquitted defendants who were falsely charged with wiretapping then-Prime Minister Recep Tayyip Erdoğan's office, commonly referred to as the "bug" trial, were removed from office prematurely by an HSYK decree on July 25, 2015. 2nd High Criminal Court judge Fatma Ekinci, who released Hasan Palaz, a top scientist and former deputy president of the Scientific and Technological Research Council of Turkey (TÜBİTAK), in the same trial, was reassigned to another court.

The violent police crackdown on Gezi Park protests in Istanbul in the Summer 2013.

The Ankara 4th Administrative Court chief judge who issued the decision to suspend the Telecommunications Directorate's (TİB) ban on access to YouTube was prematurely reassigned to the Konya Administrative Court. The Istanbul 4th Administrative Court's presiding judge and two other judges were reassigned to other provinces after rendering the decision to abolish the 16/9 towers, which spoil Istanbul's skyline -- built by a friend of the president -- and suspending the Environmental Impact Report (EIR) for Istanbul's 3rd airport.[44]

Judge Ayşe Neşe Gül, who was appointed to the Ankara Courthouse less than a year ago and who ran as an independent candidate and secured the support of 4,816 judges and prosecutors in the Supreme Board of Judges and Prosecutors (HSYK) elections, was appointed to Edirne only 45 days after the election and without her request for such an assignment.

41] Bakırköy Başsavcıvekili Mehmet Demir oldu, (2016, June 6), http://www.sozcu.com.tr/2016/gundem/bakirkoy-bassavci-vekili-mehmet-demir-oldu-1263393/

42] 'Cumhurbaşkanı'na hakareti AYM'ye götüren hakim sürüldü. (2016, June 6) http://www.sozcu.com.tr/2016/gundem/cumhurbaskanina-hakareti-aymye-goturen-hakim-suruldu-1263330/

43] YARSAV Eski Başkanı Murat Arslan FETÖ'den tutuklandı (2016, October 26) http://www.haberturk.com/gundem/haber/1315712-yarsav-eski-baskanina-fetoden-tutuklandi

44] Silueti bozan 16/9'a yıkım kararı veren mahkeme dağıtıldı. (2014, June 13) http://www.radikal.com.tr/cevre/silueti-bozan-16-9a-yikim-karari-veren-mahkeme-dagitildi-1196931/

After canceling the Taksim Square Project, Erdoğan's favorite construction project that was to be built in Istanbul's Gezi Park and its environs, Istanbul 10th Administrative Court Chief Judge Rabia Başer was reassigned to the Regional Administrative Court and Judge Ali Kurt to the province of Van. Judge Başer was reassigned again to the Istanbul Tax Court on June 6, 2016. These reassignments were demotions for both judges.

Judge Cemil Gedikli, who issued the decision to arrest the suspects including the relatives of the ministers in the graft and bribery investigation that went public on Dec. 17, 2013, was reassigned first to Erzurum, then to Kastamonu and finally to Zonguldak in just one year and six months.[45] Bakırköy 2nd Criminal Court of First Instance Judge Osman Burhanettin, who accepted the indictment that uncovered the false and slanderous news stories that appeared in pro-government papers suggesting that President Erdoğan's daughter Sümeyye Erdoğan would be assassinated was prematurely reassigned to the province of Konya with an HSYK decree on Oct. 15, 2015.

Judge Süleyman Karaçöl who was the investigating judge in Dec.2013 major graft probes.

Shortly before the general elections of Nov. 1, 2015, several critical TV channels were removed from the Digitürk broadcasting platform as a result of government pressure. Mersin 1st Consumer Court Judge Mustafa Çolaker was reassigned to Çorum on Dec. 7, 2015 after issuing a decision in favor of these TV channels, which had challenged Digitürk's removal decision.[46]

Court of Cassation Prosecutor Mazlum Bozkurt was removed from office on Dec. 1, 2015 after expressing the view that the court of first instance decision sentencing Staff Col. Hüseyin Kurtoğlu and five officers to various terms in prison should be upheld.[47] The government claim was that by convicting Col. Kurtoğlu, another officer named Hamza Celepoğlu, the Adana gendarmerie brigadier general, was promoted. Celepoğlu was the officer who intercepted the government's illegal arms shipments to Syria in January 2014. After the embarrassing exposé, Erdoğan orchestrated the removal and subsequent arrest of Celepoğlu. Bozkurt was blamed for opening the way for the promotion of the officer who uncovered illegal arms sent to Syria at the order of Erdogan.

Judge Süleyman Köksaldı, who, as an Ankara penal judge of peace, issued decisions of refutation concerning a news report claiming that US-based Muslim scholar Fethullah Gülen's passport had been canceled and regarding a news story about espionage at the Telecommunications Directorate (TİB), was reassigned to the Ankara 21st Labor Court. Gülen has been a vocal critic of Erdoğan on corruption and the Turkish government's arming and funding of jihadist groups in Syria. Both articles in the pro-government media were deemed inaccurate, and the judge

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45] Yargıda yeni sürgün dönemi. (2015, June 12) http://www.cumhuriyet.com.tr/haber/turkiye/297853/Yargida_yeni_surgun_donemi.html

46] Hsyk'dan o hakim için sürgün kararı, (2015, December 9) http://www.politikakulvari.com/haber/guncel_1/hsyk-dan-o-hakim-icin-surgun-karari/7926.html

47] http://www.sabah.com.tr/gundem/2015/12/01/savci-aciga-alindi

ordered the media outlet to run corrections.

"There may be other arrests here. That is how it looks," President Erdoğan told journalists aboard the plane returning home from a visit to Belgium on May 12, 2015, referring to the arrest of four public prosecutors and one army colonel who had been conducting an investigation into the interception in Adana of the Syria-bound arms-laden trucks belonging to the National Intelligence Organization (MİT). Former Adana Chief Public Prosecutor Süleyman Bağrıyanık, former Adana Deputy Chief Public Prosecutor Ahmet Karaca and Adana prosecutors Aziz Takçı and Özcan Şişman, who were all involved in the investigation of the illegal arms shipments, were later dismissed and arrested on trumped-up charges.

Journalist Frederike Geerdink.

Judge Süleyman Karaçöl, who issued rulings in the graft probe of Dec. 17, 2013, was arrested on charges of membership in a [terrorist/illegal] organization and attempting to overthrow the government.[48] The Venice Commission criticized Turkey for the abrupt dismissal of Karaçöl and prosecutors Zekeriya Öz, Celal Kara, Mehmet Yüzgeç and Muammer Akkaş, who were involved in investigations into high-level corruption. It said the government not only failed to execute decisions by prosecutors and judges that were valid and legal but also transferred them to other jurisdictions, in a procedure that was far from normal.[49]

After refusing to arrest 23 judges and prosecutors in Denizli in the wake of the failed coup of July 15 on the grounds that "there is no evidence other than a list of judges and prosecutors to be arrested, drawn up by the HSYK," Penal Judge of Peace H. A. was stripped of his authority by the HSYK on the same day, and Judge S. U., who was assigned in his/her place, arrested these 23 judges and prosecutors.

Pressure was exerted on Penal Judge of Peace K. O. after releasing two female judges whose husbands were also arrested "so that they could breastfeed their babies." Judge K. O. was removed from the duty list. The same judge was removed temporarily from office by a second circular issued by the HSYK and later detained. Kemal Karanfil, who filed a petition with the Constitutional Court arguing that the penal judgeships of peace should be abolished as they run counter to the principle of a fair trial, is another judge who was removed temporarily from office.

In a highly unusual practice, there has recently been a rise in the cases of taking judges into custody by interrupting the hearings they are conducting. In several cases, police barged into the courtroom to detain judges as the hearings were under way in what was seen as an escalation of an intimidation campaign against independent judges and prosecutors in Turkey. Normally, judges can be summoned for testimony or they may be detained outside the hearing. Yet, taking

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48] http://www.cnnturk.com/turkiye/suleyman-karacol-tutuklandi (http://www.hurriyet.com.tr/17-25-sanikla-ri-28355122

49] Venice Commission Declaration on Interference with Judicial Independence in Turkey (2015, June 20) http://ve-nice.coe.int/files/turkish%20declaration%20June%202015.pdf

a judge into custody during proceedings is a public act of intimidation.[50]

What happened in Diyarbakır after a journalist's detention is the essence of recent developments in Turkey. On Jan. 6, 2015, journalist Frederike Geerdink, a Dutch citizen, was taken into police custody at her home in Diyarbakır on charges of "spreading terrorist propaganda" while the Dutch foreign minister was visiting Ankara. Geerdink was released upon harsh reactions from Minister Bert Koenders. Turkish officials told the Dutch government that this was a provocation by the "parallel structure" within the judiciary [the judges and prosecutors who are allegedly affiliated with the Hizmet movement].

However, it turns out that the investigation into Geerdink had been launched due to an anonymous letter sent to the Prime Ministry with the claim that Prime Minister Erdoğan's wife Emine Erdoğan was insulted, according to journalist Sefer Can, who wrote a breaking story on it, prompting a probe into the journalist. Although Geerdink was released, the investigation was not dropped, and a criminal case was brought against Geerdink, with the prosecutor demanding that she be sentenced to five years in prison.

Penal Judge of Peace Ali Topaloğlu, who ordered the detention warrant for Geerdink, and prosecutor Ahmet Hakan Özdemir, who conducted the investigation, requested her detention, drafted the indictment and demanded her imprisonment, as well as Presiding Judge Melih Uçar, who objected to the decision to acquit, are still in office. Moreover, they received promotions and assignments to the positions of their choice.

On the other hand, prosecutor Şaban Özdemir, who argued that Geerdink should be released, was disbarred and arrested in the wake of July 15.[51] Senior judge Ramazan Faruk Güzel, who had played a major role in the acquittal decision, was dismissed at the same time Geerdink was re-detained and deported. Güzel had also played a role in the decision to acquit Diyarbakır Bar Association President Tahir Elçi, who was later assassinated. The case of Geerdink alone is sufficient to expose the arbitrariness by which judges and prosecutors are arrested or disbarred. [52]

The last example of judges being rewarded or punished according to how their decisions measure up to the expectations of the government was seen on April 3. Three judges who had previously been rewarded with promotions because they were rendering decisions to the liking of the government were abruptly suspended when they decided to release 21 jailed journalists who had already served eight months' jail time in pre-trial detention for tweets and published articles. Panel of judges İbrahim Lorasdağı, Barış Cömert and Necla Yeşilyurt Gülbiçim were suspended immediately after the decision to release. Public prosecutor Göksel Turan, who demanded the release of some of the journalists, was also suspended by the HSYK. The move came after pro-government circles were mobilized in reaction to the release order handed down by the judges.[53]

50] Hakim FETÖ'cüleri yargılarken açığa alındı (2017, February 2) http://www.haberturk.com/gundem/haber/1376040-hakim-fetoculeri-yargilarken-aciga-alindi

51] FETÖ'nün darbe girişimi (2016, July 21) http://www.haberler.com/feto-nun-darbe-girisimi-2-8634290-haberi/

52] Sen misin Hollandalı gazeteciye beraat veren (2017, January 1) http://www.tr724.com/sen-misin-hollandali-gazeteciye-beraat-veren-sefer-can/)

53] Gov't suspends judges who released journalists (2017, April 3), https://www.turkishminute.com/2017/04/03/govt-suspends-judges-released-journalists/

4. TOOLS OF REPRESSION: PENAL JUDGES OF PEACE

Then-Prime Minister and now President Erdoğan said, on June 22, 2014, that "the steps taken by the executive were hampered by the parallel judiciary. Some legislative proposals we have made are now about to be approved by the president. When he approves them, swift steps will be taken … We are developing a project. We are laying the groundwork for this." This remark was the harbinger of the creation of special courts.

Erdoğan expanded on what he called his "project" during a visit to the office of the Grand Unity Party (BBP), whose deputy chair Remzi Çayır reported Erdoğan as having said: "We have drafted legislation on penal judges of peace. It is now before Mr. Abdullah Gül; I will destroy them [the Gülen movement] within the course of one week, 10 days when it comes about." Çayır later repeated the statement on TV.[54]

The "project" was realized with Law No. 6545, which was approved by the votes of Erdoğan's party in Parliament on June 18, 2014 and entered into force on June 28, 2014. In a speech he delivered in Ordu province on July 20, 2014 Erdoğan announced that "the judicial process is starting; [this process] is to be carried out by the penal judges of peace."[55] Exclusively authorized to carry out all investigatory processes including detention, arrests, property seizures and search warrants, penal judges of peace have been introduced to persecute critics and opponents of Erdoğan, primarily members of the Gülen movement and the Kurdish political movement, who are treated as enemies by the government. As appeals against decisions by a penal judge of peace can be filed only with another penal judge of peace, this creates a "closed circuit" system. Judging from past cases, these judges with extraordinary powers can decide on the launch of investigations based on highly questionable evidence.

With these "project" courts, Erdoğan and his associates in the government have effectively seized on immense powers of prosecution, investigation and detention up until the trial stage begins by selectively bringing partisans and loyalists to the bench. The challenge of decisions rendered by the judges selected for these new courts can only be made within the same system, meaning that release orders from pre-trial detention are also controlled by government proxies. When a judge issued a decision not to the liking of the government, he or she was immediately reassigned.

The Venice Commission dealt with the case of these courts when Cesar Florin Preda, chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion on the duties, competences and functioning of the penal judges of peace on May 25, 2016. The Venice Commission issued its opinion on March 13, 2017 and said their jurisdiction and practices give rise to numerous concerns.[56]

54] "Erdoğan Cemaatle ilgili gerekeni yapacağız dedi " (2015, March 2016) https://www.youtube.com/watch?v=ok1R_ne8I1M

55] Yargının Yeni Hakimlerinden İlk İcraat Cemaate, (2014, July 22) http://www.internethaber.com/yarginin-yeni-hakimlerinden-ilk-icraat-cemaate-1227131y.htm

56] CDL-AD(2017)004-e Turkey - Opinion on the duties, competences and functioning of the criminal peace

"The system of horizontal appeals among a small number of peace judges within each region or courthouse is problematic, prevents the unification of case-law, establishes a closed system and cannot be justified with the need for specialization," the opinion underlined. It also found that "there are numerous instances where peace judges did not sufficiently reason decisions which have a drastic impact on human rights of individuals."

Iranian sanction-buster Reza Zarrab who was later arrested in the US.

The commission recommended that the Turkish government remove the competence of the penal judgeships of peace on protective measures during the investigation phase and that ordinary judges should be entrusted with the protective measures on personal liberties during the investigatory and prosecutorial phases. It also urged the replacement of the horizontal system of appeals between the peace judges with a vertical system of appeals to either criminal courts of first instance or possibly to courts of appeal. It also asked prosecutors to request the release of those who were detained on the basis of insufficiently reasoned decisions by peace judges.

When the profile of judges at these courts is examined, it is clear that the courts were staffed by partisans and loyalists of Erdoğan. Virtually all of 112 people who were assigned as penal judges of peace by the HSYK are members of the Unity in the Judiciary Platform (YBP), which was established by the government and won the HSYK elections. For instance, Bekir Altun, Hulusi Pur, İslam Çiçek, Recep Uyanık, Cevdet Özcan, and Fevzi Keleş were appointed as penal judges of peace for Istanbul. Why these six judges were hand-picked for this assignment can be seen by looking at their previous decisions. İslam Çiçek had released graft suspects including former Interior Minister Muammer Güler's son, Iranian sanction-buster Reza Zarrab (who was later arrested in the US), former Minister Zafer Çağlayan's son Salih Kaan Çağlayan, Özgür Özdemir and Hikmet Tuner. It turned out from looking at his profile and posts on his Facebook page that Judge Çiçek was a fan of Erdoğan.

Another figure is Hulusi Pur. Pur first came to the agenda with a prison sentence he handed down to leftist and dissident pianist Fazıl Say. He released six people including former General Manager of Halkbank Süleyman Aslan, favored by Erdoğan, who had been arrested during the graft probe. After being appointed as a penal judge of peace, Recep Uyanık canceled an injunction on the property of suspects in the corruption probe, including that of Aslan.

Those judges and prosecutors who have failed to perform satisfactorily in the fight against the Hizmet movement and dissidents have been removed from office or reassigned to other positions. Hülya Tıraş, Seyhan Aksar, Hasan Çavaç, Bahadır Coşlu, Yavuz Kökten, Orhan Yalmancı, Deniz Gül, and Faruk Kırmacı were appointed as penal judges of peace in Ankara by HSYK decree numbered 1644 and dated July 16, 2014. In one year, seven of these eight judges (except the 7th

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judgeships, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017) http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)004-e

penal judge of peace) were removed from office. Penal Judges of Peace Kökten and Süleyman Köksaldı, who released some police officers despite the ruling party's intention to have them arrested, were removed from office and assigned to other courts.

Penal Judge of Peace Yalmancı, who failed to arrest 24 police officers despite the prosecutor's demand for their arrest on March 1, 2015, Penal Judge of Peace Hasan Çavaç, who rejected certain objections, and Penal Judge of Peace Seyhan Aksar, who released the suspects in a previous operation against police officers, were all removed from office on March 9, 2015. On July 14, 2015, Ankara 7th Penal Judge of Peace Hülya Tıraş released a suspect who had been detained for 110 days, and she was removed from office two weeks later. Penal Judges of Peace Yaşar Sezikli and Ramazan Kanmaz, who released other suspects who were part of the same file, were removed from office by HSYK decree numbered 1157 and dated July 23, 2015.

Ankara Penal Judge of Peace Osman Doğan was removed from office after he released 18 police officers from the intelligence branch of the police department who were accused of unlawful wiretapping. 4th Penal Judge of Peace Ramazan Kanmaz, who released 25 defendants in the investigation into allegations of cheating in the Public Personnel Selection Examination (KPSS) -- which are frequently raised by the government against the Gülen movement -- was reassigned to another court even before his first year at this court expired. These judges were removed from office mainly because of release decisions they rendered or because they refused to arrest certain defendants in February, March and July 2015. [57]

Decisions related to the appointment of trustees to media outlets, companies and other entities, media bans, prevention of access to the Internet and social media, and restrictions on freedom of expression are perceived as the most problematic decisions rendered by these courts. These courts became an instrument in the hands of Erdoğan and the government by means of the detention and arrest warrants for 2,745 judges and prosecutors issued on a single day, July 16, 2016, following the attempted coup. It is simply beyond the capacity of any court or judge to review all these cases individually in a day, suggesting the whole game was planned way in advance and that penal judges of peace simply functioned as rubber-stampers to approve what the government asked them to do.

57] Ankara'da 3, İstanbul'da bir hâkim görevden alındı (2015, March 10) http://www.haberturk.com/gundem/haber/1051674-ankarada-3-istanbulda-bir-hkim-gorevden-alindi
HSYK'dan Nokta Atışı Kararname! (2015, July 27) http://www.baroturk.com/hsykdan-nokta-atisi-kararname-10842h.htm
HSYK'da 8 eski üyenin görev yeri değiştirildi, (2015, February 7) http://t24.com.tr/haber/hsykda-8-eski-uyenin-gorev-yeri-degistirildi,286354)

5. HIGH JUDICIARY

The Turkish judiciary is structured in two layers: Courts of first instance and high courts. For an applicant to file a complaint with the European Court of Human Rights (ECtHR), the exhaustion of domestic remedies at all levels must be complete. Turkish citizens can challenge the decisions of lower courts by applying to the Court of Cassation (Yargıtay in Turkish, or Supreme Court of Appeals) or the Council of State (the highest administrative court). With a constitutional amendment in 2010, Turkey introduced the individual right to petition the Constitutional Court on rights violations. Currently, however, it is virtually impossible to seek a remedy in the high courts, particularly given recent changes in their organizational structure and the composition of the courts as well as the threats and blackmail against the judiciary by the government. The fact that 170 members of the high courts have been subject to criminal procedures and are currently under arrest suggests that the members of the high judiciary are under constant threat of imprisonment.

Journalists Can Dündar and Erdem Gül.

The role of the councils that were established during the coup eras of the past to restructure the entire legal system was delegated to President Erdoğan via the National Security Council (MGK). In other words, Erdoğan staged his own coup and transformed the entire judiciary according to his own whims and emotions. This is clearly visible in the decree-law (numbered 667 and dated July 23, 2016) regarding high judges. Article 3 of the decree-law reads "... [judges] who are believed to have any membership, allegiance or connection to the terrorist organization or the structures, formations and groups which are defined by the National Security Council as acting against the national security of the state" thereby, by implication, sending a message to the Constitutional Court, the Council of State, the Court of Cassation and the Court of Accounts that they should dismiss their members profiled by the government as affiliated with critical groups. Thus, the MGK and Erdoğan were positioned as being above all high courts. The Constitutional Court, the Court of Cassation and the Council of State were reduced to the position of simple implementers of the real decision-maker.[58]

5.1. CONSTITUTIONAL COURT

The Constitutional Court conducts judicial review of legislative acts and handles individual petitions on rights violations as the last domestic remedy before the European Court of Human Rights. However, the Constitutional Court has been effectively smothered by President Erdoğan. At a time when he was unable to exert his full control over the court, Erdoğan tried to render the Constitutional Court dysfunctional through his public statements and the media outlets at his disposal. Here are some examples of this attitude:

In the wake of the release of journalists Can Dündar and Erdem Gül on Feb. 28, 2016, President

58] Olağanüstü Hal kapsamında alınan tedbirlere ilişkin Kanun Hükmünde Kararname, (2016, July 23) http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm

Erdoğan said: "This event has nothing to do with freedom of expression. This is a case of espionage. The Constitutional Court decided in this way. I don't have to accept it. I do not obey it nor do I respect it. In fact, the local court could have refused to comply with the Constitutional Court's decision."[59] Then, the journalists in question were sentenced to five years in prison by the local court.[60]

During a public rally in Burdur on March 11, 2016, President Erdoğan said: "The Constitutional Court is one of those institutions in this country that must act with total diligence as regards the rights, benefits and interests of the state and the nation. But through the agency of some of its members including its president, this institution has dared take decisions that are against the interests of the country and the nation in connection with a matter that is one of the greatest attacks on Turkey in recent years. What did I say to an institution that does not respect its own country and its interests? 'I do not respect this decision,' I had said. … I hope the Constitutional Court will never resort to such actions that would open up its existence and legitimacy to debate."[61]

In the face of this and other practices and statements, the Venice Commission issued a statement in connection with the illegitimate interventions by the Member Countries of the Council of Europe with the constitutional courts. In the "Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member States," the Venice Commission expressed serious concern over statements made by Turkish President Erdoğan, particularly as regards the Constitutional Court, noting that Turkey is bound by the council's fundamental principles (democracy, the protection of human rights and the rule of law).[62]


Alpaslan Altan Erdal Tercan

Concerning the Constitutional Court's decision in April 2014 abolishing the ban on access to Twitter, Erdoğan said: "I do not respect it. It is a decision against national interests." [63] When the Constitutional Court decided to accept the application regarding the election threshold, Erdoğan exerted pressure on the court by saying, "Sovereignty does not belong to the Constitutional Court."[64]

Then, pro-government media outlets attacked the court with a fusillade of slanderous charges

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59] Erdoğan: Anayasa Mahkemesinin kararına uymuyorum, saygı da duymuyorum (2016, February 28) http://www.milliyet.com.tr/cumhurbaskani-Erdoğan-anayasa-mahkemesi-istanbul-yerelhaber-1237210/

60] Can Dündar'a 5 yıl 10 ay, Erdem Gül'e 5 yıl hapis cezası, (2016, May 6) http://aa.com.tr/tr/turkiye/can-dundara-5-yil-10-ay-erdem-gule-5-yil-hapis-cezasi/567900)

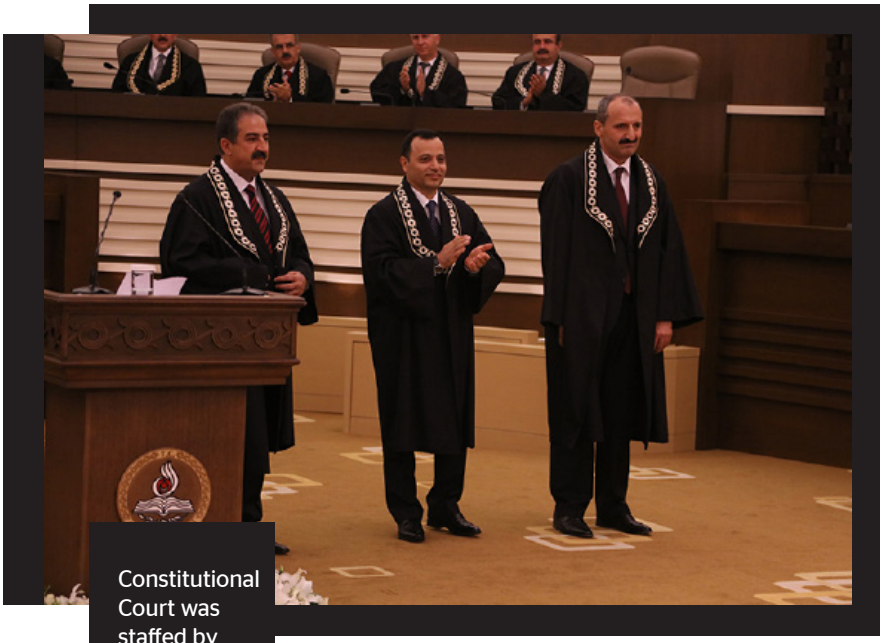
61] Erdoğan'dan Can Dündar ve Erdem Gül için mahkemeye direktif, (2016, March 11) http://www.cumhuriyet.com.tr/haber/turkiye/496255/Erdoğan_dan_Can_Dundar_ve_Erdem_Gul_icin_mahkemeye_direktif.html.

62] Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member States, (2016, March 16), http://www.coe.int/en/web/tbilisi/-/declaration-by-the-venice-commission-on-undue-interference-in-the-work-of-constitutional-courts-in-its-member-states.

63] Başbakan Erdoğan: "Anayasa Mahkemesi kararına saygı duymuyorum", (2014, April 4) http://www.cnnturk.com/haber/turkiye/basbakan-Erdoğan-anayasa-mahkemesi-kararina-saygi-duymuyorum.

64] Egemenlik milletindir, AYM'nin değil,(2014, December 3), http://www.sabah.com.tr/gundem/2014/12/03/kim-se-siyasete-yon-veremez.

that lasted for weeks, implying that the court was "controlled by the parallel state" or "linked to foreign powers." When the court eventually made a decision, they directly targeted the members of the Constitutional Court by publishing their photos on their front pages. Given the fact that an armed attack against members of the Council of State had occurred following such a process in the past, all this can hardly be dismissed as simple threats.



Constitutional Court was staffed by Erdogan loyalists.

The composition of the court has also changed with Erdoğan's appointment to the court of partisans and close advisors. In his selections, Erdoğan refused to observe any objective criteria in assigning judges to the Constitutional Court as he appointed his own personal advisers as judges. Indeed, of two members he assigned on Aug. 25, 2016, Recai Akyel was the chief presidential adviser. Şevki Hakyemez is an academic who publicly proclaimed his pro-AKP views.[65] Thus, Erdogan's clout over the Constitutional Court increased.

After July 15, the Constitutional Court gave up what was left of its independence. The first sign of this was its submission in the face of the arrest and impeachment of two of its members, Alpaslan Altan and Erdal Tercan. [66] Thus, the legal provision that members of the high courts can be investigated and prosecuted only by their own courts was violated. The Constitutional Court not only failed to resist this practice but also took part in the unlawfulness. The rationale the Constitutional Court wrote in dismissing its own members was in breach of the most fundamental principles of law.

In the court decision to dismiss its members, which was taken by a simple majority, the Constitutional Court tried to justify the dismissal and the government emergency decree. It said "Establishing a link between members of the Constitutional Court and the terrorist organization, terrorist activities and the coup attempt was not necessarily sought for the application of the measure; it was considered sufficient to establish their link with 'structures,' 'organizations' or 'groups' established by the National Security Council as engaging in activities against the national security of the State."[67]

65] Erdoğan AYM üyeliğine bakın kimleri seçti, (2016, August 25), http://odatv.com/Erdoğan-aym-uyeligine-bakin-kimleri-secti-2508161200.html

66] AYM'den Yargıtay ve HSYK'ya yüksek yargıda tutuklamalar,(2016, July 20) http://t24.com.tr/haber/aym-uyeleri-alparslan-altan-ve-erdal-tercan-tutuklandi,351034

67] Press release regarding the reasoned decision on the dismissal of two members of the Constitutional Court, Alparslan Altan and Erdal Tercan from profession (2016 August 9) http://constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/31.html

It further noted "the link in question does not necessarily have to be in the form of 'membership of' or 'affiliation with' a structure, organization or group; it is sufficient for it to be in the form of 'cohesion' or 'connection' in order for the measure of dismissal to be applied." The court also claimed there is no need to establish "certainty" with terror links and stated an "assessment" of such link by the Plenary of the Constitutional Court is enough irrespective of whether there is criminal liability. The most shocking statement came last when the court said there was no requirement to rely on a certain kind of evidence in order to reach this decision by a majority of its members.

What Constitutional Court President Zühtü Arslan had said as regards individual applications completely destroyed all hope of seeking remedies via individual applications. "Justice does not entail that you should treat everyone equally. Rather, equal treatment of those in different positions may lead to injustice. 'It is justice to water a tree, but injustice to water a thorn,' Rumi said." [68] However Article 10 of the Turkish Constitution reads: "All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings."

Meanwhile, on Nov. 2, 2016, the Constitutional Court rejected an application by the main opposition Republican People's Party's (CHP), claiming that decree-laws under emergency rule are not subject to review.[69] The opposition said the court decisions in 1992 and 2003 that voided government decree-laws set a precedent, confirming the court's mandate to review these decree-laws. The CHP also said the lack of judicial review for executive actions went against the basic principles of the rule of law. This has aggravated the legal limbo in Turkey, setting the bar for other courts that were left powerless in adjudicating cases related to decree-laws. Just like the opposition and independent jurists, the Venice Commission also believes that such a review is possible.[70]

If the Constitutional Court cannot review the decree-laws, who will review the grievances resulting from them? If it says it does not have the competence to review decree-laws, naturally, the court couldn't review the grievances resulting from them. However, it dismissed two of its members based on the decree-laws, thereby showing that it cannot question the decree-laws. Thus, the Constitutional Court's position regarding individual applications has become extremely clear.

Yet, the court is just sitting on thousands of applications that were launched after the government witch-hunt persecution in Turkey. It should have made clear by now that it has no competence to review these cases under emergency rule so that plaintiffs can appeal to the European Court

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68] Adalet herkese eşit davranılmasını gerektirmez, (2016, December 19) http://www.hurriyet.com.tr/adalet-herkese-esit-davranilmasini-gerektirmez-40311803

69] Anayasa Mahkemesi KHK red gerekçesi (2016, November 2) http://www.resmigazete.gov.tr/eskiler/2016/11/20161108-26.pdf

70] Opinion on Emergency Decree Laws Nos.667-676 adopted following the failed coup of 15 July 2016 (2016, December 12) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e

The opening of judicial year was held for the first time in Erdogan's newly built lavish palace.

of Human Rights. It appears the Constitutional Court is trying to impede the process by which victims apply to the ECtHR and seek redress. The Constitutional Court should announce at once that it will not hear the individual applications and let the European Court of Human Rights step in to deal with the applications as the real authority. In such a setting, it is impossible to assume that domestic remedies are functioning effectively. Hence, for the ECtHR to refer complainants from Turkey to seek domestic remedies is a futile move and imposes a further burden on already victimized people in Turkey.

5.2. ADMINISTRATIVE JUDICIARY AND COUNCIL OF STATE

The human rights violations that have been mounting since the failed coup of July 15 in Turkey mainly concern two areas: criminal proceedings and administrative proceedings. A total of 134,194 people have been discharged from public positions without a judicial decision and even without an administrative investigation. Of these, 7,317 were academics and 4,317 were judges and prosecutors.[71]

These dismissals were carried out under decree-laws issued during the state of emergency. In contemporary law and the Turkish constitution, all acts and actions of the executive are subject to judicial review, which is conducted by the Council of State, the highest administrative court in Turkey. As in the case of criminal courts, the Constitutional Court's giving up in the matter of decree-laws by saying it has no mandate to review them has impacted administrative courts as well. Hence, it is highly unlikely for any judicial organ to review acts carried out under decree-laws, which the Constitutional Court said it cannot review.

The ruling AKP took no chances in subordinating administrative courts to its rule by adopting a number of measures to ensure that the administration's acts and transactions are not reviewed or audited. For example, a number of the judges who were disbarred and arrested were serving in administrative courts. Moreover, with the Law on Amendments to the Law on the Council

71] Turkey widens post-coup purge, (As of April 8, 2017), https://turkeypurge.com

of State and Some Other Laws numbered 6723 [72] and dated July 23, 2016, all members of the Council of State were removed from office, except the heads of chambers. New members -- 75 by the government-controlled HSYK judicial council and 25 by President Erdoğan -- were appointed to the Council of State.

These assignments came only 10 days after the failed coup of July 15. [73] The primary criterion for these appointments was the members' ability to work harmoniously with the governing AKP. The high court was put together in violation of the principle of security of tenure of judges and natural justice, it does not seem realistic to expect this court to effectively review the acts and actions of Erdoğan and the government. Considering that 113 high judges, elected through normal processes, were arrested a few days following the failed coup, it is easy to predict how the remaining judges will perform.

Furthermore, the powers of administrative justice were drastically limited with the decree-laws. For instance, stays of execution were banned by decree-law No. 667,[74] which was promulgated in Official Gazette No.2 9779 on July 23, 2016. However, in administrative cases, stays of execution until the final decision are the only way to minimize grievances. By removing the court's competence to issue a stay of execution on massive purges that took place, public employees were deprived of their social security benefits and were denied any means of redress even if they eventually win the case. Likewise, with decree-law No. 675[75] on Oct. 29, 2016, which contained the provision that "the time prescriptions for launching an investigation stipulated in the relevant legislation for the civil servants who are removed from office on grounds of national security shall not be implemented during the course of the state of emergency," it became possible to deprive people of their rights arbitrarily without even launching an investigation.

It took five months for the government to clarify which courts would be authorized to hear cases regarding infringement of the rights of employees. On Nov. 5, 2016, the Council of State eventually held that it was beyond its jurisdiction to hear these cases and referred the applicants to the administrative courts. Actually, many legal experts had argued that the Council of State would be directly authorized to deal with these cases as the decree-laws were enacted by the Council of Ministers.

This decision not only led to a five-month delay in seeking justice, but it has also made it impossible for anybody to reasonably expect the implementation of any decision rendered in favor of the applicants as the government is entitled to raise objections to the decisions by the administrative courts. As the commission set up by decree-law numbered 658 has introduced another layer between the Council of State and the applicants, it has become increasingly impossible to ensure a fair trial in a reasonable timeframe without many delays.

72] Danıştay Kanunu ile bazı kanunlarda değişiklik yapılmasına dair kanun (2016, July 23) http://www.resmigazete.gov.tr/eskiler/2016/07/20160723M2.pdf)

73] HSYK gizli oylamayla 4 saatte 342 üye atadı… İşte Yargıtay ve Danıştay'ın yeni üyeleri (2016, July 25) http://www.cumhuriyet.com.tr/haber/turkiye/573873/HSYK_gizli_oylamayla_4_saatte_342_uye_atadi..._iste_Yargitay_ve_Danistay_in_yeni_uyeleri.html)

74] Karar Sayısı: KHK/667, (2016, July 23) http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm

75] Karar Sayısı: KHK/675, (October 29, 2016) http://www.resmigazete.gov.tr/eskiler//2016/10/20161029-4.htm

In a report issued by the Venice Commission, an organ specialized in constitutional matters for the Council of Europe, of which Turkey is a member, it was noted that "the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law." The report pointed out that in a state of emergency, certain rights cannot be restricted and that "any other restrictions on rights must be demonstrated to be strictly necessary in light of the exigencies of the stated emergency."[76]

The Venice Commission indicated that the government "took permanent measures, which went beyond a temporary state of emergency," noting that hundreds of "civil servants were dismissed, not merely suspended." Stressing that tens of thousands of public servants were dismissed on the basis of the lists appended to the decree-laws without individualization, the report said, "Basic rights of administrative due process of the public servants dismissed by the decree laws or on their basis have not been respected."

It further stated: "Collective dismissals 'by lists' attached to the decree laws (and similar measures) appear to have arbitrarily deprived thousands of people of judicial review of their dismissals." The commission's report maintained that civil servants were dismissed "because of the alleged connections of public servants to the Gülenist network or other organisations considered 'terrorist', but this concept was loosely defined and did not require a meaningful connection with such organisations."

In its November 2016 Progress Report, the European Union voiced harsh criticism regarding arrests and dismissals. "In the wake of the post-coup measures, the EU called on the authorities to observe the highest standards in the rule of law and fundamental rights. While a relationship of trust and loyalty should exist between civil servants and the state and measures can be taken to ensure that, any allegation of wrongdoing should be established via transparent procedures in all individual cases. Individual criminal liability can only be established with full respect for the separation of powers, the full independence of the judiciary and the right of every individual to a fair trial, including through effective access to a lawyer. Turkey should ensure that any measure is taken only to the extent strictly required to the exigencies of the situation and in all cases stands the test of necessity and proportionality," it said.[77]

5.3. COURT OF CASSATION AND CRIMINAL CASES

The Court of Cassation is Turkey's supreme court that has appellate authority for civil and criminal cases. Its members are supposed to be elected from among senior judges and prosecutors who have served for 15 years in courts of first instance. However, this requirement is now hardly

76] Opinion on Emergency Decree Laws Nos.667-676 adopted following the failed coup of 15 July 2016 (2016, December 12) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e

77] Turkey 2016 Report (2016, November 9) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf

ever met due to arrangements made by the government to take full control of the judiciary.

Indeed, the European Union's Progress Report notes and announces this fact: "The law changing the structure and composition of the Court of Cassation (CoC) and the Council of State (CoS) as adopted in July also raised serious concerns as to its impact on the independence of the judiciary. Frequent changes to the internal organisation of judicial bodies and to the court network, in particular the criminal court system, are creating legal uncertainty."[78]

The EU's assessment in the Progress Report elicited animadversion from the Court of Cassation. The statement, which is still accessible on the court's website, testifies to the acknowledgment of unlawfulness in Turkey. The relevant parts of the statement are as follows: "During the coup d'état attempted by the terrorists who were members of the FETÖ/PDY Terrorist Organization against our democracy and the state based on the rule of law on July 15, 2016 ... The FETÖ/PDY Terrorist Organization, which is the perpetrator of the failed coup in question ... We deeply regret to see that the report failed to include these clear and obvious facts and treat this structure as a terrorist organization."[79]

The text of this statement by the Court of Cassation violates not only numerous universal principles, but also amounts to an admission that domestic remedies in Turkey have already been rendered ineffective. Indeed, this statement is in breach of the basic principle of law that everyone is innocent until proven guilty as it declares the suspects to be "perpetrators" and "criminals" even before any indictment is prepared. This statement is also a disclosure in advance of the disposition of judicial authorities against the suspects.

By announcing in advance its opinion regarding the dossiers that it will eventually review, the Court of Cassation has lost its impartiality. This is sufficient grounds for challenging a judge even in courts of first instance. The Court of Cassation has passed judgment even before seeing, hearing and evaluating the claims, the evidence and the defense. This statement has stripped the Court of Cassation of its competence as an appellate authority. Therefore, it is fair to conclude that the domestic remedies as they relate to the Court of Cassation have been for all intents and purposes exhausted.

Furthermore, this statement clearly amounts to overt pressure on judges and prosecutors serving

78] Ibid. page 18.

79] Yargıtay'ın Basın Açıklaması, (2016, November 21) http://www.yargitay.gov.tr/sayfa/basin-aciklamasi/documents/21112016BasinAciklamasi.pdf)

in lower courts. Given the fact that the scores given by the Court of Cassation for judges and prosecutors in lower courts affect their reassignments and promotions, the Court of Cassation's declaration of its position on pending cases amounted to implicit orders on how lower courts should act. As a result, the courts in Turkey are violating the rule of law and due process and are acting contrary to the principle of innocent until proven guilty by having adopted the terrorist label attributed by the government to the Fethullah Gülen movement based on no credible evidence or court decision.

Using the failed coup as a pretext to overhaul the Court of Cassation, the government orchestrated the removal of critical and independent members of the supreme court in violation of the principle of natural justice and the security of tenure for judges. Members of the pro-Erdoğan Unity in the Judiciary Platform (YBP) were appointed in their place. Ten days after the attempted coup of July 15, the government-controlled judicial council HSYK assigned new members to replace sacked members of the Court of Cassation and the Council of State. In a showcase election that lasted four hours, 267 members of the Court of Cassation and 75 members of the Council of State were elected to office.

The YPB is an important instrument through which President Erdoğan and the government staff the judiciary with partisans and loyalists. It is staunchly pro-government and considered to be neither independent nor impartial. In fact, the International Association of Judges (IAJ) rejected a membership application by the YBP on the grounds that the association is not independent. On the same grounds, the European Association of Judges (EAJ), the Magistrats européens pour la démocratie et les libertés (MEDEL) and the European Network of Councils for the Judiciary (ENCJ) twice declined the YBP's invitation to hold a joint meeting.[80]

The result of the transformation of the Court of Cassation is devastating. For example, the court held that the employees of companies and institutions that were shut down and confiscated by decree-laws in the wake of July 15 are not entitled to seek legal remedies for reinstatement, overtime pay, severance pay, etc. The decision by the 9th Civil Chamber of the Court of Cassation relied on the decree-laws numbered 670 and 675 for its decision.[81]

Acquired and vested rights cannot be destroyed, and they are guaranteed by the Turkish Constitution. What is more, It is a statutory obligation to prioritize employees when it comes to the order of who will get paid first when the assets of seized companies are liquidated by the government according to Article 206 of the Law on Execution and Bankruptcy. With this decision, the Court of Cassation endorsed major unlawfulness and infringement on the rights of employees.

Given its recomposed membership structure and its statements which amount to prejudgment, the Court of Cassation seems to have lost its function as a domestic legal remedy.

80] Avrupalı yargıçlar Yargıda Birlik Platformunu iki kez reddetti, (2015, September 13), http://m.baroturk.com/avrupali-yargiclar-yargida-birlik-platformunun-davetini-iki-kez-reddetti-12309h.htm

81] Yargıtay'dan emsal olacak KHK kararı: kapatılan kuruma karşı dava açılamaz, (2017, January 15), http:// www.sabah.com.tr/gundem/2017/01/15/yargitaydan-emsal-olacak-khk-karari-kapatilan-kuruma-karsi-dava-acilamaz

Justice Minister Bekir Bozdağ

The EU Progress Report voiced harsh criticism of the problems in the judiciary, saying that "There has been backsliding in the past year, in particular with regard to the independence of the judiciary. The extensive changes to the structures and composition of high courts are of serious concern and are not in line with European standards. Judges and prosecutors continued to be removed from their profession and in some cases were arrested, on allegations of conspiring with the Gülen movement."

It further noted that "[t]his situation worsened further after the July coup attempt, following which one fifth of the judges and prosecutors were dismissed and saw their assets frozen. The judiciary must work in an environment allowing it to perform its duties in an independent and impartial manner, with the executive and legislature fully respecting the separation of powers. Under the state of emergency, Turkey has further extended for certain offences the pre-trial detention to 30 days without access to a judge against ECtHR case law and an important part of the judiciary is subject to these measures."[82]

5.4. JUDICIAL COUNCIL HSYK

The HSYK (Hakimler ve Savcılar Yüksek Kurulu in Turkish, Supreme Board of Judges and Prosecutors in English) is a high judicial council established to administer judges and prosecutors with respect to their appointments, reassignments, promotions and disciplinary actions including suspensions and dismissals. It is also authorized to set up new courts and endow members of the judiciary with new powers. The body was revamped in 2010 constitutional amendments that allowed members of the judiciary to elect 16 members to the 22-member HSYK, with four appointed by the president and with the justice minister and justice undersecretary being ex-officio members.

However, upon an application filed by the main opposition Republican People's Party (CHP) with Turkey's top court, the Constitutional Court canceled one of the articles of these amendments -- the rule that judges and prosecutors who are eligible to vote can vote only for one candidate -- making it impossible to hold a pluralistic election, and the HSYK's resulting membership was mainly drawn from a single candidate list. In other words, the winner-takes-all principle was applied. In the wake of the graft and bribery scandals that went public on Dec. 17, 2013 implicating senior government officials, Erdoğan made it his primary goal to take over the reins of the judiciary and, as its governing body, the HSYK.

In February 2014, just two months after the graft investigation, the law on the HSYK was hurriedly amended. Then-President Abdullah Gül, Erdoğan's ally, signed the legislation despite claims of its unconstitutionality. Indeed, the law was canceled by the Constitutional Court. However, the ruling AKP and Erdoğan had completely changed the HSYK's structure and membership by the time the Constitutional Court made its decision. The damage had been done

82] Turkey 2016 Report (2016, November 9) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf

as the Constitutional Court's annulment decisions cannot be applied retroactively. The call by reputable constitutional experts to pass a decision to include the reversal of past actions by the government, thereby rendering the acts and actions performed so far null and void, fell on deaf ears. Thus, the HSYK emerged as a body where the justice minister is its boss.[83]

The second major blow came with the HSYK elections held in October 2014. The list for which the justice minister personally canvassed in many cities across the country won the election. Justice Minister Bekir Bozdağ even promised a pay raise for judges if their list won the election. [84] Bilgin Başaran, secretary-general of the HSYK, who entered the election on the list of the pro-Erdoğan Unity in the Judiciary Platform (YBP), threatened the voters by saying, "To vote for other lists is to add fuel to the fire and fan the flames."[85] Separate ballot boxes were placed in each court with the intention of identifying those who did not vote for the YBP. It later became clear that the arrest and dismissal of judges and prosecutors were based on profiling efforts by the YBP and the ballot box results.

The "Judiciary that is in harmony with the executive" was the slogan of the new era, meaning that a judiciary independent of the government no longer exists. When the HSYK convened to discuss the case of Istanbul 29th Criminal Court of First Instance Judge Metin Özçelik and Istanbul 32nd Criminal Court of First Instance Judge Mustafa Başer, who ruled to release journalist Hidayet Karaca and police officers from pre-trial detention, President Erdoğan referred to it as a "belated meeting." After the HSYK decided to remove those judges temporarily from office, HSYK Second Chamber President Mehmet Yılmaz "apologized for the delay."[86]

The heavily politicized judicial council and its vice president Mehmet Yılmaz have started doing the bidding of Erdoğan by sacking independent judges and prosecutors. Yılmaz even admitted that he framed jailed judges and prosecutors by persuading them to make false concessions on alleged terror crimes so that they might be reinstated by smearing others or receiving a lighter sentence. [87] Talking to pro-government columnist Sevilay Yılman on Dec. 28, 2016, the HSYK vice president confessed that he had lied and set a trap for judges and prosecutors. This was explained in detail earlier in this report.

The HSYK's total submission to the government has been noted by many international institutions. The European Network of Councils for the Judiciary (ENCJ) decided to suspend the observer status of the HSYK. In a statement posted on the official

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83] Abdullah Gül topu Anayasa Mahkemesi'ne attı, (2014, February 26) http://www.bbc.com/turkce/haberler/2014/02/140226_hsyk_gul_onay

84] Hakim ve savcılara seçim zammı, (2014, September 9) http://m.radikal.com.tr/turkiye/hakim_ve_savcilara_1155_lira_secim_zammi-1211728

85] Başaran: YARSAV ve paralele oy vermek ateşe benzin dökmektir,(2014, September 28) http://www.star.com.tr/politika/basaran-yarsav-ve-paralele-verilen-oy-atese-benzin-dokmektir-haber-945332/

86] Erdoğan 'HSYK'nın toplantısı gecikti' dedi, HSYK 2.Daire Başkanı özür diledi, (2015, April 27) http://t24.com.tr/haber/Erdoğan-hsyknin-toplantisi-gecikti-dedi-hsyk-2-daire-baskani-ozur-diledi,294817)

87] İtirafçı olanlar göreve dönebilir!, (2016, October 22, http://www.gazetevatan.com/itirafci-olanlar-goreve-donebilir--998118-gundem/)

website of the ENCJ, it was indicated that they resolved unanimously to exclude the HSYK from participation in ENCJ activities. "It is a condition of membership, and for the status of observer, that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice," it said. The statement noted that the HSYK's procedures "indicated that this condition was no longer satisfied."[88]

Another point that justifies the ENCJ's criticism is that virtually all former members of the HSYK who were reluctant to launch legal actions against judges and prosecutors in the wake of the graft and bribery scandals that went public on Dec. 17, 2013, were arrested. Moreover, of the new members, those who opposed the dismissal of judges and prosecutors on the grounds of the security of tenure of judges and the independence of the judiciary, namely Mahmut Şen, Ahmet Berberoğlu, Mustafa Kemal Özçelik, Şaban Işık and Kerim Tosun, were arrested as well.

On the other hand, Erdoğan unabashedly appointed people who took an active part in the ruling AKP, even including his personal lawyer's brother, as HSYK members. For example, Muharrem Özkaya is the brother of Ali Özkaya, who is Erdoğan's lawyer, and Hayriye Şirin Ünsel was a deputy candidate for the AKP in the 2007 elections.[89]

The recent constitutional amendments passed by Parliament thanks to support from the Nationalist Movement Party (MHP) dealt a fatal blow to what is left of the HSYK's independence. Of 13 members of the new HSYK, six will be appointed by the president. Half of the remaining members will be elected by the Erdoğan-controlled Parliament. Thus, judges will not be able to govern themselves.

For judges and prosecutors, the HSYK serves as a mechanism for legal remedies and as an appellate authority for dismissals. It is not realistic to expect any redress for violations from such a politicized body. Indeed, the HSYK declined hundreds of objections from judges and prosecutors although it is supposed to deal with the petitions on an individual basis with well-reasoned decisions. Here it should be noted that the HSYK summarily dismissed from office 2,545 judges and prosecutors the day after the failed coup based on lists sent to it by the intelligence agencies that profiled judges and prosecutors according to their views of Erdoğan. In such a short period it is impossible to read the investigation files of the judges and prosecutors involved -- if such files really existed -- let alone enable them to exercise their right to a defense.

On March 6, 2016, four months before the failed coup, then-Vice President of the HSYK Metin Yandırmaz had told the Hürriyet newspaper[90] that they had identified around 5,000

88] ENCJ votes to suspend the Turkish High Council for Judges and Prosecutors, (2016, December 8) https://www.encj.eu/index.php?option=com_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en, www.hurriyet.com.tr/avrupa-hsyknin-statusunu-askiya-aldi-40302364

89] Ak HSYK göreve başladı, (2014, October 27), http://www.siyasetcafe.com/Gundem-Haberleri/8045-ak-hsyk-go-reve-basladi

90] 5bin halim ve savcı tespit ettik, (2016, March 6) http://www.hurriyet.com.tr/5-bin-hakim-savci-tespit-et-tik-40064585

judges and prosecutors for dismissal and prosecution based on thousands of complaints and whistle-blowing information from the Presidency and the Prime Ministry. Yandırmaz is a member of the Unity in the Judiciary Platform (YBP), which was publicly backed by the government in the last HSYK elections and which promised to work harmoniously with the government.

It became clear that the list of illegally profiled, unsuspecting judges and prosecutors had been prepared long ago when the leaked list of dismissed members of the judiciary also included the name of Bandırma prosecutor Ahmet Biçer, who had died about two months before the failed coup. It appeared that the HSYK found that the prosecutor had abetted the coup from the hereafter, although it had released a message of condolence for his death on May 24, 2016. The list also contained the names of Judge Metin Özçelik and Judge Mustafa Başer despite the fact that they had been arrested on April 30, 2015 and May 1, 2015, respectively, for decisions to release a journalist and police investigators from jail.

The list also included the names of public prosecutors Süleyman Bağrıyanık, Aziz Takçı, Özcan Şişman and Yaşar Kavalcıklıoğlu, who had been permanently removed from office by the HSYK's Second Chamber on Jan. 14, 2016 on the grounds that they had taken part in the interception of Syria-bound trucks belonging to the National Intelligence Organization (MİT) that were allegedly carrying weapons to members of ISIL. Thus, these prosecutors were ridiculously accused of aiding and abetting the failed coup from behind bars in a high-security prison.

Another striking feature of the list is that the previous positions of many judges and prosecutors to be dismissed had appeared in this list, suggesting that it was prepared long before the failed coup and had not yet been updated by Turkish intelligence, which profiled the independent judges and prosecutors.

Nihat Ömeroğlu, former chief ombudsman.

Christophe Regnard, president of the International Association of Judges (IAJ) and a judge at the Court of Appeals of Paris, wrote an article providing a good snapshot of the HSYK and how the government had reined in the independent judiciary. He said the government had attempted to change the HSYK to create an obedient judiciary in 2013 through bills in Parliament but failed to do so. Instead, it created the YPB to take over the HSYK and changed the voting system in order to identify who had not voted for the government-endorsed list.

Regnard underlined that under emergency rule after the failed coup, thousands of judges were dismissed by the HSYK "without any individualised procedure, without complaints against them, and therefore, without a right of defense. The mere presence of a name on a list, clearly prepared well before the coup, had apparently been sufficient to decide on penalties! Based on the information that we obtain with difficulty, the detention conditions are terrible and even cases of torture have been reported."[91] "The truth is that all boundaries have been crossed and the rule of law has disappeared from Turkey. The apparent indifference of the European authorities, which is probably due to geopolitical considerations, is troubling and shocking," Regnard added.

91]Türkiye: Hukuk Devletinin Sonu, (2016, November 7), http://researchturkey.org/tr/turkey-the-end-of-the-rule-of-law/)

The letter Regnard sent to Birol Kırmaz, the head of the Unity in the Judiciary Platform (YBP), who reacted to the article written by Regnard, lists more severe criticisms. "It cannot be questioned that the decision of dismissal of thousands of judges at the end of August 2016, comprises only 62 pages and only general accusations which are not specific to individuals, but only the mere presence of a name on a list drafted under obscure conditions, but clearly before the coup d'état." [92] Regnard also issued a public statement on behalf of the IAJ on March 24, 2017, declaring "The End of the Rule of Law in Turkey."[93]

Şeref Malkoç, the current chief ombudsman.

6. OMBUDSMAN

An ombudsman is a public authority assigned to receive complaints about injustices in the way public services are delivered, to conduct research on these matters and to solve these problems. This institution was introduced as part of the constitutional amendments of 2010 as a mechanism that was supposed to safeguard individuals against state bodies. The AKP and Erdoğan were reluctant to pass implementing legislation after it became part of Turkish Constitution. After it was belatedly established, appointments to this institution were very slow. Erdoğan wielded his control over Parliament to ensure that Nihat Ömeroğlu was elected as the chief ombudsman. Ömeroğlu was known to have exerted pressure on the prosecutor who conducted the investigation in the graft and bribery scandals that went public on Dec. 17, 2013.

After Ömeroğlu's tenure ended, the person who was elected in his place made this mechanism utterly dysfunctional. The new chief ombudsman is Şeref Malkoç, who has been a close colleague of Erdoğan for 30 years and is a leading Islamist politician. Before he was elected as ombudsman, he was working as the chief adviser to President Erdoğan. Moreover, Malkoç is the father-in-law of AKP Secretary-General Abdülhamit Gül, and he had worked as the AKP's representative at the Supreme Election Board (YSK) for many years. It is quite unrealistic to expect such a figure who is intricately tied to the ruling party to act as a true ombudsman in connection with rights violations. Malkoç is also infamous for a number of scandalous remarks that drew ire. For example, he stated that civilians will be armed against coups.[94]

He also indicated that they would listen to the nation, not to the EU, as regards the reintroduction of capital punishment.[95] Furthermore, Malkoç describes decree-laws as a major reform. Therefore, it

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92] İnternational Association Of Judges, (2016, November 24), http://dommerforeningen.dk/media/74663/answer-to-ypd-president-nov-2016.pdf

93] Appeal: The End of the Rule of Law in Turkey (2017, March 24), http://www.iaj-uim.org/iuw/wp-content/uploads/2017/03/IAJ-Appeal-for-Turkey-_March-2017.pdf

94] Cumhurbaşkanı Başdanışmanı Şeref Malkoç: "Darbeye Karşı Milletin Silahlanması Sağlanacak, (2016, July 17), https://onedio.com/haber/cumhurbaskani-basdanismani-seref-malkoc-darbeye-karsi-milletin-silahlanmasi-saglanacak--721612)

95] Cumhurbaşkanı Başdanışmanı Şeref Malkoç: AB'ye değil milletin sesine kulak verilecek, (2016, July 20), http://www.abhaber.com/cumhurbaskani-basdanismani-seref-malkocabye-degil-milletin-sesine-kulak-verilecek/

remains to be seen if Malkoç will be able to stay neutral in connection with violations stemming from the decree-laws. [96] As a matter of fact, Malkoç maintained that decree-laws were part of legislative activities, and therefore, they would not hear applications concerning violations allegedly resulting from decree-laws.[97]

Appearing on the "Akılda Kalan" program on Habertürk TV on Jan. 13, 2017, Malkoç defined the Hizmet movement as a branch of Zionism in his bid to defame the movement. Someone who has such a perspective is not likely to conduct a proper review of human rights in connection with violations resulting from public institutions. He spoke at length how Zionism produces all terrorism, secretly rules the world and the world economy on national TV.[98]

7. COMMISSION TO INVESTIGATE DECREE-LAWS

According to decree-law No.685, which was published on Jan. 23, 2017, the Turkish government was supposed to set up a commission within a month to hear the cases of victimization resulting from the decree-laws as a proposal voiced by Council of Europe Secretary-General Thorbjorn Jagland and backed by the Venice Commission and PACE. Under pressure and in the nick of time before the PACE session resumed in January 2017 in Strasbourg, the Turkish government issued the new decree-law No.685 to set up an ad-hoc commission to review complaints on purges. It was supposed to start functioning within a month. Yet, as of April 10, 2017, the commission has not been established nor its members selected. Turkish media reported that Justice Minister Bekir Bozdağ told CoE officials the setting up of the commission may take place in the summer of 2017.[99]

European Court of Human Rights (ECtHR)

Many believe this commission would be far from fulfilling the expectations in line with the CoE requirements. Previously, ad-hoc commissions had been established to address the problems of civilians who were aggrieved due to counterterrorism operations and helped resolve many cases that would otherwise end up in the Strasbourg court. In this case, however, contrary to expectations, this commission would seek to delay the human rights review by the European Court of Human Rights (ECtHR) by stalling the cases and slowing down the process of exhausting domestic remedies. Leading experts such as professor of criminal law İzzet Özgenç[100] and Director of the Human Rights Centre Kerem Altıparmak[101]

96] Şeref Malkoç, KHK'ları yorumladı, (2016, July 31), http://www.borsagundem.com/haber/seref-malkoc/1106978

97] Şeref Malkoç: FETÖ şüphesiyle ihraç edilen 438 kişi başvuru yaptı, (2017, February 2017), https://tr.sputniknews.com/turkiye/201702161027255795-seref-malkoc-feto-suphelileri-ihrac-kamu-kurumu-basvuru/)

98] Video clip on Twitter (2017, February 4), https://twitter.com/abdbozkurt/status/827931146973503490

99] OHAL komisyonu temmuza kaldı, (2017, April 2), http://www.cumhuriyet.com.tr/haber/dunya/712344/OHAL_komisyonu_temmuza_kaldi.html

100] Profesör Özgenç Uyardı: KHK Komisyonu ile mağduriyetler ötelenecek, (2017, January 25), http://www.tr724.com/profesor-ozgenc-uyardi-khk-komisyonu-ile-magduriyetler-otelenecek/

101] OHAL komisyonu nasıl karar verecek? (2017, January 23), http://www.gazeteduvar.com.tr/gundem/2017/01/23/ohal-komisyonu-nasil-karar-verecek/

point out that this commission is solely intended to waste the time of victims and postpone their efforts to seek remedies.

Professor of criminal law İzzet Özgenç

The commission is viewed as a move by the government to ward off the criticisms and sanctions from the ECtHR and Europe's political organs such as the CoE and the EU. The commission is far from satisfying the requirements set forth in the case law of the ECtHR as well as the criteria formulated by the Venice Commission. It is clear that this commission is merely intended to buy the government time and postpone the applications to the Strasbourg court. The governing rules of the commission are not clear, raising more questions as to the independence of such a commission. For example, it is not certain whether members of the commission will have any immunities against arbitrary dismissal or have any say in the operational rules. Moreover, since it would be an ad-hoc commission, its secretariat and administrative work would be taken care of by the government, suggesting leverage over the commission by the executive branch.

In past cases where ad-hoc commissions were established, the government appeared to be sincere in resolving piled-up cases of rights violations that mostly occurred under the watch of prior governments. For example, bill No.5233 was passed to ensure that civilians who were victimized during counterterrorism operations could be compensated without the need to apply to national or international judicial bodies. It entered into force in 2004 and finalized approximately 385,000 applications. It was a well-meaning, solution-centered initiative. Indeed, the European Court of Human Rights, which would not normally look for the requirement of "exhaustion of domestic remedies" regarding village evacuations, started to declare related applications as inadmissible after the commission was established.

The commissions in question were established in the provinces' governor's offices. They were widespread as there were 88 commissions across the country. They were local as they had the ability to confirm the accuracy of the incidents raised before them. The presence of local officials -- even if they were civil servants -- as well as of a lawyer selected by the bar association facilitated the settlements.

Özgenç, one of the architects of the Turkish Penal Code, stresses that it is misleading to say that the establishment of the commission to investigate the decree-laws amounts to a legal remedy. Özgenç draws attention to the fact that the commission will just "postpone the settlement of grievances." Altıparmak estimates that some 10 years will be needed to compensate for the grievances and questions the commission's limited authority, modus operandi and independence.

Professor Metin Günday, a member of the law faculty of Atılım University and a leading academic in administrative law, sees the idea of the commission as a scam similar to one run by the coup perpetrators of Sept. 12, 1980 some 30 years ago. Günday argues that the new commission would perform more poorly than the old commission.[102]
Reinstatement to the same position is not guaranteed and no compensation is envisaged for victims. The commission will not be able to access case files or documents which are defined as confidential by the state, meaning that the commission will render a decision without fully reviewing the case against the complainant. Victims can challenge the commission decision, but not the decree-laws, which were the main source of rights violations in the first place. Victims can take their cases to court, but the court will only review the commission's decisions within the confines of the limited powers of the commission, suggesting other protections envisaged under the law such as failure to implement the law on procedures would not be a reason to quash the decision. As such, the commission's competence is not in line with ECtHR case law.

The arrangement does not appear to offer a reasonable and easily accessible mechanism that will produce results in an acceptable period of time. As such, the mechanism gives the impression of being a fraud against the law and the European Convention on Human Rights. Given the commission's structure, its potential workload and the repressive atmosphere that renders even courts of law dysfunctional, the commission is clearly not the instrument that can prevent violations and compensate grievances.

Altıparmak and many other jurists urge the European court to issue a pilot judgement with respect to Turkey without waiting for the assessment on how the commission will function and to what extent Turkish courts will review the decisions of the commission. The pilot judgment can set the relevant criteria in detail and explain to Turks what must be done to ensure that the domestic remedy to be established is in harmony with the principles of the Venice Commission and the case law of the ECtHR.

8. CONCLUSION

It is impossible to implement independent and impartial adjudication of complaints of rights violations in Turkey against the background of the collapse of effective domestic remedies, be it judicial or administrative, when the executive branch has consolidated all the levers of power in its hands. Therefore, insisting on the exhaustion of domestic remedies before bringing the cases before the ECtHR will not only exacerbate the feeling of victimization in Turkey but will also undermine Turks' confidence in the ECHR.

To tell the citizens of a country in the condition summarized above to exhaust domestic remedies is akin to asking a severely wounded person arriving at the hospital to provide an insurance policy before receiving any emergency treatment. International institutions, particularly the

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102] Prof. Metin Günday: Biz bu filmi 30 yıl önce de gördük, OHAL Komisyonu aldatmacadan ibaret! (2017, February 16), http://t24.com.tr/haber/prof-metin-gunday-biz-bu-filmi-30-yil-once-de-gorduk-ohal-komisyonu-aldatmacadan-ibaret,389313

Judge Aydın Sefa Akay, serving at the UN Mechanism for International Criminal Tribunals.

European Court of Human Rights, should voice demands that are aligned with the country's realities and help Turkey restore the rule law in line with its international obligations.

There are credible reports of massive rights violations including torture, rape and violation of the right to life being committed against persons in custody and in prisons. The Turkish government was not even ashamed of this when images of battery, assault and torture and photos showing hundreds of suspects lying naked in stables and gyms were aired by the state-run Anadolu news agency. It was part of an intimidation campaign by the government to showcase these horrible images. More reports since then suggest these practices are rather frequent and systematic. There have been 58 suspicious deaths and suicides under the watch of the government in the last eight months alone. A judicial system where perpetrators of torture cannot be punished and where judges and prosecutors are threatened with losing their jobs and being jailed if they fail to do what they are told cannot produce justice.

In an address to the General Assembly of the Ankara Bar Association, Contemporary Jurists Association (ÇHD) President Selçuk Kozağaçlı touched on the claims of torture and rape in prison, which target judges and prosecutors as well. Kozağaçlı said: "There is widespread and systematic torture all across the country and in Ankara. Are you aware of it? Trivial issues aside, the judges, prosecutors, soldiers, police officers and citizens who are allegedly members of a Parallel State Structure are being systematically tortured. Are you aware of it?"[103]

There is now a vicious circle among higher judicial organs: The Council of State refers people to administrative courts. Some 300 local administrative courts refer people to the Constitutional Court, maintaining while decree-laws are an act of the executive, they are considered to be legislative activity in terms of their function, implying that the Constitutional Court would deal with them. The Constitutional Court, on the other hand, took a binding decision saying, "We cannot review the decree-laws." In their decisions for dismissal of their own members, the three high courts, namely the Constitutional Court, the Court of Cassation and the Council of State, declared that they cannot question decree-laws and that they are supposed to implement them as they are. They denied their members the right to a defense and issued administrative penalties to them in a definitive and irrevocable manner. How can the judges who sacrificed their own members to the government witch-hunt despite their immunity assume this risk for normal citizens?

This question by former president of the International Association of Judges Christophe Regnard sums it all up: "But how can judges, who hitherto escaped the purges, give decisions with confidence, when they know the fate that potentially awaits them if they act contrary to the wishes of the executive?"

103] ÇHD Başkanı: Emniyet ve hapishanede tecavüzler yaşanıyor, (2016, October 16) https://www.evrensel.net/haber/293062/chd-baskani-emniyet-ve-hapishanede-tecavuzler-yasaniyor

The assessment by Nils Muiznieks, the commissioner for human rights of the Council of Europe, who issued a report after fact-finding missions to Turkey, is very much valid today. He said in the aftermath of the corruption investigations of December 2013, the HSYK, within which the government already wielded considerable power, intervened in the judiciary much more actively from then on, through a high number of forced relocations of members of the judiciary, followed by investigations, suspensions and dismissals.

"Overall, the members of the judiciary seem to have reverted to their previous state-centrist approach which, as already noted by the Commissioner in previous reports, results in prosecutors and courts perceiving dissent and criticism of the government as a threat to the integrity of the state, and seeing their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals, rule of law and democracy," Muiznieks said.[104]

The case of Sefa Akay, which has evolved into a diplomatic crisis between the United Nations and Turkey, summarizes the plight of judges. Judge Aydın Sefa Akay, serving at the United Nations Mechanism for International Criminal Tribunals, had been arrested in Ankara on Sept. 21, 2016 on charges of committing a crime against the constitutional order in Turkey in connection with the failed coup of July 15, 2016. In its resolution dated Feb. 8, 2017, the UN held that Akay enjoyed privileges and immunities accorded to diplomatic envoys under international law when engaged on the business of the mechanism, even while carrying out their functions in their home country. Although the deadline given for the release of Akay expired on Feb. 14, he was not released.[105] The case was referred to the UN Security Council by the mechanism, which asked the council to oblige Turkey to release the UN judge.

If an international judge with diplomatic immunities afforded to him by the UN cannot be safe in Turkey, how can we expect local judges whose lives are contingent upon the whims of Erdoğan to make fair decisions?

Unashamedly, senior officials from Turkey's ruling party publicly admit that they enjoy their grip over the Turkish judiciary. "We have the legislature; we have the executive; we have the judiciary; we have everything," AKP Diyarbakır deputy Galip Ensarioğlu said, referring to the legal system in Turkey on a TV program. "We have control over both. Why should we inspect them?" professor of law Burhan Kuzu, who is a former lawmaker and President Erdoğan's legal adviser, asked ironically.[106]

By systematically meddling with judicial institutions, actors and processes, the Turkish

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104] Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights (2017, February 15) https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961658&SecMode=1&DocId=2397056&Usage=2

105] The mechanism orders turkey to release judge Aydin Sefa Akay, (2017, January 31) http://www.unmict.org/en/news/mechanism-orders-turkey-release-judge-aydin-sefa-akay

w106] AKP'lilerden hukuk sistemi yorumu: Oğlan bizim kız bizim, (2016, April 5) http://www.cnnturk.com/video/turkiye/ensarioglu-ve-kuzudan-hukuk-sistemi-yorumu

government has demonstrated in many ways and instances that they have little or no respect for due process or a fair trial. Most members of the judiciary, willingly or unwillingly, have so far largely complied with abusive decrees and requests from the Turkish government, putting the independence and impartiality of the judiciary into question. In light of all these factors, SCF calls on the European Court of Human Rights, where a majority of the appeals have been directed, and other relevant international monitoring bodies to not delay or deny applications from Turkey's purge victims and others based on the unrealistic premise that domestic legal processes must first be exhausted.

In sum, SCF believes all courts and tribunals which may fall into the category of domestic remedies in Turkey have lost their competence to make independent and fair decisions. Can we expect a judicial system to do so if thousands of its members have been arrested and the remaining members have no guarantee of not being arrested at any time? If enjoyment of the right to a defense is not allowed, and defending someone who is critical of the government is treated as a crime in itself and lands lawyers in jail, talking about the existence of the rule of law in Turkey is no longer possible. Even high judges are not immune from this mass persecution campaign targeting anyone who may have a different perspective than the one propagated by Erdoğan and his associates in the government. As a result, it is fairly reasonable to conclude that the rule of law no longer exists in Turkey.

SCF stockholm center for freedom

www.stockholmcf.org