



TURKEY'S JUDICIAL COUNCIL:

Guarantor or Annihilator of Judicial Independence?

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ABOUT STOCKHOLM CENTER FOR FREEDOM

Stockholm Center for Freedom (SCF) is a non-profit advocacy organization that promotes the rule of law, democracy and human rights with a special focus on Turkey.

SCF 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, documenting individual cases of the infringement of fundamental rights and publishing comprehensive reports on human rights issues.

SCF is a member of the Alliance Against Genocide, an international coalition dedicated to creating the international institutions and the political will to prevent genocide.

1. INTRODUCTION

The composition, powers and functioning of Turkey's Council of Judges and Prosecutors ("Judicial Council" or "HSK") have always been at the center of the political debate in Turkey. The Judicial Council is the top judicial administrative body with significant powers in the functioning of the judiciary on such matters as judicial appointments, assignments, authorizations, promotions and discipline. The Judicial Council is depicted as the cornerstone of the Turkish judicial architecture, as scholar Thomas Giegerich noted in a 2014 report, saying, "When the independence and impartiality of the HSYK is jeopardized, so is the independence and impartiality of the Turkish judiciary as a whole."¹ Thus, the Judicial Council occupies a key position in the Turkish judicial hierarchy for ensuring the independence and impartiality of the judiciary, or in the alternative, for keeping the judiciary under the thumb of the government, as the case may be.

This report begins by highlighting the developments following the referendum of 2010 in respect to the amendments regarding the composition and powers of what was then called the High Council of Judges and Prosecutors (HSYK). It then moves on to examine the impact of the December 2013 corruption investigations on the re-designing of the structure and powers of the HSYK by



The Council of Judges and Prosecutors, Ankara

the government. The report further explores the executive's desperate efforts to take control of the HSYK by exerting direct influence on the judicial election in October 2014. Finally, the report examines the impact of the constitutional amendments of the April 2017 referendum on the composition of the Judicial Council, which have introduced an "à la Turca" executive presidential system. In addition to analyzing the legislative and regulatory amendments relating to the Judicial Council, the report also seeks to shed light on the background of some of the developments and underlying events within this period.

The report provides an assessment of the role played by the Judicial Council in various stages since 2010 in order to show how and to what extent this judicial body set up to ensure an independent judiciary has become a political instrument for placing the judiciary under the government's control. The report demonstrates that, particularly since the emergence of the 2013

¹ Professor Dr. Thomas Giegerich (Europa-Institut Jean Monnet Chair for EU Law and European Integration Professor of EU Law, Public International Law and Public Law at Saarland University) was an independent expert on a joint mission authorized by the EU Commission and the government of Turkey in 2014. See Thomas Giegerich, 18 December 2014, 'Report of the High Judicial Council of Judges and Public Prosecutors by Law No. 624 of February 2014', Peer Review Mission on the High Council of Judges and Prosecutors (6-8 May 2014), p. 4; at https://www.avrupa.info.tr/fileadmin/Content/Files/File/Docs/Final_TG_Report18122014.pdf

corruption investigations, the government's interference in the judiciary and in its functioning through the HSYK (HSK since April 2017) has become an institutional reality in Turkey. The report shows that the Judicial Council has been acting in full conformity with the government's political agenda in a manner that has put an end to the separation of powers and the independence and impartiality of the judiciary in Turkey.

2. THE HIGH COUNCIL OF JUDGES AND PROSECUTORS (HSYK) FOLLOWING THE 2010 REFERENDUM

2.1. Background of the September 2010 constitutional referendum

The structure, composition and functioning of the HSYK have always raised concerns for the independence and impartiality of the judiciary in both national and international fora. For instance, the European Union progress reports on Turkey had constantly pointed out that the HSYK was far

from providing an independent and impartial judiciary.² There were often allegations that the HSYK was intervening in some ongoing judicial investigations. For instance, in 2005 public prosecutor Ferhat Sarıkaya, who was investigating the bombing of a bookstore in the southeastern city of Şemdinli³, where intense clashes took place between the outlawed Kurdistan Workers' Party (PKK) and Turkish security forces, had been dismissed from his profession on April 20, 2005 as he had implied that some army generals had formed a criminal organization to foment unrest to justify military operations in that vicinity.⁴ The PKK is designated as a terrorist organization by Turkey, the European Union and the United States.

Further, there had always been tension between the ruling Justice and Development Party (AKP) and the secular-Kemalist establishment that had a strong presence within the state structure and bureaucracy since the AKP came to power in 2002. In addition to other state institutions such as the National Security Council (MGK) and the Higher Education Council (YÖK), the HSYK has always been a

2 See for instance Commission of the European Communities, Turkey 2008 Progress Report, Brussels, 05.11.2008, SEC (2008) 2699 final, p. 66; at http://www.avrupa.info.tr/sites/default/files/2016-11/turkey_progress_report_en%202008.pdf

3 The Umut bookstore in Şemdinli, Hakkari province, was bombed, killing one person and injuring several others. The bookstore was owned by Seferi Yılmaz, an individual of Kurdish origin who was convicted and imprisoned for involvement with the PKK in 1984. Two non-commissioned military officers (Ali Kaya and Özcan İldeniz) and a former PKK (Kurdistan Workers' Party) member-turned-state informant (Veysel Ateş) were indicted for their involvement in the bombing following their apprehension at the scene of the incident: see Bar Human Rights Committee of England and Wales, Promoting Conflict – The Şemdinli Bombing: Trial Observation Report, September 2006, Kurdish Human Rights Project, p. 19- 20; at http://www.barhumanrights.org.uk/wp-content/uploads/2016/10/Promoting_Conflict.pdf

4 Bianet Haftanın Özeti, [in Turkish], Van Savcısı Sarıkaya Meslekten İhraç Edildi [Van prosecutor Sarıkaya dismissed from profession], July 8, 2012, at <http://web.archive.org/web/20120708044146/http://bianet.org:80/bianet/bianet/78005-van-savcisi-sarikaya-meslekten-ihrac-edildi>

strong instrument of control over the ruling AKP in the event of its “deviation” from what is considered to be “state policy.”



A National Security Council (MGK) meeting presided by then-President Abdullah Gül

This tension between the secular-Kemalist establishment and the ruling AKP was further increased with the instigation of criminal prosecutions in the Ergenekon⁵ and Balyoz (Sledgehammer)⁶ trials beginning in 2008 and 2010, respectively. These two cases allegedly targeted criminal organizations with deep roots in the state structure and bureaucracy. Ergenekon was the prosecution of the wider organization of the illegal state structures for plotting against the government, whereas Balyoz prosecuted the military junta

that planned to topple the AKP government in 2003.

Viewing the secular-Kemalist power circles as the biggest threat to their governments, it is no surprise that the ruling AKP and its leader Recep Tayyip Erdoğan were naturally once staunch supporters of these trials, because the Ergenekon and Balyoz trials were central to this power struggle. On July 15, 2008 Erdoğan infamously stated that he was the “public prosecutor of the Ergenekon case.”⁷ The ruling AKP also had to face party closure proceedings filed before the Constitutional Court in 2008 that only failed by one vote, but the majority agreed that the AKP had become “the hub of anti-secular activities,” leading to a loss of state funding.⁸ So the ruling AKP had always had an uneasy relationship with the judiciary since it came to power in 2002.

The AKP and its leader Erdoğan also had to deal with some other judicial challenges that targeted religious communities and people associated with the AKP and its supporters. The most significant threat was posed in February 2009 by then- Erzincan Chief

5 Aljazeera, Timeline: Turkey’s ‘Ergenekon’ trial, August 3, 2013, at <https://www.aljazeera.com/news/europe/2013/08/20138512358195978.html>; Wikipedia, Ergenekon Trials, at https://en.wikipedia.org/wiki/Ergenekon_trials

6 The Guardian, Turkey’s Sledgehammer Coup verdict: justice or Soviet-style show trial?, by Simon Tisdall, September 25, 2012, at <https://www.theguardian.com/world/2012/sep/25/turkey-sledgehammer-coup-trial-verdict>; Wikipedia, Sledgehammer (coup plan), at [https://en.wikipedia.org/wiki/Sledgehammer_\(coup_plan\)](https://en.wikipedia.org/wiki/Sledgehammer_(coup_plan))

7 Sözcü, [in Turkish], Ergenekon için kim ne demişti? [Who said what for Ergenekon?] April 21, 2016, at <https://www.sozcu.com.tr/2016/gundem/ergenekon-icin-kim-ne-demisti-1195230/>

8 BBC News, Turkey’s ruling party escapes ban, July 30, 2008, at <http://news.bbc.co.uk/1/hi/world/europe/7533414.stm>; The Guardian, Turkey’s governing party avoids being shut down for anti-secularism, by Robert Tait, July 31, 2008, at <https://www.theguardian.com/world/2008/jul/30/turkey-nato1>

Public Prosecutor İlhan Cihaner,⁹ who is now an MP from the Republican People's Party (CHP). Cihaner had instigated a series of investigations into some of the communities and obtained court orders for wiretapping between 2007 and 2009 that also included government ministers and then-Prime Minister Erdoğan.

In response to these developments, specially authorized public prosecutors from neighboring Erzurum obtained orders from the Erzurum courts for the arrest of Cihaner in connection with the ongoing Ergenekon case.¹⁰ The arrest of Cihaner exposed tensions between the secular establishment and the governing AKP.¹¹ As a counter to this, in February 2010 the HSYK suspended Erzurum's specially authorized prosecutors for their role in the investigation and the arrest of Cihaner.¹² This series of divisive events sparked tension between the HSYK and the government and put the spotlight once again on the composition, powers and functioning of the Judicial Council. The ensuing political discussion further triggered a tense constitutional debate across

the country revolving around the independence of the judiciary. This ended up with a constitutional amendment following a public referendum on September 12, 2010 in Turkey.¹³

2.2. The September 2010 constitutional amendments relating to the HYSK



Ballot used in the constitutional referendum.

The Judicial Council as well as the Constitutional Court were the subject matter of radical change and heated debate in the constitutional amendments of 2010 initiated with the support of the AKP majority in parliament and adopted in a referendum on September 12, 2010.¹⁴ The

9 Wikipedia, İlhan Cihaner, at https://en.wikipedia.org/wiki/%C4%B0lhan_Cihaner

10 Cumhuriyet [in Turkish] HSYK'den tarihi karar [Historic decision from the HSYK], February 17, 2010, available at <https://www.cumhuriyet.com.tr/haber/hsykden-tarihi-karar-120448>; NTV [in Turkish] Özel yetkili savcının yetkisi alındı, February 16, 2010, at <https://www.ntv.com.tr/turkiye/ozel-yetkili-savcinin-yetkisi-alindi,mfIKI-wm4kOb-tH5ROlziA>

11 The New York Times, Arrest of Prosecutor in Turkey Exposes Tensions Between Secular and Religious Turks, by Sebnem Arsu, February 20, 2010, at <https://www.nytimes.com/2010/02/21/world/europe/21turkey.html>

12 Cumhuriyet, [in Turkish], HSYK'den tarihi karar [Historic decision from the HSYK], February 17, 2010, at <https://www.cumhuriyet.com.tr/haber/hsykden-tarihi-karar-120448>; NTV, [in Turkish] Özel yetkili savcının yetkisi alındı [Specially authorized prosecutor stripped of powers] February 16, 2010, at <https://www.ntv.com.tr/turkiye/ozel-yetkili-savcinin-yetkisi-alindi,mfIKI-wm4kOb-tH5ROlziA>

13 BBC News, Q&A: Turkey's constitutional referendum, September 12, 2010, at <https://www.bbc.co.uk/news/world-europe-11228955>

14 BBC News, Q&A: Turkey's constitutional referendum, September 12, 2010, at <https://www.bbc.co.uk/news/world-europe-11228955>

constitutional amendments¹⁵ brought forward significant changes in the Turkish Constitution but more importantly in the structure, composition and functioning of the HSYK with a view to creating a pluralistic and representative structure and to increasing its autonomy vis-à-vis the government.¹⁶ Prior to the 2010 constitutional amendments, the HSYK was composed of only seven regular and five substitute members, all except two of whom were appointed by the president of the republic from among the candidates nominated by the plenaries of the Supreme Court of Appeals and the Council of State (the supreme courts). While under the previous arrangement only the supreme courts had been represented in the Judicial Council, the amendments introduced a system of elections by which all ranks of the judiciary including first instance courts were represented.¹⁷

As a result of the constitutional amendments, a significant majority of the members (10 out of 22 from first instance courts and five from supreme courts) were judges elected by their peers in conformity with international standards. However, the amendments still retained the justice

minister and undersecretary of his ministry as ex officio members, a feature not considered to be in conformity with international guidance on the composition of judicial councils.¹⁸ The constitutional amendments also created the Judicial Council's administrative and budgetary autonomy from the executive, which was previously linked and subordinated to the Justice Ministry in these matters. The constitutional amendments further made it possible to challenge decisions on the dismissal of judges and prosecutors but kept exempt other decisions and measures taken by the council from judicial review such as the appointment, transfer and assignment of judges and prosecutors.

The composition of the HSYK following the judicial election of October 2010, particularly the election of 10 members of the judiciary from among the lower courts, was a matter of intense public and political discussion. The original text of the amended Article 159 of the constitution envisaged a one person-one vote system that would create a more plural representation. However, the Constitutional Court revoked this principle upon an application by the main opposition CHP, paving the way for the judicial

15 Türk Anayasa Hukuku Sitesi, [Turkish], Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [The Law Amending Some of the Articles of the Constitution of the Republic of Turkey], at <http://www.anayasa.gen.tr/5982.htm>

16 See Ergun Özbudun (2015) Pending Challenges in Turkey's Judiciary, Global Turkey in Europe, Policy Brief 20, p. 2, at https://www.iai.it/sites/default/files/gte_pb_20.pdf

17 Article 22 of Law No. 5982 dated 07.05.2010 significantly changed Article 159 of the Turkish Constitution: see Türk Anayasa Hukuku Sitesi [Turkish] Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [The Law Amending Some of the Articles of the Constitution of the Republic of Turkey], at <http://www.anayasa.gen.tr/5982.htm>

18 International Commission of Jurists (ICJ) (2016), Turkey: the Judicial System in Peril, a briefing paper, p. 13, at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

electorate to cast as many votes as the number of candidates.¹⁹ This intervention had an unexpected outcome in the upcoming judicial election that helped the Ministry of Justice-led group of candidates (the so-called ‘Ministry List’) win a landslide victory.²⁰ This gave rise to a majoritarian HSYK composition as opposed to the more pluralistic one that may have been possible under the one man-one vote system. One Turkish daily ran the headline ‘The Judicial Council of the Ministry’ by way of innuendo.²¹ With the appointment of four members directly by the president from among law professors and practicing lawyers, the council’s new composition was swiftly completed within a week in October 2010.

2.3. The new HSYK following the October 2010 judicial election

As previously pointed out, the composition of the HSYK following the October 2010 judicial election clearly left traces of the government’s involvement and connection to the HSYK. Among the members of the HSYK

were three former Justice Ministry bureaucrats. Former Justice Ministry Undersecretary Ahmet Hamsici was elected as a member of the HSYK by the General Assembly of the Justice Academy while serving as president of the academy.²² Hamsici served as deputy president of the HSYK and chair of the Third Chamber responsible for disciplinary matters between 2010 and 2014. During the mass purges and arrests in the judiciary following a July 2016 coup attempt, Hamsici was first arrested and later released, becoming a so-called informant in the post-coup attempt trials.²³

Former Justice Ministry Undersecretary İbrahim Okur and former General Director of Personnel Birol Erdem were also elected as members in the October 2010 judicial election. Okur served as chair of the First Chamber of the HSYK between 2010 and 2014, which was responsible for the appointment, transfer and reassignment of judges and prosecutors. During the mass purges and arrests in the judiciary following the July 2016 coup attempt, Okur was also arrested and jailed in the post-July 2016 coup attempt trials.²⁴ Erdem, who had

19 BBC NEWS TÜRKÇE, [in Turkish], Anayasa Değişikliğine kısmi iptal [Partial annulment of the constitutional amendment], July 7, 2010, at https://www.bbc.com/turkce/haberler/2010/07/100707_turkey_constitution; Constitutional Court decision [in Turkish], Case No. 2010/49, Decision No. 2010/87, Decision Date. 7.7.2020, at http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/830d89d9-3582-4f8c-95fe-ffd1a59219ed?excludeGerekce=False&word_sOnly=False

20 Hürriyet, [in Turkish], Bakanlık Kazandı [The ministry has won], October 18, 2010, at <https://www.hurriyet.com.tr/gundem/bakanlik-kazandi-16066259>

21 Milliyet, [in Turkish], Bakanlığın HSYK’sı [The ministry’s HSYK], October 18, 2010, at <https://www.milliyet.com.tr/siyaset/bakanligin-hsyk-si-1302929>

22 Cumhuriyet, [in Turkish], HSYK Üyeleri belli oldu [The HSYK members have been determined], October 19, 2010, at <https://www.cumhuriyet.com.tr/haber/hsyk-uyeleri-belli- oldu-188652>

23 Vikipedi [in Turkish], Ahmet Hamsici, at https://tr.wikipedia.org/wiki/Ahmet_Hamsici

24 Vikipedi [in Turkish], İbrahim Okur, at https://tr.wikipedia.org/wiki/%C4%B0brahim_Okur

been elected as a HSYK member in the October 2010 judicial election, was later appointed as Justice Ministry undersecretary by the government on November 23, 2011 and continued to serve as an ex-officio member of the First Chamber until January 1, 2014.²⁵ It appears that these are the three people with previous longstanding ministerial links through whom the government wanted to keep the HSYK and the judiciary under its control.

On 25 October 2010 the HSYK began its work with multi-sectional representation from within the judiciary (covering courts of first instance and supreme courts as well as civil and administrative jurisdictions) and with the participation of members from outside the judiciary, i.e., from universities and legal practices. The early days of the HSYK's work in office looked quite impressive and worthy of praise. For instance, the HSYK organized regional meetings of judges and prosecutors to determine and evaluate the problems of the judiciary.²⁶ These meetings created excitement among members of the judiciary, whose opinions they often thought had never been much valued by the HSYK. The views and

recommendations put forward in these meetings shaped the future action plans of the HSYK.²⁷ Based on these opinions and recommendations, the HSYK for the first time prepared a "Strategic Plan," laying out its prospective activities for the years between 2012 and 2016.²⁸

The HSYK also focused on developing training programs for judges and prosecutors as well as promoting the judiciary's academic and linguistic level. For instance, whereas, in 2011, of the total 12,040 judges and prosecutors, 493 (4.1%) had completed master's degrees and 95 (0.8%) had obtained doctorates; in 2014, of the total 14,810 judges and prosecutors, 2,232 (15%) had completed master's, and 112 (1%) had obtained a Ph.D. A similar upward trend was also apparent in the judiciary's foreign language acquisition. While the number of judges and prosecutors who received top level scores (90 to 100%) in a foreign language in national tests was 40 in 2011, this number more than doubled to 84 in 2014.²⁹

The international participation and activities of judges and prosecutors were also encouraged in the Strategic

25 Vikipedi [in Turkish], Birol Erdem, at https://tr.wikipedia.org/wiki/Birol_Erdem; Anadolu Ajansı (AA), HSYK üyesi müsteşar oldu [HSYK member becomes undersecretary], November 23, 2011, at <https://www.aa.com.tr/tr/turkiye/hsyk-uyesi-mustesar-oldu/392422>

26 For meetings on the assessment of the current situation of the judiciary, see Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2012-2016 Stratejik Planı [2012-2016 Strategic Plan], p. 52, at <http://www.sp.gov.tr/upload/xSP-StratejikPlan/files/gxFKa+2012-2016-stratejik-plan.pdf>

27 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2011 Yılı Faaliyet Raporu [2011 Activity Report], January 2012, pp. 133-134, at http://www.sp.gov.tr/upload/xSPRapor/files/Ks43c+HSYK_2011_Yili_Faaliyet_Raporu.pdf

28 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2012-2016 Stratejik Planı [2012-2016 Strategic Plan], at <http://www.sp.gov.tr/upload/xSPStratejikPlan/files/gxFKa+2012-2016-stratejik-plan.pdf>

29 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2011 Yılı Faaliyet Raporu [2011 Activity Report], January 2012, pp. 61-62, at http://www.sp.gov.tr/upload/xSPRapor/files/ibsdU+HSYK_2014_Yili_Faaliyet_Raporu.pdf

Plan.³⁰ While in 2011 only 136 judges and prosecutors were sent abroad for study visits, in 2012 and 2013, 1,380 judges and prosecutors were sent abroad – 229 for advanced study and experience, 79 for language courses, 55 for postgraduate education, 17 for internship and research and 1,000 for study visits and international meetings.³¹ The HSYK also developed a Human Rights Awareness Project to encourage members of the judiciary to take into account European Court of Human Rights (ECtHR) case law in their judicial functions.³²

These positive efforts were closely observed and acknowledged by EU institutions. For instance, the 2013 Progress Report on Turkey prepared by the EU Commission included the following statements:

“As regards the independence of the judiciary, the High Council of Judges and Prosecutors continued with the implementation of its 2012-16 strategic plan. In cooperation with the Turkish Justice Academy and other judicial bodies, it promoted training of a large number of judges and prosecutors all over the country, including on new legislation, human rights and judicial ethics. In cooperation with the Ministry of Justice, the High Council promoted the translation

and publication of European Court of Human Rights (ECtHR) judgments, and notified the judges who had taken the relevant decisions of violations of the European Convention on Human Rights (ECHR) found by the Strasbourg Court. Such violations were taken into account in the professional evaluation of judges and prosecutors. The High Council organised legal consultation meetings, bringing members of first instance and higher courts together to compare notes on case law and try to ensure the coherence and consistency of legal decisions in practice. Overall, the predictability and transparency of the decisions of the High Council has been further strengthened. In its effort to provide the public with information on judicial matters, it assigned, and provided training to 62 spokespersons from among judges and prosecutors.”³³



30 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2012-2016 Stratejik Planı [2012- 2016 Strategic Plan], p. 150, at <http://www.sp.gov.tr/upload/xSPStratejikPlan/files/gxFKa+2012-2016-stratejik-plan.pdf>

31 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2014 Yılı Faaliyet Raporu [2014 Activity Report], pp. 112, at http://www.sp.gov.tr/upload/xSPRapor/files/ibsdU+HSYK_2014_Yili_Faaliyet_Raporu.pdf

32 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], 2013 Yılı Faaliyet Raporu [2013 Activity Report], pp. 135, at http://www.sp.gov.tr/upload/xSPRapor/files/ZtrTk+HSYK_2013_Yili_Faaliyet_Raporu.pdf

33 Commission of the European Communities, Turkey 2013 Progress Report, Brussels, 16.10.2013, SEC (2013) 417 final, p. 44, at https://www.ecoi.net/en/file/local/1056681/1226_1402917387_turkey-2013.pdf



Turkey's The Supreme Court of Appeals (Yargıtay), Ankara

2.4. Continuation of the old political divides in the HSYK

Despite these positive and encouraging developments pioneered by the HSYK in developing the judiciary's human resources, the deep divisions among the judiciary, reflective of Turkish society, did not disappear. Prior to the 2010 amendments, the HSYK was dominated by the five (out of seven) members of the two supreme courts (the Supreme Court of Appeals and the Council of State). The five members were essentially elected by their peers from among the supreme court judges. The judicial members of the first instance courts (including judges and prosecutors), who constitute the overwhelming majority, did not have the right to stand for election nor the right to vote. This can be likened to "oligarchic governance" of the judiciary, which lacks a pluralistic and representative composition.

Prior to the election of the new members of the HSYK in October 2010 there were also ideological divides between the prevalent opinion of the members of the HSYK and the ruling party, i.e., the AKP. This often gave rise to political quarrels with respect to the appointment of judges and prosecutors in politically important trials such as the Ergenekon and Balyoz trials as well as in the above-cited incident that took place in Erzincan, the last in the series of events that led to the public referendum in September 2010. The dominant view among the AKP elites as well as its liberal, social democratic and conservative allies was that the HSYK was controlled by the so-called "old judiciary," with its members having predominantly Kemalist and secularist worldviews.

Partly this perception of the old judiciary but more significantly the government's desire to seize control of the judiciary were driving forces behind the constitutional amendments and the subsequent recomposition of the HSYK. Under the new composition of the HSYK, the so-called old judiciary was represented by the five members elected from the supreme courts, which constituted a minority in the Judicial Council (22 members).³⁴ Ten members elected from among the first instance courts, two government-appointed ex-officio members, four members appointed by the president from among university professors and practicing

³⁴ For a list of HSYK members from the supreme courts, see Hürriyet, [in Turkish], İşte HSYK'nın yeni üyeleri [Here are the HSYK's new members], October 23, 2010, at <https://www.hurriyet.com.tr/gundem/iste-hsyknin-yeni-uyeleri-16117023>

lawyers and one member appointed by the Justice Academy constituted a “de facto alliance” in the HSYK with an overwhelming majority of 17 members.³⁵

In addition to the general powers and duties of the HSYK, there are three critical areas that have always been contentious in the HSYK’s functioning: appointment, promotion and discipline. The most significant of these is often considered appointment, which also includes powers relating to the transfer, reassignment and authorization of judges and prosecutors. This is a critical area that could easily be misused where the HSYK could interfere with judicial functioning by removing, transferring or reassigning members of the judiciary. Should this power not be carefully and responsibly used, the HSYK could influence the outcome of any pending legal proceedings through appointing and assigning the desired judges and prosecutors to the case.

22. There were two main criticisms voiced against the functioning of the HSYK in this era. The first relates to the favoritism in the appointment of judges and prosecutors to the desired judicial positions based on their political and social proximity to HSYK members. The second criticism came about as a result of the election of 160 judges by the HSYK to the Supreme Court of Appeals and the Council of State. As a matter of fact, the election of the supreme court judges, a prerogative of the General Assembly of

the Judicial Council (shared with the president of the republic for the election of one-quarter of the vacancies in the Council of State), has always been a contentious issue in the practices of the HSYK.

There are statutory requirements for eligibility for higher judicial positions and to be selected as judges for the supreme courts (Articles 154-155 of the constitution) such as minimum years of service and promotion requirements, absence of disciplinary sanctions and the like. Two main influential factors can be cited in the discretion of appointment exercised and election choices favored by HSYK members. The first was the presence of the young generation of HSYK members, who tended to prefer and vote for less senior members of the judiciary from among those statutorily eligible. The second decisive factor was the dominant political worldview and the de facto political alliance among members of the HSYK for exercising discretion in a certain direction.

2.5. Signs of divergence in the de facto alliance in the new HSYK

Despite the above-cited de facto alliance, an early sign of divergence in the HSYK emerged following the government’s pressure over the investigation of Ankara public prosecutors in the infamous Deniz Feneri charity case. The Deniz Feneri investigation

³⁵ For a list of the HSYK members from these sources, see Hürriyet, [in Turkish], İşte HSYK’nın yeni üyeleri [Here are the HSYK’s new members], October 23, 2010, at <https://www.hurriyet.com.tr/gundem/iste-hsyknin-yeni-uyeleri-16117023>

had previously been launched in Germany in 2008 for the embezzlement of 41 million euros that allegedly ended up in Turkey in the hands of the pro-government Kanal 7 television channel and a business group close to the ruling AKP.³⁶ The Frankfurt High Court ruled in September 2008 that the donations were illegally transferred to Kanal 7 in Turkey under the control of Zekeriya Karaman, İsmail Karahan, Mustafa Çelik and Zahid Akman.³⁷ In the event it was established that these funds were received by the AKP from the charity's German branch, this could trigger a party closure (disbandment) proceeding against the AKP in the Constitutional Court as well as a blow to the party's reputation.³⁸

Former head of Turkey's Supreme Board of Radio and Television (RTÜK) Akman and the other defendants were later charged by the Ankara Chief Public Prosecutor's Office with forgery, participation in forgery committed by a public official and abuse

of power.³⁹ The defendants were later arrested on July 6, 2011 pending trial and faced a prison sentence of up to 18 years.⁴⁰ On August 26, 2011 Ankara public prosecutors Nadi Türkaslan, Abdulvahap Yaren and Mehmet Tamöz, who launched the criminal investigations, were removed from the case following an investigation initiated by the HSYK into the conduct of these prosecutors.⁴¹ Despite the existence of some technical faults in the investigation, especially regarding asset seizures, it was alleged that the real aim was to remove the public prosecutors from the case in order to stop the prosecution.⁴² It was also common knowledge in the halls of the HSYK that the decision to remove the prosecutors was taken at the behest of the government via the former Justice Ministry bureaucrats who were members of the HSYK.

Another split within the de facto alliance in the HSYK unfolded upon the summoning of National Intelligence Organization (MIT) staff on February

36 Hürriyet Daily News, Former prosecutors of Deniz Feneri embezzlement case criticize court's rule, May 15, 2015, at <https://www.hurriyetdailynews.com/former-prosecutors-of-deniz-feneri-embezzlement-case-criticize-courts-rule-82424>

37 DW, German Court Hands Down Jail Terms in Islamic Charity Scandal, September 17, 2008, at <https://www.dw.com/en/german-court-hands-down-jail-terms-in-islamic-charity-scandal/a-3652266>

38 Financial Times, Graft case threat to Turkey's ruling party, October 2, 2008, at <https://www.ft.com/content/f2682ed8-9006-11dd-9890-0000779fd18c>

39 Hürriyet Daily News, Former prosecutors of Deniz Feneri embezzlement case criticize court's rule, May 15, 2015, at <https://www.hurriyetdailynews.com/former-prosecutors-of-deniz-feneri-embezzlement-case-criticize-courts-rule-82424>

40 Biamag, [in Turkish], Zahid Akman ve Üç Yönetici Tutuklandı [Zahid Akman and Three Executives Arrested], Jul 11, 2011, at <http://bianet.org/biamag/diger/131359-zahid-akman-ve-uc-yoneticisi-tutuklandi>

41 Biamag, [in Turkish], Deniz Feneri e.V.'nin Savcısı Değişti [Deniz Feneri e.V.'s prosecutor replaced], August 24, 2011, at <http://bianet.org/biamag/siyaset/132353-deniz-feneri-e-v-nin-savcisi-degisti>

42 Milliyet, [in Turkish], Amaç bizi uzaklaştırmaktı ve başardılar [The aim was to remove us and they have succeeded], May 5, 2012, at <https://www.milliyet.com.tr/gundem/amac-bizi-uzaklastirmakti-ve-basardilar-1536397>; Oda TV, [in Turkish], Adalet Bakanı ve HSYK töhmet altında [Justice minister and the HSYK are implicated], November 20, 2012, at <https://odatv4.com/adalet-bakani-ve-hsyk-tohmet-altindadir-2011121200.html>

7, 2012. MIT Undersecretary Hakan Fidan, his predecessor Emre Taner, former MIT Deputy Undersecretary Afet Güneş and two other MIT staff members were summoned by the Istanbul public prosecutors for the MIT agents' involvement in bombing and terror activities carried out within the context of the Kurdistan Communities Union (Koma Civaken Kurdistan [KCK]) probe.⁴³ The KCK case was an investigation into the structure of the KCK, an umbrella organization that allegedly oversaw the PKK and other Kurdish groups.⁴⁴ Summoning Fidan and the other senior MIT staff to testify was nevertheless described as “a power struggle within the Turkish government ... by a court summons”⁴⁵ and a “power game within [the] Turkish establishment.”⁴⁶ Some even described⁴⁷ the event as “the crumbling of the coalition” and a challenge to the authority of Prime Minister Erdoğan by the police

and parts of the judiciary that enjoy the backing of the Gülen movement.⁴⁸



Hakan Fidan, head of Turkey's National Intelligence Organization (MIT)

MIT Undersecretary Fidan is known to be the “black box” and protégé of Erdoğan, and thus the government reacted swiftly on February 8, 2012 and removed the Istanbul police chiefs who had been supervising the KCK investigations.⁴⁹ The criminal investigation had been initiated by Istanbul public prosecutor Sadrettin Sarıkaya

43 Hürriyet Daily News, Ankara in shock over probe on intel chiefs, February 9, 2012, at <https://www.hurriyetdailynews.com/ankara-in-shock-over-probe-on-intel-chiefs-13359>

44 Financial Times, Turkish spy chief summoned over PKK talks, February 9, 2012, at <https://www.ft.com/content/12733aa0-5328-11e1-8aa1-00144feabdc0>

45 Financial Times, Turkish spy chief summoned over PKK talks, February 9, 2012, at <https://www.ft.com/content/12733aa0-5328-11e1-8aa1-00144feabdc0>

46 Hürriyet Daily News, Power game within Turkish establishment, by Murat Yetkin, February 10, 2012, at <https://www.hurriyetdailynews.com/opinion/murat-yetkin/power-game-within--turkish-establishment-13446>

47 Halil M. Karaveli (2012) 'The Coalition Crumbles: Erdogan, the Gülenists, and Turkish Democracy', in The Turkey Analyst, February 20, 2012, Vol. 5, No. 4, at <https://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/395-the-coalition-crumbles-erdogan-the-g%C3%Bclenists-and-turkish-democracy.html>.

48 The Gülen movement, also known as the Hizmet (meaning service) movement, is a worldwide civic initiative rooted in the spiritual and humanistic tradition of Islam and inspired by the ideas and activism of Fethullah Gülen, a US-based Muslim cleric. The bases of the movement are diverse service projects that are initiated, funded and conducted by people who are motivated to various extents by Gülen's humanitarian discourse. Ranging from private schools to poverty aid programs, these projects are independent of each other in operational terms, so the movement has no hierarchical structure. For more information visit <https://afsv.org/about-us/hizmet-movement/>

49 Independent Türkçe, MIT ile FETÖ arasındaki çetin savaşın kronolojisi 7 Şubat iddianamesinde: 'One minute' ile başladı, Fidan'ın tutuklanması için 2 yıl boyunca çalışıldı [Chronology of the battle between MIT and FETÖ in the indictment of 7 February: It started with 'One minute', 2 years were spent in order to arrest Fidan], February 14, 2020, at <https://www.indyturk.com/node/132466/haber/mit-ile-fet%C3%B6-aras%C4%B1ndaki-%C3%A7etin-sava%C5%9F%C4%B1n-kronolojisi-7-%C5%9Fubat-iddianamesinde-one>

under the supervision of İstanbul Deputy Chief Prosecutor Fikret Seçen. The government therefore also put direct pressure on the HSYK, notably through member İbrahim Okur, a former bureaucrat and chair of the First Chamber. Okur raised the issue of removing the public prosecutors involved in the KCK investigation at an unscheduled meeting of the First Chamber on February 8, 2012.⁵⁰ The majority of First Chamber members did not agree to removing the prosecutors but proposed the investigation of any possible misconduct on the part of the prosecutors.⁵¹ Prosecutor Sarıkaya was nevertheless removed from the investigation by the İstanbul Chief Public Prosecutor's Office instead on February 11, 2012.⁵²

İbrahim Okur, who himself became a defendant in the notorious post-July 2016 coup attempt trials, explained in his defense his involvement and

communication with then-Prime Minister Erdoğan, Justice Minister Sadullah Ergin and MİT Chief Fidan in order to bypass the judges and prosecutors in charge and stop the pending investigation.⁵³ Okur also stated in his defense that he flew to İstanbul together with Minister Ergin on board a private jet and had a meeting with İstanbul Chief Public Prosecutor Turan Çolakkadı and Deputy Chief Prosecutor Seçen at Dolmabahçe Palace to stop the investigation into Fidan.⁵⁴ Okur further admitted that he had a private meeting with Fidan at his MİT office solely about the 'summons crisis.'⁵⁵ Okur justified all his actions as a proper and righteous intervention to end a "state crisis" and submitted this line of defense to demonstrate that he was on the government's side. In fact, his statement could well be considered an admission of guilt as his actions could be construed as intervention

50 The First Chamber was composed of the following members at the time: İbrahim Okur (chair), Birol Erdem (ex-officio member), Zeynep Nilgün Hacımahmutoğlu, İsmail Aydın, Prof. Bülent Çiçekli, Dr. Teoman Gökçe, Ahmet Berberoğlu: see *Hakimler ve Savcılar Yüksek Kurulu (HSYK)*, [in Turkish] 2012 Faaliyet Raporu [2012 Activity Report], January 2013, at <https://www.hsk.gov.tr/Eklentiler/Dosyalar/a4741446-474d-4c81-a611-65c5357e252a.pdf>

51 Members Zeynep Nilgün Hacımahmutoğlu, Prof. Bulent Çiçekli, Teoman Gökçe and Ahmet Berberoğlu opposed such a measure as it would be perceived as interference in an ongoing judicial process.

52 Independent Türkçe, MİT ile FETÖ arasındaki çetin savaşın kronolojisi 7 Şubat iddianamesinde: 'One minute' ile başladı, Fidan'ın tutuklanması için 2 yıl boyunca çalışıldı [Chronology of the stiff battle between MİT and FETÖ in the indictment of 7 February: It started with 'One minute', 2 years were spent in order to arrest Fidan], February 14, 2020, available at <https://www.indyturk.com/node/132466/haber/mit-ile-fet%C3%B6-aras%C4%B1ndaki-%C3%A7e-tin-sava%C5%9F%C4%B1n-kronolojisi-7-%C5%9Fubat-iddianamesinde-one>

For the ordeal of Sarıkaya in the aftermath of his removal from office see: <https://stockholmcf.org/son-of-jailed-prosecutor-suffering-from-brain-tumor-pleads-for-fathers-release/>

53 TR724, [in Turkish] Okur, 7 Şubat MİT krizini anlattı; Önce Ergin sonra Erdoğan ile görüşmüş [Okur told about MİT crisis; he had spoken first with Ergin and then Erdoğan], July 25, 2018, at <https://www.tr724.com/okur-7-subat-mit-krizini-anlatti-once-adalet-bakani-ergin-ile-sonra-erdogan-ile-gorusmus/>

54 Cumhuriyet, [in Turkish], Okur'dan çarpıcı iddialar: Hakan Fidan için seferberlik [Striking claims from Okur: mobilization for Hakan Fidan], July 24, 2018, at <https://www.cumhuriyet.com.tr/haber/okurdan-carpici-iddialar-hakan-fidan-icin-seferberlik-1036305>

55 Cumhuriyet [in Turkish], Okur'dan çarpıcı iddialar: Hakan Fidan için seferberlik [Striking claims from Okur: mobilization for Hakan Fidan], July 24, 2018, at <https://www.cumhuriyet.com.tr/haber/okurdan-carpici-iddialar-hakan-fidan-icin-seferberlik-1036305>

in a judicial process and obstruction of justice.

Another internal crisis that did not attract much public attention emerged just before the conclusion of the 2013 summer judicial appointment decree in the course of the First Chamber's regular meetings in April 2013. Following an unexpected one-day break given for deliberations, Undersecretary Birol Erdem proposed the removal of Ankara Chief Public Prosecutor İbrahim Ethem Kuriş, while Okur proposed the removal of İzmir Chief Public Prosecutor Durdu Kavak. As a result, Kuriş was re-assigned as the Antalya chief public prosecutor and Kavak as Manisa chief public prosecutor, both having been removed from Ankara and İzmir, respectively, and sent to smaller provinces.⁵⁶ It later emerged that the three members of the HSYK who were former bureaucrats at the Justice Ministry (Hamsici, Okur and Erdem) had arranged a meeting during that one-day break to seek the support of Erdoğan, who expressed his backing for the removal of these chief prosecutors. As one of the reasons for proposing the removal of the Ankara chief public prosecutor, Erdem cited the actions and attitudes of Kuriş during the MİT "summons crisis" that took place in February 2012.

The government and the ruling AKP

were somehow not fully comfortable with the way the judiciary was functioning as they wanted to retain more control, similar to that which they enjoyed over the state bureaucracy. The government was also becoming more worried over corruption allegations concerning both the national government and AKP-run municipalities.⁵⁷ According to Firat Kimya, the political economy of corruption in Turkey points to a decline in petty corruption but a rise of cronyism under AKP governments.⁵⁸ Thus the corruption under Erdoğan-led governments is an institutionalized mechanism to finance party politics and consolidate the party's power to be able to stay in government. There were rumors of serious corruption allegations in many metropolitan municipalities, some of which later surfaced as criminal charges including in İstanbul, İzmir, Ankara, Bursa and Kayseri.

3. THE DECEMBER 2013 CORRUPTION INVESTIGATIONS AND RE-DESIGNING THE JUDICIAL COUNCIL

3.1. The December 2013 corruption investigations

Two major corruption investigations emerged in Turkey on December 17

56 Anadolu Ajansı (AA), [in Turkish] HSYK yaz kararnamesi yayımlandı [HSYK summer decree published], April 30, 2013, at <https://www.aa.com.tr/tr/turkiye/hsyk-yaz-kararnamesi-yayimlandi/250721>

57 See U4 Anti-Corruption Resource Centre, Overview of corruption and anti-corruption in Turkey, Transparency International, January 17, 2012, Number. 313, at https://www.transparency.org/files/content/corruptionqas/313_Overview_of_corruption_and_anti-corruption_in_Turkey.pdf

58 <https://www.tandfonline.com/doi/abs/10.1080/14683849.2018.1531352?journalCode=ftur20>

and December 25, 2013 involving the inner circle of then-Prime Minister Erdoğan including his son, four cabinet ministers, three sons of cabinet ministers, the head of the biggest public bank and high-profile businessmen.⁵⁹



Police seized \$4.5m in cash that was stashed in shoe boxes in the home of Halkbank CEO Süleyman Aslan, while more than \$1m in cash was discovered in the home of Interior Minister Muammer Güler's son, Barış.

The December 2013 corruption investigations concerned the alleged bribery of high-level politicians and bureaucrats in order to win public tenders and to secure the smuggling of gold to Iran to evade US sanctions.

On December 17, 2013, the first of these corruption operations was triggered upon the instructions of public prosecutors Celal Kara and Mehmet Yüzgeç on a number of

allegations including “bribery, misfeasance in public office, bid rigging and smuggling.”⁶⁰ Eighty-nine people including Barış Güler (Interior Minister Muammer Güler's son), Salih Kaan Çağlayan (Economy Minister Zafer Çağlayan's son), Abdullah Oğuz Bayraktar (Environment and Urban Planning Ministry Erdoğan Bayraktar's son), state-owned Halkbank's General Director Süleyman Arslan and Reza Zarrab were detained and later arrested (except Bayraktar) under the pending investigation.

On December 25, 2013, another criminal prosecution was instigated against 41 people upon the instruction of public prosecutor Muammer Akkaş on allegations of “establishing and leading a criminal organization, bid rigging and bribery.”⁶¹ Public prosecutor Akkaş also issued a subpoena to Prime Minister Erdoğan's son Bilal Erdoğan as a suspect as part of this second investigation.

3.2. The government's response to the corruption investigations

The government immediately intervened in the corruption investigations, adopting a series of measures

59 Report on the Rule of Law and Respect of Human Rights in Turkey since December 2013, published by the Rt. Hon. The Lord Woolf C.H., Professor Sir Jeffrey Jowell KCMG QC, The Rt. Hon. Sir Edward Garnier QC MP, and Sarah Palin, (“Woolf Report”) in July 2015, para 52-56, at https://www.onebrickcourt.com/files/REPORT_ON_THE_RULE_OF_LAW_FINAL_FINAL_24_0815_27622.pdf

60 BBC News Türkçe, [in Turkish], 10 soruda: 17-25 Aralık operasyonları [17-25 December operations in 10 questions], December 16, 2014, at https://www.bbc.com/turkce/haberler/2014/12/141212_17_25_aralik_operasyonu_neler_oldu_10_soruda

61 BBC News Türkçe, [in Turkish], 10 soruda: 17-25 Aralık operasyonları [17-25 December operations in 10 questions], December 16, 2014, at https://www.bbc.com/turkce/haberler/2014/12/141212_17_25_aralik_operasyonu_neler_oldu_10_soruda

designed to control the judicial processes.⁶² On December 19, 2013 İstanbul Governor Hüseyin Çapkin and prosecutors leading the investigations were quickly removed from their positions, and 350 police officers including many senior officers such as the police chief of İstanbul were reassigned within days.⁶³ Newly installed police officers refused to carry out orders for the arrest and detention of a further group of suspects including Erdoğan's son Bilal Erdoğan.⁶⁴ In the days following the events, Erdoğan described the corruption investigations as a political operation and a smear campaign aimed at his government and as an "attempted judicial coup"⁶⁵ orchestrated by a "parallel structure"⁶⁶ loyal to Turkish cleric Fethullah Gülen.⁶⁷ Gülen denies having any role in the corruption probes.⁶⁸

Erdoğan wanted to stop and contain the corruption investigations by all means at his and the government's disposal. It was revealed by İbrahim Okur in his trial in September 2018 that he and Erdoğan had a telephone conversation with the specific purpose of aborting the corruption investigations and preventing the arrest of Bilal Erdoğan.⁶⁹ Okur stated that he had a phone call with Prime Minister Erdoğan on the night of December 18, 2013 when he was in Undersecretary Birol Erdem's office, using an encrypted telephone belonging to Erdoğan's chief of staff, Hasan Doğan. Okur further explained that "Mr. Prime Minister said Zekeriya Öz [deputy chief prosecutor] was carrying out unlawful activities and according to the rumors he might organize a raid on Kısıklı [Erdoğan's private residence] and apprehend Bilal Erdoğan. He sought my help in not permitting such unlawful

62 BBC News Türkçe, [in Turkish], 10 soruda: 17-25 Aralık operasyonları [17-25 December operations in 10 questions], December 16, 2014, at https://www.bbc.com/turkce/haberler/2014/12/141212_17_25_aralik_operasyonu_neler_oldu_10_soruda

63 For a timeline of the corruption investigations and the Turkish government's response, see Turkey's December 17 Process: A Timeline of the Graft Investigation and the Government's Response, Central Asia-Caucasus Institute Silk Road Studies, 2014, at <http://isdpc.eu/content/uploads/publications/2014-muller-turkeys-december-17-process-a-timeline.pdf>; see also Woolf Report, at para. 54; BBC NEWS, Turkish Corruption Probe Row Deepens, January 7, 2014, at <http://www.bbc.co.uk/news/world-europe-25637710>.

64 See Woolf Report, para 54.

65 See Woolf Report, para. 53.

66 The term "parallel structure" was invented by Erdoğan and his allies soon after the corruption and bribery investigations of December 2013 and was used as a political propaganda tool with a negative connotation against those in the government who align themselves with Mr. Gülen. The term implies that the alleged Gülenist displays loyalty or allegiance to his own structure rather than to the political hierarchy of the state.

67 See Woolf Report, para 2.

68 BBC News, Turkey's Fethullah Gulen denies corruption probe links, January 27, 2014, at <https://www.bbc.co.uk/news/world-europe-25909139>

69 Cumhuriyet, [in Turkish], 17 Aralık sürecinin perde arkası: 'Bilal'i alacaklar engelle' [Backstage of 17 December process: they will apprehend 'Bilal', stop them] September 11, 2018, at <https://www.cumhuriyet.com.tr/haber/17-aralik-surecinin-perde-arkasi-bilali-alacaklar-engelle-1080071>, Diken, [in Turkish], Eski HSYK yöneticisi: Erdoğan 'Bilal'i alabilirler' diyerek benden yardım istedi [Former HSYK executive: Erdoğan said they may apprehend Bilal and asked for my help], September 12, 2018, at <http://www.diken.com.tr/eski-hsyk-yoneticisi-erdogan-bilali-alabilirler-diyerek-benden-yardim-istedi/>

doings.”⁷⁰ Erdoğan was clearly making a request of the president of the HSYK’s First Chamber to interfere with an ongoing criminal prosecution of his government ministers and his own son.



(From left) Bağış, Güler, Albayrak and Çağlayan in a rally with Erdoğan hours before their resignation.

A plethora of evidence including audio and video recordings relating to the alleged crimes committed by the suspects was made available on the Internet and also published by the media. As a result of the publicity and negative public opinion, EU Affairs Minister Egemen Bağış was removed from office, and Interior Minister Güler, Economy Minister Çağlayan and Environment and Urban Planning Minister Bayraktar had to resign on

December 25, 2013.⁷¹ Bayraktar expressly said in a live televised statement he made to NTV that “a great majority of city development plans in the investigation file were done upon the instructions of Mr. Prime Minister ... so Mr. Prime Minister should also resign,” implying that Erdoğan himself must be included in the investigations.⁷²



Reza Zarrab appears in a courtroom sketch.

It must also be noted that a Turkish banker, Mehmet Hakan Atilla of Turkey’s state-run Halkbank, who took part in a billion-dollar conspiracy to violate US sanctions on Iran, was sentenced to 32 months in prison on May 16, 2018 by a US court on facts confirming the revelations in

70 Cumhuriyet, [in Turkish], 17 Aralık sürecinin perde arkası: ‘Bilal’i alacaklar engelle’ [Backstage of 17 December process: they will apprehend ‘Bilal’, stop them] September 11, 2018, at <https://www.cumhuriyet.com.tr/haber/17-ara-lik-surecinin-perde-arkasi-bilali-alacaklar-engelle-1080071>, Diken, [in Turkish], Eski HSYK yöneticisi: Erdoğan ‘Bilal’i alabilirler’ diyerek benden yardım istedi [Former HSYK executive: Erdoğan said they may apprehend Bilal and asked for my help], September 12, 2018, at <http://www.diken.com.tr/eski-hsyk-yoneticisi-erdogan-bilali-alabilirler-diyerek-benden-yardim-istedi/>

71 Milliyet, [in Turkish], Zafer Çağlayan ve Muammer Güler istifa etti [Zafer Çağlayan and Muammer Güler resign], December 25, 2013, at <https://www.milliyet.com.tr/siyaset/zafer-caglayan-ve-muammer-guler-istifa-etti-1812771>

72 Hürriyet, [in Turkish], Erdoğan Bayraktar istifa etti [Erdoğan Bayraktar resigns], December 25, 2013, at <https://www.hurriyet.com.tr/gundem/erdogan-bayraktar-istifa-etti-25440241>

the December 2013 investigations.⁷³ At the trial in late 2017, Reza Zarrab⁷⁴ also testified that he had paid millions of dollars in bribes to then- Economy Minister Çağlayan and Süleyman Aslan, general manager of Halkbank, to facilitate the scheme. Zarrab said at the trial that he ran an international money laundering scheme to help Iran evade US sanctions and spend its oil and gas revenues abroad. Zarrab also suggested in his testimony that Erdoğan approved the operation in 2012 when he was prime minister. Zarrab more recently reportedly said he has not yet revealed the most important name in the US sanctions-busting scheme, implying that it was Erdoğan at the top of this international money laundering scheme.⁷⁵ Atilla returned to Turkey after serving his prison sentence and was rewarded by the government with an appointment as head of the İstanbul Stock Exchange on October 21, 2019.⁷⁶ It appears that the US courts have accepted that the original Turkish investigations, aborted by then-Prime Minister Erdoğan, who saw them as a “judicial coup,” were credible and had identified serious criminal offenses.

The European Commission expressed concern that the government’s moves to remove, reassign and fire police officers and investigators “could undermine the current investigations and capacity of the judiciary and the police to investigate matters in an independent manner.”⁷⁷ Furthermore, the Parliamentary Assembly of the Council of Europe (PACE) noted: “The disclosure of corruption cases on 17 and 25 December 2013, allegedly involving four ministers and the son of the then Prime Minister Mr Recep Tayyip Erdoğan, marked the beginning of changes in domestic political processes, in particular the adoption of restrictive legislation (amendments to the Criminal Code and the Code of Criminal Procedure in 2014 and the Internal Security Act of March 2015) and the executive’s increased control over the judiciary (amendments to the law on the High Council for Judges and Prosecutors in 2014), the creation of special courts (“criminal peace judgeships”) in June 2014 and the adoption of Law No. 5651 on the internet in March 2015, increasing the Turkish Telecommunications Directorate’s (TIB) capacity to block

73 The New York Times, Turkish Banker in Iranian Sanctions-Busting Case Sentenced to 32 Months, May 16, 2018, at <https://www.nytimes.com/2018/05/16/world/turkish-iran-sanctions-trial.html>

74 Reza Zarrab, an Iranian-Turkish gold trader, was the prime suspect in the December 2013 corruption investigations which implicated the inner circle of the ruling Justice and Development Party (AKP) government and then-Prime Minister Erdogan.

75 Stockholm Center for Freedom (SCF), Report: Reza Zarrab not yet revealed ‘most important name’ in sanctions-busting scheme, June 11, 2018, at <https://stockholmcf.org/report-reza-zarrab-not-yet-revealed-most-important-name-in-sanctions-busting-scheme/>

76 Financial Times, Turkey picks former jailed banker to head Istanbul stock exchange, October 21, 2019, at <https://www.ft.com/content/31e25da8-f442-11e9-a79c-bc9acae3b654>, Hürriyet Daily News, Hakan Atilla to head Istanbul Stock Exchange, October 22, 2019, at <https://www.hurriyetdailynews.com/hakan-atilla-to-head-istanbul-stock-exchange-147813#:~:text=This%20July%20Atilla%20returned%20to,no%20respect%20for%20the%20law.%22>

77 Financial Times, European Commission criticises police moves in Turkey, January 8, 2014, at <http://www.ft.com/cms/s/0/3915188c-903c-11e4-b55d-00144feabdc0.html#axzz3ZBQxgQUH>

websites.”⁷⁸

The government also sought to prevent other corruption investigations from being initiated by law enforcement and the judiciary and rushed regulatory changes in legislation. On December 21, 2013, just a few days after the revelation of the first corruption investigation, an amendment was made to the Regulation on Judicial Law Enforcement⁷⁹ requiring “members of the police force [and gendarmerie] involved in criminal investigations under the authority of public prosecutors” to notify the provincial governors and thus the Ministry of Interior of any pending criminal investigation (amended Article 5).⁸⁰ This amendment enabled the executive and the Ministry of Interior to be informed of all ongoing investigations immediately and to prevent them from being advanced by means of suspending or reassigning the police officers involved in the investigations.⁸¹

On December 26, 2013, 13 members of the HSYK criticized this amendment in a public statement, emphasizing

that the separation of powers, independence of the judiciary and judicial review of executive acts and actions are sine qua non principles of the rule of law.⁸² The HSYK also pointed out that the new “judicial law enforcement” amendment violated the respective provisions of the Code on Criminal Procedure and the constitution. On December 27, 2013 the Council of State stayed the execution of the amended regulation, considering it contrary to the Code on Criminal Procedure.⁸³ However, the pending corruption investigations in connection with the central and local governments had already been disclosed to the Ministry of Interior and to the government before the stay of execution took effect.

The December 2013 corruption investigations were a fatal blow for Erdoğan and his government and were therefore considered by Erdoğan and his close circles as a matter of life or death. The government mobilized all its forces to avert this existential threat by whatever means necessary. Swiftly taking full control of the HSYK and the judiciary was the main strategy of

78 Report on the Functioning of the Democratic Institutions in Turkey, PACE, 06 June 2016, Do. No. 14078, para 5, at https://www.ecoi.net/file_upload/1226_1465286865_document.pdf.

79 Ergün Özbudun, Pending Challenges in Turkey’s Judiciary: Policy Brief 20, Global Turkey in Europe, January 2015, at http://www.iai.it/sites/default/files/gte_pb_20.pdf.

80 See Woolf Report, para. 59.

81 Ergun Özbudun, Pending Challenges in Turkey’s Judiciary, Global Turkey in Europe, January 2015, Policy Brief 20, p. 3, at http://www.iai.it/sites/default/files/gte_pb_20.pdf

82 Members Birol Erdem, Ahmet Karayığit, İsmail Aydın, Halil Koç and Rasim Aytin submitted opposition views to the General Assembly decision, see Hürriyet, [in Turkish] İşte HSYK’nın yaptığı açıklamanın tam metni [Here is the full text of the HSYK’s statement], December 12, 2013, at <https://www.hurriyet.com.tr/gundem/iste-hsyk-nin-yaptigi-aciklamainin-tam-metni-25448975>

83 See Woolf Report, para 60; also see Hürriyet, [in Turkish], Danıştay Adli Kolluk Yönetmeliği’ni durdurdu [Council of State stays the execution of the Judicial Police Regulation], December 28, 2013, at <http://www.hurriyet.com.tr/danistay-adli-kolluk-yonetmeligi-ni-durdurdu-25453285>.

Erdoğan and his government to overcome this threat in the aftermath of the December 2013 corruption investigations. In addition to taking swift actions for the required legislative and administrative overhaul, Erdoğan was desperately in need of making new political and bureaucratic alliances within both the judiciary and the security forces.



Interior Minister Efkân Ala and Justice Minister Bekir Bozdağ

Following the resignation and firing of the ministers involved in the December 2013 corruption investigations, Erdoğan declared that they were entering a “war of independence” and formed a new cabinet on December 25, 2013 that was depicted as a “war cabinet.”⁸⁴ The selection of two people in the cabinet proved to be pivotal in the coming days in terms of preventing and quashing the corruption investigations as well as carrying out sweeping changes in the judiciary and the police force: Justice Minister Bekir Bozdağ and

Interior Minister Efkân Ala. Erdoğan had already promised to cleanse the state apparatus of the “parallel structure,” and the new appointees were expected to carry out this cleansing against what the AKP called a “police-judiciary junta.”⁸⁵

3.3. The reshuffling of the HSYK

New Justice Minister Bozdağ began serving in office with a critical top-level change in the ministry by firing the incumbent undersecretary, Birol Erdem, and appointing Kenan İpek as the new undersecretary on December 31, 2013. İpek had previously served as the general director of prisons and houses of detention between 2003 and 2008 and had been in a passive administrative job since 2008 as a “senior advisor,” which is basically a consolatory position for ministry officers removed from active duty. It is quite remarkable that after being left idle as “senior advisor” for so long, İpek was appointed to a pivotal post at a critical time by the Erdoğan government. İpek is reported to have “nationalistic” roots and worldviews.⁸⁶ In addition to carrying out many sweeping changes in the judiciary during his tenure, İpek is known to have infamously demanded on January 7, 2014 that İzmir public prosecutor Hüseyin Baş halt the İzmir

84 BBC News Türkçe, [in Turkish] Yeni kabine 'savaş kabinesi' mi? [Is the new cabinet a 'war cabinet'?), December 26, 2013, available at https://www.bbc.com/turkce/haberler/2013/12/131225_erdogan_kabine_demirtas

85 BBC News Türkçe, [in Turkish] Yeni kabine 'savaş kabinesi' mi? [Is the new cabinet a 'war cabinet'?), December 26, 2013, at https://www.bbc.com/turkce/haberler/2013/12/131225_erdogan_kabine_demirtas

86 SOL, [in Turkish] AKP'nin yeni yıldızı, 'gizli' bakan: Müsteşar Kenan İpek kimdir? [AKP's new star, 'covert' minister: Who is Undersecretary Kenan İpek], January 25, 2014, at <https://haber.sol.org.tr/devlet-ve-siyaset/akpnin-yeni-yildizi-gizli-bakan-mustesar-kenan-ipek-kimdir-haberi-86513>

Harbor corruption investigations and to have threatened that he would otherwise face consequences.⁸⁷

In order to take swift control of the HSYK and thus the judiciary, the government first wanted to seize full control of the First Chamber by means of a change in its composition. The First Chamber is often considered to be the most significant chamber, responsible for the appointment, transfer, reassignment and authorization of judges and prosecutors. The voting equilibrium in the First Chamber was in the balance, and the outcome could depend on the facts of the case in critical appointments. This offered no guarantee for the government, which felt threatened in the wake of the corruption investigations and wanted to carry out swift and sweeping changes in the judiciary.

The government initially attempted to exert pressure on First Chamber members who had voiced opposition to the reassignments, using top politicians and members of the judiciary to get them to voluntarily vacate their seats in the First Chamber. The government soon decided to make

an alliance in the HSYK with the forces long being left in the minority. The de facto alliance in the HSYK against the “old judiciary” referred to earlier had long been gone. The five members elected from the supreme courts were eager to join this new grouping to have a stronger say in the HSYK, albeit having completely opposite political worldviews from those of the pro-government members.⁸⁸ They had long resented that they did not have any real power in HSYK decision making. All the other members except for one appointed by the president also joined this new alliance. Again, the members who were former ministerial bureaucrats (particularly İbrahim Okur and Birol Erdem) were instrumental in facilitating meetings and achieving the change of balance within the HSYK.

As a result of these informal meetings at the HSYK organized by the members cited above and sanctioned by the government, a new alliance of members was formed. The resulting quorum gave the justice minister the confidence to propose a reshuffling of the HSYK on January 15, 2014.⁸⁹ It has never been publicly acknowledged,

87 Ege'de SonSöz, [in Turkish] İzmir'i sarsan operasyonda Bozdağ'a fezleke! [Investigation into Bozdağ in operation that shook İzmir], January 24, 2014, at <http://www.egedesonsoz.com/haber/izmir-i-sarsan-operasyon-da-bozdag-a-fezleke/860087>

88 Star, [in Turkish], 5 üye sürpriz yaptı, HSYK'da dengeler değişti [5 members spring a surprise, the balances in the HSYK are changed], January 16, 2014, at <https://www.star.com.tr/politika/5-uye-surpriz-yapti-hsykda-dengeler-deg-isti-haber-830332/>

89 İbrahim Okur makes reference to his personal contact with Constitutional Court President Haşim Kılıç and Kılıç's communication with President Abdullah Gül and acknowledges these informal meetings as follows: 'We discussed the issue with the members who represent the supreme courts in the council. We agreed to reshuffle the members of the council by way of a general assembly decision. We had the required quorum. We called Haşim Kılıç and explained that we had secured the quorum. After this, Gül explained to journalists that 'no one should worry, good things will happen soon'. We convened the HSYK. The Gülenist members were reshuffled to other chambers. ...'. [Translation]"; Memurlar.net, [in Turkish] Yargıdaki FETÖ sürecini en iyi bilen sanık konuştu [Suspect who best knows the FETÖ process in the judiciary talks], September 12, 2018, at <https://www.memurlar.net/haber/774423/yargidaki-feto-surecini-en-iyi-bilen-sanik-konustu.html>

but this new alliance seemed to be an early sign of the new political coalition Erdoğan was making with the “nationalist” and “left-wing nationalist” forces in the state bureaucracy and politics. It appears that this internal alliance in the HSYK could not have taken place without the explicit or tacit support of an external political coalition. The political developments following the coup attempt of July 2016 further lent support to the existence of this early coalition in the state bureaucracy and politics.

Under the above-mentioned preparations and political mindset, the newly appointed justice minister, Bozdağ, called for an Extraordinary General Meeting of the HSYK on January 15, 2014 and proposed a reshuffling of the HSYK members.⁹⁰ Two members of the First Chamber (Professor Bülent Çiçekli and Ahmet Berberoğlu⁹¹) who opposed the government-initiated proposals, were removed from the First Chamber and replaced with two

pro-government members (Halil Koç⁹² from the Second Chamber and Rasim Aytin⁹³ from the Third Chamber). With this intervention, the government secured full control (at least 5 to 2 or even 6 to 1) of the First Chamber for the upcoming appointments and transfers of judges and prosecutors.

3.4. Amendment of Law No. 6087 on the HSYK

These interventions in the composition of the First Chamber were followed by a far-reaching amendment of Law No. 6087 on the HSYK. Law No. 6524 dated February 15, 2014 sought to limit the powers of the HSYK General Assembly and strengthen the role of the minister of justice over the Judicial Council.⁹⁴ The unconstitutionality of the amendment was raised by the opposition parties and constitutional lawyers.⁹⁵ Chair of the HSYK's Second Chamber Nesibe

90 SonDakika.com, [in Turkish] HSYK'da Görev Değişikliği [Change of duty in the HSYK], January 15, 2014, at <http://www.sondakika.com/haber/haber-hsyk-da-gorev-degisikligi-5546914/>

91 Ahmet Berberoğlu, who was elected as an HSYK member for a second term in the Judicial Election of October 2014 with a large number of votes from his peers, was sentenced to 12 years, 9 months and 27 days' imprisonment for membership in the FETÖ/PDY armed terror organization in the government-driven post-July 2016 coup attempt trials: see Gazete Duvar, [in Turkish] Eski HSYK üyesi Ahmet Berberoğlu'na hapis cezası [Prison sentence for former HSYK member Ahmet Berberoğlu], November 12, 2019, at <https://www.gazeteduvar.com.tr/gundem/2019/11/12/eski-hsyk-uyesi-ahmet-berberogluna-hapis-cezasi/>

92 Halil Koç was later elected as an HSYK member in the October 2014 Judicial Election and was further appointed as an HSK member by the president in May 2017 following the constitutional amendments. Koç has been a member of the First Chamber since this reshuffling and president of the First Chamber since October 2014 as a trusted government appointee: see the HSYK website at https://www.hsk.gov.tr/Uyeler/2_halil-koc.aspx

93 Rasim Aytin was re-appointed as an HSYK member in October 2014 by the president and was later appointed as a member of the Council of State by the president on May 19, 2017 following the statutory termination of his office: see Vikipedi, Rasim Aytin at https://tr.wikipedia.org/wiki/Rasim_Aytin

94 Memurlar.net, [in Turkish], HSYK Kanun Değişikliği [Change in HSYK Law], February 27, 2014, at <https://www.memurlar.net/haber/458675/hsyk-kanunu-degisikligi.html>

95 T24, [in Turkish], Prof. Dr. Ergun Özbudun: HSYK değişikliği Anayasa Mahkemesi'nden döner [Prof. Dr. Ergun Özbudun: HSYK amendment to be overturned by the Constitutional Court], January 9, 2014, at <https://t24.com.tr/haber/hsyk-degisikligi-anayasa-mahkemesinden-doner,247934>

Özer⁹⁶ and member Professor Bülent Çiçekli⁹⁷ criticized the amendment, emphasizing that the increasing powers of the Justice Ministry over the HSYK at the expense of the independence of the judiciary would damage the system of checks and balances. President Abdullah Gül also said he found many provisions of the amendment unconstitutional.⁹⁸



Abdullah Gül, 11th President of Turkey

The HSYK amendment also included

a provisional article authorizing the minister of justice to “reorganize” all the HSYK staff members with the exception of elected members, whose status was constitutionally preserved. Provisional Article 4 provided that “with the entry into force of the law, the positions of the Secretary General, Deputy Secretaries, the President of the Board of Inspectors and Vice Presidents, High Council inspectors, rapporteur judges and all the administrative personnel shall be terminated.”⁹⁹ Thus, the terms of office of all the existing HSYK administrative staff were terminated and they were replaced with new appointments that were quickly carried out to prevent any possible review of the act by the Constitutional Court.¹⁰⁰

The effect was that even if the Constitutional Court ultimately annulled the law, these personnel

96 Sözcü, [in Turkish], Düzenlemeye HSYK'dan tepki [Reaction to the regulation by the HSYK], February 20, 2014, at <https://www.sozcu.com.tr/2014/gundem/duzenleme- hsykdan-tepki-460070/>

97 Radikal [in Turkish] '12 Eylül benzetmesi abartılı olmaz' [Comparing this to September 12 military coup would not be an exaggeration], February 17, 2014, at <http://www.radikal.com.tr/yazarlar/omer-sahin/12-eylul-benzetmesi-abartili-olmaz-1177048/>

98 President Gül stated that “I had the bill examined and saw that 15 points in 12 articles were clearly unconstitutional, and I warned the minister of justice. In the Justice Committee and the plenary stages, these warnings were taken into consideration, and certain changes were made. I finally signed the law thinking that it would be more appropriate for the Constitutional Court to rule on the remaining controversial points.” [Translation] Radikal [in Turkish], Gül'den HSYK'ya 'yetmez ama evet' [From Gül to HSYK not sufficient but yes], by Murat Yetkin, February 27, 2014.

99 See the Law on the High Council of Judges and Prosecutors, Law No. 6087 dated 11.12.2010, Official Gazette No. 27789 dated 18.12.2010 at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6087.pdf>.

100 Secretary-General Muzaffer Bayram, Secretary-General Deputies Neslihan Ekinci, Engin Durnagöl, Bülent Albayrak, Havva Bağlı Gürgen; Inspection Board head Selim Yıldız and deputies İlhan Önkal and Adem Kartal were thus removed from office. Justice Minister Bekir Bozdağ reappointed Selim Yıldız as Inspection Board head and Şaban Kazdal, Kemal Açıkgöz and Abdulkadir Güngör as deputy Inspection Board heads. Serdar Mutta, Musa Kanıcı, Erdal Demir, İbrahim Pektaş and Müjgan Karyağdı were appointed deputy secretaries-general and Bilgin Başaran the new secretary-general: see Milliyet [in Turkish], Bakan'dan HSYK'ya ilk atamalar [First appointments by the minister to the HSYK], February 28, 2014, at <https://www.milliyet.com.tr/siyaset/bakandan-hsykya-ilk-atamalar-1844044>; Medya 24, [in Turkish], Teftiş Kurulu Başkanı Selim Yıldız Değişmedi [Board of Inspectors head Selim Yıldız did not change], February 28, 2014, at <https://www.medya-24.com/m- haber-6319.html>; Dünya, [in Turkish] HSYK Genel Sekreterliği'ne Bilgin Başaran atandı [Bilgin Başaran appointed secretary-general of the HSYK], March 3, 2014, at <https://www.dunya.com/gundem/hsyk-genel-sekreterligi039ne-bilgin-basaran-atandi-haberi-239690>

could not be reinstated to their previous posts, as judgments of the Constitutional Court did not have retroactive effect under Article 153 of the Turkish Constitution. Indeed, on April 10, 2014 the Constitutional Court annulled various provisions of the amendment upon an annulment application submitted by the main opposition CHP (File No. 2014/57, Decision No. 2018/81).¹⁰¹ Nevertheless, the government succeeded in terminating the positions of all the clerical staff, which was normally a prerogative of the HSYK General Assembly. With the reshuffling of January 15, 2014 and the new appointments to administrative positions following termination of the existing staff, the government secured full control of the HSYK.

These observations have also been verified by the independent reports of various NGOs. For instance the International Commission of Jurists (ICJ) stated: “The ICJ is concerned that the Government’s dominance of the HSYK has effectively co-opted this core constitutional institution to the Executive and that this undermines the independence of the judiciary,

allowing it to shape the composition of the judiciary, affecting the transfer of judges and the allocation of judges to sensitive cases, and allowing channels for executive pressure on individual judges.”¹⁰² Amnesty International also expressed the view that the justice minister’s power within the HSYK “will weaken the independence of the judiciary and threaten the actual and perceived independence and impartiality of the judiciary in Turkey and the right to a fair trial.”¹⁰³

3.5. Sweeping appointments and reassignments in the judiciary following the reshuffling

The appointment and transfer decrees of the First Chamber following the reshuffling of January 15, 2014 display the extent of the arbitrary appointment, transfer and reassignment of judges and prosecutors.¹⁰⁴ The newly formed First Chamber reassigned the Istanbul chief public prosecutor in its first day in office, on January 16, 2014, as well as some further 20 public prosecutors in critical positions.¹⁰⁵ A second reassignment decree came

101 The Constitutional Court as a matter of fact annulled 19 provisions of Law No. 6524 amending Law No. 6087. For the Constitutional Court decision of 10.04.2014 [in Turkish], Case No. 2014/57, Decision No. 2014/81, see <https://www.resmigazete.gov.tr/eskiler/2014/05/20140514-21.pdf>

102 International Commission of Jurists (ICJ), “Turkey: the Judicial System in Peril”, a Briefing Paper, 2016, pp. 13-14, at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

103 Amnesty International, Turkey: Independence and Impartiality of the Judiciary under Threat, February 24, 2014, at <https://www.amnesty.org/en/documents/EUR44/003/2014/en/>

104 Platform for Peace and Justice (PPJ), Turkey’s Criminal Peace Judgeships, April 21, 2017, para 9, at <http://www.platfompj.org/turkeys-criminal-peace-judgeships/>

105 Hürriyet Daily News, Major reshuffle in Turkish judiciary amid graft probe row, January 16, 2014, at <http://www.hurriyetdailynews.com/major-reshuffle-in-turkish-judiciary-amid-graft-probe-row.aspx?page-ID=238&nID=61162&NewsCatID=338>

on January 22, 2014 involving as many as 96 judges and prosecutors including the chief public prosecutor of Adana (then conducting an investigation of alleged weapons and ammunition transport by MIT to jihadists in Syria) and of İzmir (then conducting the İzmir harbor investigation involving businessmen close to government circles).¹⁰⁶ A further group of 166 judges and prosecutors were reassigned to new posts on February 11, 2014 by another decree.¹⁰⁷ The First Chamber reassigned a further 271 judges and prosecutors on March 23, 2014 with a view to removing jurists in critical positions as a continuation of its response to the December 2013 corruption investigations.¹⁰⁸

A further appointment decree replacing 2,224 judges and prosecutors and 293 administrative judges was released by the First Chamber on June 11, 2014. The timing and scale of these appointment decrees demonstrate the clear intention of the government to purge all critical positions

in the judiciary that might have any impact on any ongoing investigations into the government.¹⁰⁹ First Chamber member Teoman Gökçe¹¹⁰ strongly criticized the appointment decrees published following the government-driven reshuffling by characterizing the HSYK 2014 summer appointment decree as a “cleansing decree.”¹¹¹ Gökçe further asserted that “the appointments have been made in such a manner as to eliminate the independence of the judiciary and the tenure of judges and prosecutors’ and that ‘our colleagues have been put into a situation where they will have to consider extrajudicial concerns in their judicial activities and not the law.”

3.6. Creation of the Criminal Peace Judgeships (Sulh Ceza Hakimlikleri) (SCH)

After ultimately hushing up the December 2013 corruption

106 Hürriyet Daily News, Up to 96 judges and prosecutors reassigned in fresh purge within Turkish judiciary, January 22, 2014, at <http://www.hurriyetdailynews.com/up-to-96-judges-and-prosecutors-reassigned-in-fresh-purge-within-turkish-judiciary.aspx?pageID=238&nID=61392&NewsCatID=338>.

107 Hürriyet Daily News, More judges and prosecutors reshuffled in fresh purge, February 11, 2014, at <http://www.hurriyetdailynews.com/more-judges-and-prosecutors-reshuffled-in-fresh-purge.aspx?pageID=238&nID=62356&NewsCatID=341>

108 Hürriyet Daily News, Turkish gov't reshuffles over 200 judges and prosecutors amid graft probe, March 23, 2014, at <http://www.hurriyetdailynews.com/turkish-govt-reshuffles-over-200-judges-and-prosecutors-amid-graft-probe.aspx?pageID=238&nID=63970&NewsCatID=338>

109 See Central Asia – Caucasus Institute Silk Road Studies Program (2014) Turkey's December 17 Process: A timeline of the Graft Investigation and the Government's Response, compiled by Hendrik Müller, at <http://isdp.eu/content/uploads/publications/2014-muller-turkeys-december-17-process-a-timeline.pdf>.

110 Teoman Gökçe, who was jailed following the controversial coup attempt on July 15, 2016, sadly died of a heart attack under suspicious circumstances in his solitary cell in Ankara's Sincan Prison on April 2, 2018: see Stockholm Center for Freedom (SCF), Judge Gökçe dies in Turkish prison where he was held over alleged links to Gülen movement, April 2, 2018, at <https://stockholmcf.org/judge-gokce-dies-in-turkish-prison-where-he-was-held-over-alleged-links-to-gulen-movement/>

111 Milliyet, [in Turkish], HSYK'da yaz kararnamesi krizi [Summer decree crisis in the HSYK], June 12, 2014, at <https://www.milliyet.com.tr/siyaset/hsyk-da-yaz-kararnamesi-krizi-1895926>

investigations, fighting what Erdoğan depicted as the “parallel structure” became his administration’s primary political objective. To this end, the government established the so-called Criminal Peace Judgeships (SCH), which became operational on June 28, 2014.¹¹² When asked by a journalist on June 22, 2014 whether there would be an “operation against the parallel structure,” Erdoğan responded that “the parallel judiciary is thwarting the executive’s steps” and signaled the operations that were to come on July 22, 2014 against the police officers who conducted the December 2013 corruption investigations.¹¹³ On July 16, 2014 the First Chamber of the HSYK, which had been reassigning judges and prosecutors following the executive-compelled reshuffling on January 15, 2014, appointed judges to fill the SCHs in a selective manner and in limited numbers.

The SCHs essentially serve an investigative function with the judges

handling serious procedural matters until the prosecution reaches the trial stage. SCH judges may order wiretaps, arrests, seizures, property searches and pre-trial detentions.¹¹⁴ After the first appointments and assignments to these SCHs by the HSYK and the initial operations that soon followed, it became clear that Erdoğan’s real purpose in establishing the SCHs was to fight against the supposed “parallel structure.” Erdoğan stated in Ordu province on July 20, 2014 that “appointments have been made in order to fight the parallel structure. ... The appointments have been made to the criminal peace judgeships. ... We will see what happens in both the police and the judiciary”.¹¹⁵ In line with his objective the first target of these newly established SCHs and appointment of judges to fill them were the police officers who conducted the December 2013 corruption investigations.¹¹⁶

The closed-circuit appeal mechanism that was specifically introduced

112 See Platform for Peace and Justice (PPJ), Turkey’s Criminal Peace Judgeships, April 21, 2017, para 9, at <http://www.platfompij.org/turkeys-criminal-peace-judgeships/>

113 Akşam, [in Turkish], Paralel Yargı Türkiye’yi Bitirir [Parallel judiciary destroys Turkey], June 23, 2014, at <http://www.aksam.com.tr/siyaset/paralel-yargi-c2turkiyeyi-bitirir/haber-318147>.

114 Platform for Peace and Justice (PPJ), Turkey’s Criminal Peace Judgeships, April 21, 2017, para 20, at <http://www.platfompij.org/turkeys-criminal-peace-judgeships/>

115 Star, [in Turkish], Başbakan Erdoğan: Paralel Yapıyla Mücadele Etmeyen Bedelini Ağır Öder [Prime Minister Erdoğan: those who do not fight parallel structure pay a heavy price], July 22, 2014, at <https://www.star.com.tr/politika/basbakan-erdogan-paralel-yapiyla-mucadele-etmeyen-bedelini-agir-oder-haber-915819/>

116 The CPJs assumed their duties on July 21, 2014. On the same day, one of the judges issued search and seizure warrants for 100 police officers allegedly linked to the “parallel structure.” Ostensibly, this decision was reached after having reviewed 106 folders, seven hard drives, the wiretaps of 238 persons, a CD of 1,292 pages along with other documents: see Platform for Peace and Justice (PPJ) (2018) Non-Independence and Non- Impartiality of the Turkish Judiciary, [PPJ Report on Non-Independence and Non- Impartiality] para 37, at <http://www.platfompij.org/wp-content/uploads/non-independence-1.pdf> In addition, when commenting on these operations against police officers, Erdoğan admitted that he and the executive were central to the ongoing judicial process, saying, “Now that an accounting has been asked for, you will see what else will come about, what else ... not finished yet, this is just the beginning” [translation]: see Star, [in Turkish], Erdoğan’dan operasyon yorumu: Bu daha başlangıç [Erdoğan’s comment on the operation: This is just the beginning], July 23, 2014, at <https://www.star.com.tr/guncel/erdogandan-operasyon-yorumu-bu-daha-baslangic-haber-917107/>.

with the establishment of the SCHs allows decisions of the SCH judges to be appealed only by another SCH judge.¹¹⁷ This renders the appeals procedure ineffective as it offers no way for a superior court to intervene in cases where citizens' rights to liberty or security may have been violated. Concerns about the SCH system have also been raised by various other groups, including the International Commission of Jurists (ICJ), which stated that there was "widespread concern within the Turkish legal community about the lack of independence of criminal judges of the peace" who were appointed by the state-aligned First Chamber of the HSYK.¹¹⁸ Furthermore, the Venice Commission has raised numerous concerns over both the jurisdiction and practice of the SCHs.¹¹⁹

4. THE HSYK AFTER THE 2014 JUDICIAL ELECTION

4.1. The formation of the HSYK with the 2014 judicial election

The term of the previous HSYK that took office on October 25, 2010 ended on October 24, 2014. Prior to the end of the term, a new HSYK had to

be formed in accordance with constitutional rules. A judicial election for the new HSYK was held on October 12, 2014 under extraordinary circumstances. After the HSYK reshuffling of January 15, 2014, this election was watched with interest almost equal to that of a parliamentary election since the results would be critical in determining the extent of the Erdoğan administration's future interference with judicial independence.¹²⁰



Undersecretary of the Ministry of Justice Kenan İpek

The 2014 judicial election was heavily influenced by the Justice Ministry via the Platform for Judicial Unity (YBP), an association of judges and prosecutors established by a group of pro-government members of the judiciary prior to the election, which later became the Association for Judicial Unity.¹²¹ The platform, led by Justice

117 Code on Criminal Procedure of the Republic of Turkey (2005), Art. 268(3-a).

118 International Commission of Jurists (ICJ) (2016), Turkey: the Judicial System in Peril, a briefing paper, p. 18, at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

119 See Venice Commission-Council of Europe, Turkey: Opinion on the Duties, Competences, and Functioning of the Criminal Peace Judgeships, Opinion No. 852/2016, March 13, 2017, at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e>.

120 Human Rights Foundation (HRF), The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECHR's Response, [HRF Report] New York, April 2019, p. 12.

121 See PPJ Report on Non-Independence and Non-Impartiality, *supra* note, paras 12-27.

Ministry Undersecretary Kenan İpek, asserted that they set out to fight against the alleged members of the Gülen movement in the judiciary and hence would make the judiciary an independent power.¹²² It is generally reported that the selection of the YBP candidates was headed by İpek on the basis of the candidates' political convictions and religious beliefs, comprising religious unionist (Hak-Yol), nationalist and left-wing candidates who were also known to be pro-AKP.¹²³ However, it appears that the government's real aim was the appearance that the list was representative of all worldviews in the judiciary rather than an independent plural representation in the HSYK.

The platform was used as a means to promote government-supported candidates, and the government contributed enormous resources to and arranged meetings and advocacy for the platform's election campaign.¹²⁴

The YBP candidates conducted their electoral campaign with free access to public facilities, and it was made compulsory for judges and prosecutors to attend the YBP election meetings.¹²⁵ The bureaucrats in the Ministry of Justice were sent to the cities under the guise of seminars to run campaigns for the candidates on the YBP list and demanded that the judges and prosecutors vote for the YBP candidates.¹²⁶ The other candidates were exposed to harassment, false accusations and defamation by the government-controlled media and pro-government Twitter trolls such as @kuscuesref and @kuscubasiesref!¹²⁷ The Twitter accounts were opened solely to manipulate the elections by smearing and putting pressure on the rival candidates. AKP parliamentary group deputy chairman Mahir Ünal went as far as to declare that the ruling AKP would not recognize the election results and consider them illegal should the YBP list candidates lose

122 See Platform for Peace and Justice (PPJ) (2017) *Witch Hunt's Judicial Club: Platform for Unity in Judiciary (YBP)*, [Witch Hunt's Judicial Club], p. 4, at <http://www.platformpj.org/wp-content/uploads/Witch-Hunts-Judicial-Club-Platform-for-Unity.pdf>

123 The YBP nominated the following: Ahmet Çiçekli (Erzurum chief prosecutor), Bilgin Başaran (secretary-general of HSYK), Mehmet Durgun (İstanbul judge), Mehmet Yılmaz (chief inspector at HSYK), Metin Yandırmaz (Balıkesir chief prosecutor), İsa Çelik (chief inspector at HSYK), Ömür Topaç (Istanbul deputy chief prosecutor), Ramazan Kaya (Ankara deputy chief prosecutor), Selahattin Menteş (deputy undersecretary of the Ministry of Justice), Turgay Ateş (head of Denizli Criminal Court) and Zeynep Şahin (rapporteur judge at the Supreme Court of Appeals); and Cafer Ergen (deputy undersecretary of the Ministry of Justice), Halil Koç (HSYK member), Hasan Odabaşı (member of Ankara Regional Administrative Court), Gönül Sayın (member of Ankara Regional Administrative Court) and Mehmet Gökpinar (head of Edirne Regional Administrative Court): see *Witch Hunt's Judicial Club*, supra note, p. 5-6.

124 Ergun Özbudun, (2015) "Turkey's Judiciary and the Drift Toward Competitive Authoritarianism", *The International Spectator*, Issue 50/2, DOI: 10.1080/03932729.2015.1020651, pp. 42-55 (at p. 51), at <https://core.ac.uk/download/pdf/38329833.pdf>

125 See *Witch Hunt's Judicial Club*, supra note, p. 7-11.

126 See PPJ Report on Non-Independence and Non-Impartiality, supra note, para 15.

127 See *Witch Hunt's Judicial Club*, supra note, p. 13-18.

and another group win the election.¹²⁸

Government cooperation with the platform was even acknowledged by then- Prime Minister Erdoğan when he stated on national television that he had created the platform for the purpose of the judicial election.¹²⁹ On October 4, 2014, Prime Minister Ahmet Davutoğlu, who assumed office on August 28, 2014 after Erdoğan was elected president, hosted the YBP representatives in his office, declaring his support for the group.¹³⁰ Following their meeting with the prime minister, the YBP representatives announced that they would be “working in harmony with the executive,” help raise the salary of judges and prosecutors, issue an amnesty for judges and prosecutors who had received disciplinary penalties and increase the number of members of the Supreme Court of Appeals and the Council of State.¹³¹ To this end, the Ministry of Justice drafted a bill with similar provisions to be enacted prior to the judicial election

to demonstrate its support for the promises as well as for the YBP candidates.¹³² This also gave a clear signal to all judges and prosecutors who they should be voting for in the coming judicial election.

The circumstances of this judicial election and its results accelerated the end of the separation of powers and judicial independence in Turkey.¹³³ The candidates from the pro-government YBP secured eight of the 10 seats.¹³⁴ Mehmet Durgun, Mehmet Yılmaz, Metin Yandırılmaz, İsa Çelik, Ömür Topaç, Ramazan Kaya, Turgay Ateş and Halil Koç were elected from the YBP list, whereas Ahmet Berberoğlu and Mahmut Şen were elected from the independent list from the courts of first instance.¹³⁵ The election results were presented as a victory for the government and a loss for the independent candidates and those close to the Gülen movement.¹³⁶ The election results in fact displayed a very close race between the government-supported YBP list

128 Hürriyet [in Turkish], *Kazanırlarsa gayrimeşru sayarız* [Should they win we will declare it illegitimate], September 25, 2014, at <https://www.hurriyet.com.tr/gundem/kazanirlarsa-gayrimesru-sayariz-27269851>

129 See Turkey: the Judicial System in Peril, *supra* note, p. 13.

130 See PPJ Report on Non-Independence and Non-Impartiality, *supra* note, para. 16.

131 See PPJ Report on Non-Independence and Non-Impartiality, *supra* note, para. 16.

132 Memurlar.net, [in Turkish], *Hakim ve savcılara zam disiplin cezalarına af* [Salary increase for judges and prosecutors, amnesty for disciplinary sanctions], September 5, 2014, at <https://www.memurlar.net/haber/482227/>

133 See HRF Report, *supra* note, p. 12.

134 See PPJ Report on Non-Independence and Non-Impartiality, *supra* note, para 17-27.

135 Anadolu Ajansı (AA), [in Turkish], *HSYK seçim sonuçları açıklandı* [HSYK election results announced], October 12, 2014, at <https://www.aa.com.tr/tr/turkiye/hsyk-secim-sonuclari-aciklandi/111683>.

136 Milliyet, [in Turkish] *HSYK'da 8 asil üye Yargıda Birlik'ten* [8 regular members of the HSYK are from the Unity in Judiciary], October 13, 2014, at, <https://www.milliyet.com.tr/gundem/hsyk-da-8-asil-uye-yargida-birlik-ten-1953614>

and the so-called independent list.¹³⁷ This close race reflects a deep division among the preferences of the members of the judiciary and further explains the later purge of the judiciary by the government in great numbers following the coup attempt in July 2016.

The new HSYK composition pointed to a new alliance formed under the YBP umbrella that was led and ultimately controlled by the government. This composition is often pictured as a coalition of the members of the judiciary who have Islamist, nationalist and social democrat (or left-wing) worldviews.¹³⁸ This may not be a fully accurate depiction of the real state of affairs. The pro-government YBP list clearly excluded many other candidates from broader backgrounds who were not hand-picked by the government-controlled selection committee. Furthermore, the YARSAV (a dissident judicial association that was later dissolved by an emergency decree) list featured candidates of various political backgrounds including social democrats, liberals, secularists and the like. Despite the rhetoric of

representing all worldviews, with the four members directly appointed by the president plus the two ex-officio members, the government clearly took total control of the new HSYK in October 2014.¹³⁹

Notably, on December 8, 2016 the European Network of Councils for the Judiciary (ENCJ), which unites the judicial councils of the EU member states, suspended the HSYK's observer status on the grounds that it did not meet the requirement of independence from the executive and legislature.¹⁴⁰ The ENCJ stated in its suspension decision that "[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. The ENCJ became concerned that the procedures adopted by the High Council for Judges and Prosecutors of Turkey (HSYK) indicated that this condition was no longer satisfied."

Following the judicial election, Law

137 For instance the candidates received the following numbers of votes in general jurisdictions: "Metin Yandirmaz 5,836, Mehmet Yılmaz 5,758, Mehmet Durgun 5,695, Ömür Topaç 5,665, Ramazan Kaya 5,657, İsa Çelik 5,429, Turgay Ateş 5,400, İlker Çetin 5,312, Selahaddin Menteş 5,302, Zeynep Şahin 5,291, Orhan Gödel 5,202, Levent Ünsal 5,143, Bilgin Başaran 5,100, Yeşim Sayıldı 5,009, İdris Berber 5,003, Yaşar Akyıldız 4,943, Mehmet Kaya 4,864, Ayşe Neşe Gül 4,816, Teoman Gökçe 4,797, Nesibe Özer 4,545, Ahmet Çiçekli 4,499, Hasan Ünal 4,495, Murat Aydın 2,078, Nuh Hüseyin Köse 1,498, Bülent Yüçetürk 1,416, Leyla Köksal 1,406, Aydın Başar 1,338, Hayrettin Türe 1,296". The candidates received the following numbers of votes in administrative jurisdiction: "Halil Koç 736, Ahmet Berberoğlu 735, Mahmut Şen 713, Cafer Ergen 706, Mehmet Gökpinar 695, Saadetin Kocabaş 692, Hasan Odabaşı 673, Gönül Sayın 655, Ali Bilen 651, Devrim Egemen Durmuş 626"; see Anadolu Ajansı (AA), [in Turkish], HSYK seçim sonuçları açıklandı [HSYK election results announced], October 12, 2014, at <https://www.aa.com.tr/tr/turkiye/hsyk-secim-sonuclari-aciklandi/111683>.

138 Sözcü, [in Turkish], HSYK seçimlerinde fişleme iddiası [Blacklisting claims in the HSYK election], 28 July, 2014, at <https://www.sozcu.com.tr/2014/gundem/hsyk-secimlerinde-fisleme-iddiasi-566158/>

139 HFR Report, supra note, p. 12.

140 European Network of Councils for the Judiciary (ENCJ), ENCJ votes to suspend the Turkish High Council for Judges and Prosecutors, December 8, 2016, at <https://www.encj.eu/index.php/node/449>

No. 6572 dated December 2, 2014, which included disciplinary amnesty for members of the judiciary covering the 2005-2013 period, was enacted by lawmakers of the AKP.¹⁴¹ The disciplinary misconduct of about 1,500 judges and prosecutors was pardoned under this law as had been promised by the government as part of its judicial election promises.¹⁴² The salary increase promised by the justice minister was also realized in this connection.¹⁴³ Just after the judicial election, Law No. 6572 was adopted, on December 12, 2014, which increased the number of chambers and members in the Supreme Court of Appeals and the Council of State.¹⁴⁴



Judges and prosecutors stand up to welcome President Erdoğan

4.2. The functioning of the HSYK following the 2014 judicial election

The newly formed HSYK dominated by pro-government members swiftly carried out the appointments to the supreme courts. On December 15, 2014 a total of 144 new judges were appointed to the Supreme Court of Appeals and an additional 33 to the Council of State.¹⁴⁵ Supreme Court of Appeals President Ali Alkan strongly protested against this law as an undue interference in the functioning of the high court.¹⁴⁶ With these new appointments, the government was able to place further supreme court judges in positions of power to firmly establish its control of the supreme courts as well.¹⁴⁷ It must be noted that the government passed the law which allocated new judicial posts in the supreme courts only after it had secured the design of the HSYK in its favor.

The creation of “special high criminal courts” by the HSYK on February 17, 2015¹⁴⁸ was also instrumental in that it followed a similar but less visible

141 Law No. 6572 dated 02/12/2014; Official Gazette (OG) dated December 12, 2014 numbered 29203, at <http://www.resmigazete.gov.tr/eskiler/2014/12/20141212M1.pdf>

142 See PPJ Report on Non-Independence and Non-Impartiality, supra note, para 18.

143 See PPJ Report on Non-Independence and Non-Impartiality, supra note, para 19.

144 Law No. 6572 dated 02/12/2014; Official Gazette (OG) dated December 12, 2014 numbered 29203, at <http://www.resmigazete.gov.tr/eskiler/2014/12/20141212M1.pdf>

145 Hakimler ve Savcılar Yüksek Kurulu (HSYK), [in Turkish], Yargıtay ve Danıştay Üyeliği Mazbata Töreni [Supreme Court of Appeals and Council of State Certificate of Election Ceremony], December 23, 2014, https://www.hsk.gov.tr/DuyuruOku/607_yargitay-ve-danistay-uyeligi-mazbata-toreni.aspx

146 Oda TV, [in Turkish], Yargıtay Başkanı Ali Alkan, hükümetin yargı paketine eleştiride bulundu [Supreme Court of Appeals President Ali Alkan criticizes the government's judicial package], November 24, 2014, at <https://odatv.com/yargitay-akpye-kilic-cekti--2411141200.html>

147 HRF Report, supra note, p. 13.

148 HSYK Decision No. 224 dated 12/02/2015, at <https://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>

pattern to the establishment of the SCHs as part of the government's political agenda of fighting against the "parallel state." Despite all the criticism of the special high criminal courts, which had earlier been abolished (by Law No. 6352 of July 2, 2012 and Law No. 6526 of February 21, 2014) as they had not offered a fair trial and contravened the principle of natural justice, several high criminal courts across the country were reassigned to hear "organized and terror crimes" by the HSYK.¹⁴⁹ It is a paradox and raises serious questions that some of the high criminal courts were assigned as "special high criminal courts" after the same government had abolished similar special courts just a few years earlier. The new chief judges and members of the judiciary were appointed to these special high criminal courts by the HSYK under the justification of 'specialization.'¹⁵⁰

A selective appointment process similar to those of the criminal peace judgeships took place for appointing the judges and prosecutors to these newly reassigned courts. As demonstrated above, the criminal peace judgeships were specifically created to cover the pre-trial stages of the prosecutions involving perceived members of the Gülen movement. As the cases progressed, the government considered it necessary to control the trial stages in these cases,

too. Instead of leaving it to the general authority of high criminal courts across the country, some high criminal courts were thus authorized by the government-controlled HSYK to deal with such cases.¹⁵¹ It is obvious that all the cases related to perceived members of the Gülen movement are "terror-related cases" and that these courts were also designed as part of the government's fight against the movement.

Following the judicial election in October 2014, the candidates who lost the election were assigned to other provinces before the end of their tenure without their having requested it on November 27, 2014. For example Judge Ayşe Neşe Gül, an independent candidate who received 4,816 votes and had been working in Ankara for less than a year, was reassigned to Edirne without her request or consent.¹⁵²

Kemal Karanfil, a criminal judge of the peace in Eskişehir province, who referred a case to the Constitutional Court because he refused to accept that a Criminal Peace Judgeship was an independent and impartial tribunal established by law, was appointed to Zonguldak province on January 15, 2015 just six months after his instatement in office.¹⁵³

On June 12, 2015 HSYK General

149 HRF Report, supra note, p. 13.

150 HSYK Decision No. 224 dated 12/02/2015, at <http://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>

151 Sözcü, [in Turkish], Yeni 'özel yetkili' mahkemeler geldi [New 'specially authorized' courts arrive], February 17, 2015, at <http://www.sozcu.com.tr/2015/gundem/yeni-ozel-yetkili-mahkemeler-geldi-746185/>

152 See PPJ Report on Non-Independence, supra note, para 39.

153 See PPJ Report on Non-Independence, supra note, para 44.

Secretary Bilgin Başaran, in a meeting organized by the pro-government YBP, depicted judges Mustafa Başer and Metin Özçelik, who were arrested because they had released police officers involved in the December 2013 corruption investigations in May 2015 as “kamikaze judges.”¹⁵⁴ Başaran further stated that the HSYK would support members of the judiciary carrying out investigations into the “parallel structure” and warned that in the event of another “kamikaze incident,” what was required would be done exactly the same way, hinting the further arrest and prosecution of judges issuing release decisions. As regards the suspension of the same judges by the HSYK, Erdoğan had stated that “the meeting initiated by the HSYK is an overdue meeting” while praising the HSYK but nevertheless finding the move belated.¹⁵⁵ In response to the president’s criticism, HSYK 2nd Chamber President Mehmet Yılmaz offered his apologies to the public because “they were late to respond to

this due to the weekend.”¹⁵⁶

On July 14, 2015 the HSYK suspended 49 judges and prosecutors¹⁵⁷ who had their signatures on investigations relating to the Iranian-supported Selam-Tevhid Kudüs Ordusu Terror Organization¹⁵⁸ in which MİT chief Hakan Fidan was also implicated. Selam-Tevhid, listed as a terrorist organization by Turkey, is an extension of the Islamic Revolutionary Guard Corps (IRGC) Quds Force. The investigation exposed Erdoğan’s secret ties to IRGC generals and revealed how MİT, run by pro-Iranian Fidan, worked with the Iranian regime.¹⁵⁹ Many members of the police force and the judiciary have been jailed for running this investigation.

Ankara 7th High Criminal Court judges İsmail Bulun and Numan Kılınç, who acquitted the suspects in a case regarding the illegal wiretapping of the prime minister’s office, were removed from their posts shortly after their decision by an HSYK decree

154 Haberler.com, [in Turkish], HSYK Genel Sekreteri’nin Yargıyı Tehdit Eden Açıklamalarına Suç Duyurusu [Criminal complaint for the HSYK secretary-general’s statements Threatening the Judiciary], June 20, 2015, at <https://www.haberler.com/hsyk-genel-sekreteri-nin-yargiyi-tehdit-eden-7434688-haberi/>

155 Sabah, [in Turkish], Erdoğan: HSYK geç kaldı [Erdoğan: HSYK is overdue], April 27, 2015, at <https://www.sabah.com.tr/gundem/2015/04/27/erdogan-hsyk-gec-kaldi>

156 T24, [in Turkish] HSYK 2. Daire Başkanı: Türk yargısı erozyona uğradı, bütün olup bitenden mahcup oldum ve özür diledim! [HSYK 2nd Chamber president: The Turkish judiciary is exposed to erosion, I am embarrassed by all the things that happened and apologize], July 21, 2015, at <https://t24.com.tr/haber/hsyk-2-daire-baskani-erdogan-biz-toplantidayken-konustu-turk-yargisi-erozyona-ugradi-ozur-diledim,303598>

157 Sözcü, [in Turkish], Başbuğ’u tutuklayan hakim açığa alındı! [Judge who arrested Başbuğ is suspended], July 14, 2 at <https://www.sozcu.com.tr/2015/gundem/basbuğu-tutuklayan-hakim-acığa-alındı-884826/>; <https://www.haberler.com/acığa-alinan-kadin-hakim-bu-mahkemeleri-ben-7542068-haberi/>

158 Haberler.com, [in Turkish], Selam Tevhid Örgütü Nedir? [What is the Selam Tevhid Organization?], July 28, 2014, at <https://www.haberler.com/selam-tevhid-orgutu-nedir-6313541-haberi/>; Stockholm Center for Freedom (SCF) Former prosecutors, judge overseeing Iran-backed Tevhid-Selam network detained, February 18, 2017, at <https://stockholmcf.org/former-prosecutors-judge-overseeing-iran-backed-tevhid-selam-network-detained/>

159 Nordic Monitor, Erdogan punished investigators who probed 25 IRGC Quds Force operatives in Turkey, by Abdullah Bozkurt, September 12, 2019, at <https://www.nordicmonitor.com/2019/09/erdogan-punished-investigators-who-probed-irgc-qods-force-in-turkey/>

dated July 25, 2015.¹⁶⁰

Nilgün Güldalı, a judge at the Bakırköy 2nd High Criminal Court who voted for the release of arrested judges Başer and Özçelik on July 24, 2015 -- the judges arrested because they had issued release decisions for police officers involved in the December 2013 corruption investigations -- was demoted to a labor court just one day later.¹⁶¹

Chief Judge of the İstanbul 10th Administrative Court Rabia Başer and member judge Ali Kurt, who stayed the execution of the government-supported Gezi Park and Taksim Square projects, were appointed to different courts and different cities following their decision before the end of their term.¹⁶² The pro-government Sabah daily on July 26, 2015 reported: "Judges who take a firm stand against the parallel structure are appointed as members of the high criminal courts, whereas ambivalent judges who are indecisive about the parallel structure are demoted to family courts or courts of first instance."¹⁶³

The HSYK summer appointment decree on June 6, 2016 also saw 3,228 judges and prosecutors, almost twice the normal figure, reassigned and

transferred without having requested it and before the end of their term.¹⁶⁴

For instance, the vice president of YARSAV, Judge Murat Aydın, and his wife, Judge Gülay Aydın, were moved from Karşıyaka (İzmir) to Trabzon without their request or consent. Murat Aydın was the judge who applied to the Constitutional Court for the cancellation of Article 299 of the Turkish Penal Code, which regulated insults against the president, on the grounds that it was unconstitutional.

In contrast, Hulusi Pur, a criminal judge of the peace who released pro-government businessmen detained in the December 2013 corruption investigations, was rewarded and appointed as the chief of an İstanbul high criminal court.¹⁶⁵

On June 14, 2016 YBP and HSYK member Turgay Ateş, in explaining the HSYK's moves at a dinner during Ramadan, stated:

"We have seen that the judiciary cannot arise from the place to which it has fallen without cleansing the said structure [the so-called 'parallel structure'] from the profession. The priority of our HSYK is to fulfil this objective with the support of the Judicial Union

160 See PPJ Report on Non-Independence, supra note, para 45.

161 See PPJ Report on Non-Independence, supra note, para 47.

162 See PPJ Report on Non-Independence, supra note, para 50.

163 T24, [in Turkish], Sabah: Paralel'le mücadelede kararsız hakimlerin yetkileri alındı! [Sabah: Judges indecisive in fighting the parallel state have been stripped of their authority], July 26, 2015, at <http://t24.com.tr/haber/sabah-paralelle-mucadelede-kararsiz-hakimlerin-yetkileri-alindi,304066>

164 See PPJ Report on Non-Independence, supra note, para 42.

165 Gazete Duvar, [in Turkish], 3746 hakim ve savcının görev yeri değişti, [3746 judges and prosecutors were reshuffled] June 6, 2016, at <https://www.gazeteduvar.com.tr/gundem/2016/06/06/3746-hakim-ve-savcinin-gorev-yeri-degisti/>

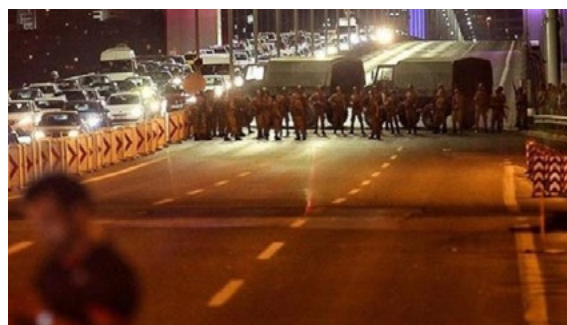
Association. The HSYK indeed has various procedures at hand to achieve this goal. These procedures can only work within the framework of the legislation. This process is taking too long. When the State Supervisory Council asked the HSYK to combat the parallel structure, I personally and some other members submitted that we need legislation to carry out serious activities in order to combat this structure within the framework of this legislation. Without the existence of this new legislation, we will of course combat the parallel structure with the procedures at hand. God knows how long it will take to accomplish the result. But we will continue working with the same determination with a view to fulfilling our duties to the end.”¹⁶⁶

This statement demonstrates that State Supervisory Council, an executive body that is part of the office of the presidency, asked the HSYK to combat the “parallel structure.” This is an admission of a clear violation of Article 159 (1) of the constitution, which provides that no authority can give instructions to the judiciary. Further, combatting a group of judges and prosecutors cannot be a priority for members of the HSYK, which must be independent and impartial in dealing with members of the judiciary.

Justice Ministry Undersecretary

Yüksel Kocaman also said at the same event: “As the HSYK member has mentioned, we are working together with the Ministry of Justice, the HSYK and the Judicial Union Association. You may criticize us because the process is slow. We are doing our best in terms of fulfilling our promise. It is a long process, which includes enacting legislation and requires Ministry of Justice and HSYK to take some actions.”¹⁶⁷ These statements also show that the YBP, Ministry of Justice and HSYK had been working together to eliminate from the profession a certain group of judges and prosecutors who they viewed as a threat. All these statements reflect the political mindset and determination among members of the HSYK that cannot be reconciled with the independence and impartiality of the judiciary.

4.3. The purge of the judiciary after the July 2016 coup attempt



Istanbul Bosphorus bridge on the night of the coup attempt, July 15, 2016.

166 CNN Türk.com [in Turkish], Hakim ve savcılar iftarda buluştu: ‘Devletin yanındayız’ [Judges and prosecutors meet at iftar: ‘We stand by the state’], December 11, 2018, at <http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz>

167 CNN Türk.com [in Turkish], Hakim ve savcılar iftarda buluştu: ‘Devletin yanındayız’, December 11, 2018, available at <http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz>

The worst was yet to come for an overall purge and persecution of the judiciary in the wake of a July 2016 coup attempt. On the night of July 15, 2016, when the identity of the soldiers and coup plotters who actually participated in the coup attempt had yet to be determined, the HSYK convened to suspend 2,745 judges and prosecutors, including its own members.¹⁶⁸ The HSYK's suspension decision paved the way for the subsequent arrest warrants to be issued by prosecutors for members of the judiciary. It is simply inexplicable how the HSYK and prosecutors gathered sufficient evidence, or any evidence at all, of the involvement of supposedly 2,745 judges and prosecutors in the coup attempt within a matter of hours. There is no doubt that a profiling study had been made in advance by the government as part of preparations for a planned purge of the judiciary in a suitable political setting and that the coup attempt provided this opportunity. None of the subsequent prosecutions has, however, sought to establish any link with the coup attempt, with all the prosecutions merely based on membership in an armed terrorist organization.

In response to the coup attempt, the

Turkish government declared a 90-day state of emergency throughout the entire country, starting on July 21, 2016. The state of emergency was extended seven times and finally lifted on July 18, 2018. Many emergency decree-laws (EDL) were promulgated during this period making permanent legislative changes without any effective judicial review or parliamentary input. As of July 14, 2020, 4,145 judges and prosecutors had been dismissed from office.¹⁶⁹ Among the dismissed and arrested judges were two Constitutional Court judges, 140 Supreme Court of Appeals judges and 48 Council of State judges. The five regular¹⁷⁰ and four reserve members¹⁷¹ of the HSYK who were not pro-government YBP members were placed in pre-trial detention on accusations of involvement in the coup attempt and were later arrested on grounds of suspicion of membership in an armed organization.¹⁷² On August 24, 2016 the HSYK dismissed its own members as well as other members of the judiciary without discussing any specific evidence or conducting individual assessments. The dismissals were carried out in violation of the right of defense, the principle of equality of arms and due process as well as the procedure set up by Law No. 2802.¹⁷³

168 Anadolu Ajansı (AA) Turkey's top judicial board suspends 2,745 judges, July 16, 2016, available at <https://aa.com.tr/en/anadolu-post/turkey-s-top-judicial-board-suspends-2-745-judges/609091>

169 <https://stockholmcf.org/infographic-july-15-2016-blow-to-human-rights/>

170 Members Ahmet Berberoğlu, Mahmut Şen, Şaban Işık, Mustafa Kemal Özçelik and Kerim Tosun

171 Members Salih Sönmez, Ali Eryılmaz, İlker Çetin ve Orhan Gödel

172 Memurlar.net, [in Turkish], FETÖ'cü Yargı Üyeleri Tutuklandı [FETÖ'ist members of the judiciary detained], July 20, 2016, at <https://www.memurlar.net/haber/597508/>

173 For the legal reasoning and the list of the dismissed members of the judiciary in this instance, see HSYK General Assembly Decision No. 2016/426 dated 24/08/2016, at https://www.hsk.gov.tr/DuyuruOku/889_hakimler-ve-savcilar-yuksek-kurulu-genel-kurulunun-24082016-tarihli-ve-2016426-sayili-karari-ile-.aspx

The sweeping dismissals, arrests and prosecutions of members of the judiciary following the coup attempt were used as a means of punishing and silencing dissent in the Turkish judiciary. Sixteen independent candidates who participated in the October 2014 judicial election and eight former HSYK members who received most of the votes in the 2010 judicial election were dismissed and are jailed in solitary confinement.¹⁷⁴ These dismissed and incarcerated members of the judiciary once received the support of 60 to 70 percent of their peers in the October 2010 election. In the October 2014 judicial election, the pro-government YBP candidates received an average of 5,500 votes, whereas the independent candidates garnered an average of 5,000 votes from their peers in the judicial election for general jurisdiction.¹⁷⁵ In the same judicial election, the pro-government YBP candidates received an average of around 700 votes, while the independent candidates obtained an average of around 670 votes from their peers for administrative jurisdiction.

The dismissals in the judiciary took place under Article 3 of EDL No. 667¹⁷⁶ enacted on July 23, 2016 which set

forth that the judges and prosecutors of first, second and third instance courts as well as the Constitutional Court may be permanently discharged by a unilateral decision without any legal investigation or proceeding. The power to dismiss all the judges and prosecutors in the first and second instance courts is entrusted to the General Assembly of the HSYK by virtue of Article 3 of EDL No. 667. The UN High Commissioner for Human Rights also said in March 2018 that such collective dismissals “have been largely arbitrary, and that appropriate procedures were not followed, including respect for the fundamental principle of presumption of innocence, the provisions of specific evidence and individual reasoning of the case, or the ability to present a defense.”¹⁷⁷

As a matter of fact, the judges and prosecutors were detained and arrested in clear violation of Articles 159/9 of the constitution and Article 88/1 of Law No. 2802. Under Turkish law judges and prosecutors can only be arrested if there are circumstances that give rise to strong suspicion that they have committed a crime and have been caught in flagrante

174 See ts_justice's blog, Punishing and Silencing the Opposition in the Turkish Judiciary, January 18, 2017, Table I and 2, at <http://tsjustice.info/wordpress/2017/01/18/punishing-silencing-opposition-turkish-judiciary/>

175 See ts_justice's blog, Punishing and Silencing the Opposition in the Turkish Judiciary, January 18, 2017, Table I and 2, at <http://tsjustice.info/wordpress/2017/01/18/punishing-silencing-opposition-turkish-judiciary/>

176 Emergency Decree Law No. 667 dated 22/07/2016, Official Gazette dated July 23, 2016 numbered 29779, at <http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm>

177 Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East (January – December 2017) March 2018, para 50, at http://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf

delicto (to be caught red handed).¹⁷⁸ It is implausible to accept the coup attempt as evidence of flagrante delicto against the judges and prosecutors as none of them has ever been charged with such involvement. All the members of the judiciary were indeed later arrested on accusations of membership in an armed organization. For this reason the investigatory measures such as arrest, search and detention warrants are completely unlawful and a flagrant violation of Article 88/1 of Law No. 2802 as well as the independence of the judiciary.¹⁷⁹

The European Court of Human Rights (ECtHR) found on two occasions that the national courts' interpretation of flagrante delicto in the pre-trial detention of the members of the judiciary violated Article 5 of the European Convention on Human Rights (ECHR).¹⁸⁰ The Turkish government relied on the Supreme Court of Appeals' judgment of October 10, 2017, which held that a situation of discovery in flagrante delicto arose when a judge was arrested on suspicion of membership in an armed organization.¹⁸¹ According to the Supreme

Court of Appeals, the suspicion of membership in a criminal organization could be sufficient to characterize a case of discovery in flagrante delicto without the need to establish any current factual element or any other indication of an ongoing criminal activity.



The European Court of Human Rights

However, the ECtHR observed that the concept of flagrante delicto requires the discovery of an offense while it is being committed or immediately afterwards.¹⁸² The ECtHR therefore observed that the national courts' extension of the concept of flagrante delicto and their application in domestic law was not only problematic in terms of the principle

¹⁷⁸ Article 88/1 of the Law on Judges and Prosecutors No. 2802 states: "Except for offenses in flagrante delicto, which are subject to the jurisdiction of the assize criminal courts, judges and prosecutors may not be arrested, neither their bodies nor their houses may be searched, nor may they be interrogated, for claims of having committed a crime."

¹⁷⁹ See Platform for Peace and Justice (PPJ) [OPINION] Arrests of Judges and Prosecutors in Turkey and Violation of the Principles of in Flagrante Delicto, June 23, 2017, at <http://www.platformpj.org/arrests-judges-prosecutors-turkey-violation-principle-flagrante-delicto/>

¹⁸⁰ Case of Alparslan Altan v. Turkey, (Application No. 12778/17), Strasbourg, 16 April 2019, European Court of Human Rights, Second Section; at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-192804%22%5D%7D>; Case of Baş v. Turkey, (Application No. 66448/17), Strasbourg, 3 March 2020, European Court of Human Rights, Second Section; at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-201761%22%5D%7D>

¹⁸¹ Alparslan Altan v. Turkey, supra note, para. 96, 109; Case of Baş v. Turkey, supra note, para. 148.

¹⁸² Alparslan Altan v. Turkey, supra note, para. 111; Case of Baş v. Turkey, supra note, para 148.

of legal certainty but also manifestly unreasonable.¹⁸³ The court thus concluded that the decision to place the applicant in pre-trial detention was not “in accordance with a procedure prescribed by law” and that Article 5(1) had been violated on account of the unlawfulness of the applicant’s pre-trial detention.

In addition to the dismissals and prosecutions, the terms of all members of the supreme courts (Supreme Court of Appeals and Council of State) were ended with Law No. 6723 on July 23, 2016.¹⁸⁴ On July 25, 2016, 267 members of the Supreme Court of Appeals and 75 members of the Council of State were re-elected by the HSYK, which had already been redesigned by the government. Twenty-five members were also appointed to the Council of State directly by the president. It follows that within just 10 days of the coup attempt on July 15, 2016, the two supreme courts were completely redesigned and reconstituted, blatantly ignoring the security of tenure and other legal guarantees of the existing members. This is yet further evidence of how the independence of the judiciary has been destroyed and the judicial structure shaped by the government with the aid of its accomplice, the HSYK.

The actions of the executive and HSYK following the coup attempt of July 2016 have been the subject of harsh criticism by intergovernmental bodies and NGOs. ICJ Secretary-General Wilder Tayler¹⁸⁵ stated that “purging the judiciary now endangers the deepest foundations of the separation of powers and the rule of law. An independent judiciary will be critical to ensure a functioning administration of justice for all people in Turkey as the country emerges from the crisis.” Amnesty International also noted that the judiciary, itself decimated by the dismissal or detention of up to a third of Turkey’s judges and prosecutors, remained under extreme political pressure.¹⁸⁶ The International Bar Association’s (IBA) Human Rights Institute (IBAHRI) Co-Chair Retired Ambassador Hans Corell further stated that “this sort of blanket dismissal is in direct conflict with Turkey’s Constitutional protection for judges’ security of tenure and against unfair dismissal.”¹⁸⁷ Bernd Fabritius, co-rapporteur of PACE, referring to the dismissals, also said, “This has seriously disrupted the proper functioning of the judicial system, including through the possible ‘chilling effect’ on new and remaining judges of the sudden dismissal of their colleagues with its

183 Alparslan Altan v. Turkey, supra note, para. 115; Case of Baş v. Turkey, supra note, para 148

184 Law No. 6723 dated July 1, 2016; Official Gazette dated July 23, 2016 numbered 29779, at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2016/07/20160723m2.htm&main=http://www.resmigazete.gov.tr/eskiler/2016/07/20160723m2.htm>

185 International Commission of Jurists (ICJ), Turkey: ICJ condemns purge of judiciary, July 18, 2016, at <https://www.icj.org/turkey-icj-condemns-purge-of-judiciary/>

186 Amnesty International, Turkey 2019, at <https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/>

187 International Bar Association, IBAHRI condemns mass removal of judges following attempted coup in Turkey, July 20, 2016, at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>

adverse consequences for judicial independence.”¹⁸⁸

4.4. The HSYK’s further interference in judicial processes

The HSYK has interfered in judicial processes in many instances since the attempted coup. For instance the Antalya 2nd High Criminal Court released 20 police officers and eight civilians who were accused of membership in the Gülen movement on March 17, 2017 and March 30, 2017, respectively.¹⁸⁹ Immediately after these release decisions, Antalya 2nd High Criminal Court President Yücel Dağdelen was unseated and reassigned to Manisa as an ordinary judge; judge Saim Karakaya was transferred to Siirt, and the two other members, Ayşegül Yıldız Kaya and Ali Emre Sula, were reassigned from Antalya to other provinces on April 6, 2017. Furthermore, upon the objection of the office of the public prosecutor, the Antalya 3rd High Criminal Court presided over by Judge İbrahim Altınkaynak ordered the arrest of the formerly released defendants. Judge Altınkaynak was appointed soon after, on April 8, 2017,

to the newly established Antalya 10th High Criminal Court, which handles organized and terror-related crime. This demonstrates that not only were judges who ruled against the Turkish government punished, but those who ruled in favor were rewarded.

On March 31, 2017 chief judge İbrahim Lorasdağı and judges Barış Cömert and Necla Yeşilyurt of the İstanbul 25th High Criminal Court released 21 journalists who were accused of membership in a terrorist group and aiding and abetting a terrorist organization as part of a case concerning the Gülen movement media network.¹⁹⁰ The judges who handed down the release decisions were suspended on April 3, 2017 and faced disciplinary proceedings.¹⁹¹ The 21 journalists who were released were kept in a prison van until a new detention and arrest order was secured from another court, and they were then sent back to prison without actually having been released. The direct link between the release of these individuals and the suspension of and disciplining of the judges is worrying enough, but the social media threats to the judiciary, which appear to have influenced the events, by pro-government journalists are even more damaging for

188 Parliamentary Assembly of the Council Of Europe, Joint Statement on the availability of domestic remedies for allegations of human rights violations in Turkey, May 24, 2017, at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6660&lang=2&cat=5>

189 See PPJ Report on Non-Independence, supra note, para 90.

190 Daily Sabah, 45 people including judges, prosecutors laid off as part of FETÖ probe, April 3, 2017, at <https://www.dailysabah.com/war-on-terror/2017/04/03/45-people-including-judges-prosecutors-laid-off-as-part-of-feto-probe>

191 See PPJ Report on Non-Independence, supra note, para 80.

any remaining appearance of judicial independence.¹⁹²

Brig. Gen. İsmail Gürgen, who was on leave during the coup attempt in July 2016 and called his garrison and gave clear orders to his military units not to follow any orders from the putschists, was briefly detained and then released on July 18, 2016.¹⁹³ Gürgen was later detained and arrested on July 19, 2016 and then released on April 14, 2017 by the Çanakkale 2nd High Criminal Court by a majority decision. Despite the release order, Gürgen was not released and was rearrested before midnight by another court. The two members of the court who voted in favor of the release were removed by the HSYK and reassigned to other courts. Gürgen was tried by the newly formed high criminal court with the addition of two new members appointed to the court and was sentenced to life in prison. The Supreme Court of Appeals later reversed the decision of the lower court.¹⁹⁴

5. THE JUDICIAL COUNCIL (HSK) AFTER THE 2017 CONSTITUTIONAL AMENDMENTS

5.1. The 2017 constitutional amendments relating to the Judicial Council

Some of the most important provisions of the constitution were amended on April 16, 2017 through Law No. 6771.¹⁹⁵ With respect to the judiciary, the High Council of Judges and Prosecutors (HSYK), as it was named under the old Article 159 of the constitution, was renamed the Council of Judges and Prosecutors (HSK). Though not having a direct legal or technical effect, this change is worth noting as it shows the political and mental background of the constitutional amendment package. The new constitutional provisions dramatically changed the composition of the HSYK. The HSYK was in fact restructured in 2010, not that much earlier, through a constitutional amendment approved in a public referendum with 58 percent of the votes cast.

192 Soon after the release decision, pro-government journalist Cem Küçük shared the following tweets from his @cemkucuk55:¹⁹² “10- If these traitors were not rearrested, some people would pay a heavy price. I am knowingly saying this. Things will get shattered.” (6:39 PM – 31 March 2017), “13- Bekir Bozdağ (Minister of Justice) must urgently convene HSYK this evening and actions must be taken concerning some judges. This is the demand of the nation.” (6:50 PM – 31 March 2017), “Every judge and prosecutor who releases the known persons from FETÖ shall be dismissed. This is the final decision of the STATE. Let everybody know this.” (7:08 PM – 31 March 2017).

193 Sultan Nur Gergen, [in Turkish], 840. Gün [840. Day], November 6, 2018, at <https://medium.com/@sngur-gen87/840-g%C3%BCn-d0fb49e18460>

194 Aynalı Pazar Haber, Darbe Tutuklusu General'e Tahliye Kararı [Release decision for general arrested on coup charges], June 15, 2019. Available at: <https://www.canakkaleaynalipazar.com/darbe-tutuklusu-general-e-tahliye-karari/16016/>

195 Official Gazette, [in Turkish], Law Amending the Constitution of the Republic of Turkey, Law No. 6572 dated February 11, 2017, at <http://www.resmigazete.gov.tr/eskiler/2017/02/20170211-1.htm>; also see Venice Commission, Turkey Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, Opinion No. 875/2017, [Venice Commission Turkey Opinion No. 875/2017], March 13, 2017, at [http://www.venice.coe.int/webforms/documents/default.aspx?pdf_file=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf_file=cdl-ad(2017)005-e)

That amendment was also initiated and fully supported by the AKP government of the time.

The new constitutional provisions were in complete contrast to the amendments passed in the 2010 referendum. The number of members of the Judicial Council was reduced to 13 from 22 (Article 159 of the constitution). The designation of these 13 members were to be as follows: Four members were to be directly selected by the president from among senior judges. Seven members were to be appointed by the parliament. The remaining two members would be the minister of justice and the undersecretary of the Justice Ministry. The constitutional provisions left no space for any self-representation from among the judiciary through a direct election, which was the case under the previous constitutional rules. The reason for this dramatic shift in the designation of the members of the Judicial Council appeared to be the ruling party's belief that it had effective control over the parliament and other institutions that were authorized with the new amendment to nominate members of the HSK (the Supreme Court of Appeals, the Council of State and the Board of Higher Education).

The new constitutional provisions nevertheless deprive the great majority of judges and prosecutors of first instance courts from contributing to the designation of the members of the HSK. This may emanate from the fear that ordinary members of the judiciary are still not considered to be

sufficiently under control. Considering that the president also appoints the minister of justice and the undersecretary, it is clear that six members of the Judicial Council will be designated and appointed directly by the president, who is also a member (and most probably the head of) his/her political party. The method of selection in parliament of the remaining seven members will enable the selection of these members by means of a simple majority vote in the final round. Considering the division of seats in parliament among the political parties, it would be difficult to talk about the independence and impartiality of the judiciary from the executive. The president now has broad and direct authority over the formation and designation of members of the HSK, which will be another bureaucratic tool under the president's control.

The constitutional amendments interestingly terminated the membership of all the existing members of the HSYK whose tenure was due to last until 2018, which gave the president another opportunity to make fresh appointments and oversee new elections in May 2017 (Provisional Article 19 of Law No. 6771). The selection of almost all HSK members is essentially made by the president, either directly by himself by virtue of his office, or through the parliament, in which the governing AKP he chairs constitutes the majority. Therefore, President Erdoğan as the head of the executive directly controls the composition of the HSK, a circumstance that poses an immediate

threat to the independence and impartiality of judges and prosecutors.¹⁹⁶



A number of international institutions have raised concerns over the independence of the judiciary and the separation of powers in connection with the constitutional amendments. According to the Venice Commission:

“... the proposed composition of the CJP [HSK] is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. ... The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the

CJP [HSK] is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice. ...”¹⁹⁷

Human Rights Commissioner of the Council of Europe Nils Muižnieks expressed his concerns on June 7, 2017, saying:

“The new composition of the HSYK does not offer adequate safeguards for the independence of the judiciary and considerably increases the risk of it being subjected to political influence. To avert such risk, European standards foresee that at least half of the members of judicial councils that are in charge of overseeing the professional conduct of judges and prosecutors (including appointments, promotions, transfers, disciplinary measures and dismissals of judges and public prosecutors) should be elected by the judiciary from within the profession.”¹⁹⁸

The Office of the United Nations High Commissioner for Human Rights expressed its concerns in March 2018 in following terms:

“... the new appointment system for

196 HRF Report, supra note, p. 23.

197 Venice Commission Turkey Opinion No. 875/2017, supra note, para. 119;

198 Council of Europe Commissioner for Human Rights, Facebook, June 7, 2017, at <https://www.facebook.com/CommissionerHR/posts/806253422883903>.

the members of the Council of Judges and Prosecutors (formerly High Council of Judges and Prosecutors), introduced through amendments to the Constitution, does not abide by international standards, such as the Basic Principles on the Independence of the Judiciary.’ In particular, under the amended Constitution, the President appoints four members - that is almost a third of the members of the Council of Judges and Prosecutors, - whose regular number has decreased from 22 to 13 as a result of the amendments. Because of the Council’s key role of overseeing the appointment, promotion and dismissal of judges and public prosecutors, the President’s control over it effectively extends to the whole judiciary branch. The United Nations Human Rights Committee has noted that a situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal.”¹⁹⁹

5.2. The composition of the HSK following the 2017 constitutional amendments

Under the new constitutional rules, the HSK is now composed of two chambers and 13 members headed by the minister of justice. Parliament selected seven members from among the candidates proposed by the supreme courts and from among professors or law and practicing attorneys. Five of these seven members are claimed to have connections to and the support of the ruling AKP, and the other two have connections with and support from the ruling party’s ally, the ultranationalist MHP.²⁰⁰ In essence, the selection of the HSK members by the parliament has proven to be a continuation of the political alliance between the AKP and the MHP.²⁰¹ President Erdoğan also directly appointed four members.²⁰²

The composition of the HSK is criticized as being only composed of members with Islamist and nationalist

199 Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January-December 2017, March 2018, para 34, at http://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf

200 Diken, [in Turkish], Yeni Anayasa’nın getirdikleri: Meclis, HSK’nın yedi üyesini seçti [What the new constitution brings forward: Parliament elects seven members of the HSK], May 18, 2017, at <http://www.diken.com.tr/yeni-anayasanin-getirdikleri-meclis-hsknin-yedi-uyesini-secti/>

201 The following members were elected by the parliament: Cafer Ergen (341 votes), Alp Arslan (340 votes), Hamit Kocabey (personal attorney for MHP chair Devlet Bahçeli) (337 votes), Songül Yazar (334 votes), Yaşar Şimşek (333 votes), Ali Cengiz Köseoğlu (333 votes), Mehmet Ademoğlu (331 votes): see Diken [in Turkish] Yeni Anayasa’nın getirdikleri: Meclis, HSK’nın yedi üyesini seçti [What the new constitution brings forward: Parliament elects seven members of the HSK], May 18, 2017, at <http://www.diken.com.tr/yeni-anayasanin-getirdikleri-meclis-hsknin-yedi-uyesini-secti/>

202 Erdoğan directly appointed the following members: former member and deputy HSYK president Mehmet Yılmaz, former member and First Chamber head Halil Koç, Ankara deputy chief prosecutor Hüseyin Şahin and İstanbul deputy chief prosecutor Mehmet Akif Ekinci: see Diken [in Turkish] Referandumun ardından: Erdoğan, HSK üyeliğine dört ismi atadı [After the referendum: Erdoğan appoints four HSYK members], May 19, 2017, at <http://www.diken.com.tr/referandumun-ardindan-erdogan-hsk-uyeligine-dort-ismi-atadi/>

backgrounds, excluding those members with social democrat world-views.²⁰³ As a matter of fact, the HSK composition clearly indicates an open alliance between the Islamist AKP and the nationalist MHP and a less visible alliance with neo-nationalists ('ulusalcılar' in Turkish) in the structure of the judiciary. Neo-nationalist (ultra-left) forces in the state bureaucracy especially in the judiciary and the army have become more instrumental in helping Erdoğan consolidate his power since the 2013 corruption investigations.



Doğu Perinçek

It is widely believed that Doğu Perinçek, a prominent neo-nationalist and chairman of the Homeland (Vatan) Party who was arrested on March 21, 2008 on charges of membership in Ergenekon and released

on March 10, 2014, formed an alliance with Erdoğan.²⁰⁴ Perinçek is a shady political figure who appeared to be a Maoist and supporter of the PKK in the 1980s, promising to fight against Erdoğan, Gül and Gülen upon his release from prison²⁰⁵ and has now metamorphosed into an adamant supporter of the Erdoğan regime.²⁰⁶ Perinçek is also known to have infamously said that “the law is the dog of politics.”²⁰⁷

5.3. The functioning of the HSK after the 2017 constitutional amendments

Since the revelation of the December 2013 corruption investigations, there have been many instances of interference, overt or covert, in the functioning of the Turkish legal system and the Turkish judiciary that may be depicted as the “collapse of the rule of law” in Turkey.²⁰⁸ This section provides further examples of the HSK’s recent interference in the judicial system under the influence of the new executive presidency. In this period, many judges and prosecutors have become subject to arbitrary appointments and reassignments by the HSK because of judicial decisions that are

203 Cumhuriyet, [in Turkish], ‘Yargıda birlik’ lafta kaldı, [‘Unity in judiciary’ in words only] May 11, 2017, at <https://www.cumhuriyet.com.tr/haber/yargida-birlik-lafta-kaldi-738938>

204 Wikipedia, Doğu Perinçek, at https://en.wikipedia.org/wiki/Do%C4%9Fu_Perin%C3%A7ek

205 BBC News Türkçe, Ergenekon davası: Doğu Perinçek de tahliye edildi [Ergenekon trial: Doğu Perinçek is also released], March 10, 2014, at https://www.bbc.com/turkce/haberler/2014/03/140310_perincek_tahliye.shtml

206 Mustafa Akyol, The AKP’s strange bedfellows, Al-Monitor, at <https://www.al-monitor.com/pulse/originals/2016/01/turkey-akp-old-enemies-turning-into-allies.html>

207 Haberturk broadcast, October 27, 2017;

208 See HRF Report, supra note.

not viewed as favorable or expedient for the government. The following provides an indicative set of overt interferences by the HSK.

On March 4, 2018 CHP leader Kemal Kılıçdaroğlu revealed that the HSK²⁰⁹ had on April 6, 2017 sent a booklet published by the Justice Ministry's General Directorate of Criminal Affairs titled "Information Booklet on Terror Investigations" to judges and prosecutors dealing with terror offenses. The booklet includes the following instructions as to how courts should act regarding the judges and prosecutors detained pending trial: "Decisions on release will be made following consultation with the Council of Judges and Prosecutors." This means that no one will be released by the courts in these cases without first obtaining the approval of the HSK. Criticizing this, Taha Akyol, a prominent columnist and lawyer, in the Hürriyet daily posed the following questions to the justice minister and undersecretary:²¹⁰ "Is the HSK an adjudicative organ?²¹¹ Does the HSK have authority to review court decisions? How do you legally explain the fact that

the courts consult an 'administrative' body such as the HSK?! Even the Supreme Court of Appeals does not enjoy such authority!"

With the HSK decree dated July 3, 2017, Aytaç Ballı, chief judge of the Akhisar High Criminal Court, and judge Esra Dokur, who were about to decide on a case involving a May 13, 2014 mining disaster, were transferred to other provinces.²¹² Ballı was reassigned to İzmir province as a regular judge, and Dokur to Aydın province. This may look like a routine reassignment; their transfers were nevertheless decided without any request by them and before the end of their terms. Attorney Can Atalay, a lawyer of the victims' families, and Özgür Özel, a deputy from the opposition CHP, said this was clear interference by the government in the judiciary.²¹³ The mining accident in Soma, which claimed the lives of 301 miners and injured 162 others, was a huge embarrassment for the government as the authorities allegedly allowed the mine to operate at the expense of the safety of its miners.²¹⁴

209 Yeni Çağ [in Turkish], Hani yargı bağımsızdı!! [As if the judiciary is independent], by Fatma Çelik, March 04, 2018, at <https://www.yenicaggazetesi.com.tr/hani-yargi-bagimsizdi-46493yy.htm>

210 Hürriyet [in Turkish] Bu nasıl hukuk? [What kind of law is this?], by Taha Akyol, March 01, 2018, at <https://www.hurriyet.com.tr/yazarlar/taha-akyol/bu-nasil-hukuk-40757089>

211 Hürriyet [in Turkish] Bu nasıl hukuk? [What kind of law is this?], by Taha Akyol, March 01, 2018, at <https://www.hurriyet.com.tr/yazarlar/taha-akyol/bu-nasil-hukuk-40757089>

212 Gazete Duvar [in Turkish], Soma duruşmasına 1 hafta kala kritik değişiklik [Critical change 1 week prior to Soma trial], July 04, 2017, at <https://www.gazeteduvar.com.tr/gundem/2017/07/04/soma-durusmasina-1-hafta-kala-kritik-degisiklik/>

213 Gazete Duvar [in Turkish], Soma duruşmasına 1 hafta kala kritik değişiklik [Critical change 1 week prior to Soma trial], July 04, 2017, at <https://www.gazeteduvar.com.tr/gundem/2017/07/04/soma-durusmasina-1-hafta-kala-kritik-degisiklik/>

214 BBC News, Turkey mine disaster: Raw anger in Soma a year on, by Mark Lowen, May 13, 2015, at <https://www.bbc.co.uk/news/world-europe-32709431>

Leyla Güven, who in the June 24, 2018 election was elected as a member of parliament for Hakkari from the pro-Kurdish Peoples' Democratic Party (HDP) while in prison pending trial, requested her release upon her election. The Hakkari 9th High Criminal Court approved the request and ordered her release on June 29, 2018. However, upon the objection of the prosecutor, Güven was rearrested before actually being freed by the 10th High Criminal Court, which had no prior knowledge of the case file or sufficient time to consider the matter.²¹⁵ It later turned out that the president of the 9th High Criminal Court, who had ordered Güven's release, was removed from the court by the HSK.²¹⁶

On September 14, 2018 the İstanbul 37th High Criminal Court ordered the release of 17 lawyers who are members of the People's Law Office (HHB) and the Contemporary Lawyers Association (ÇHD), which were dissolved by an emergency decree-law. Soon after this release decision, İstanbul 37th High Criminal Court

president Kadir Alpar and judge Serkan Baş were removed from the bench of this court and reassigned to other courts, on September 20, 2018. The lawyers were rearrested following the objections of the office of the prosecutor.²¹⁷

Judge Aydın Başar was transferred from Balıkesir to Zonguldak in 2018 after he had acquitted a defendant accused of insulting the president. Başar was later transferred from Zonguldak to Erzurum, on March 5, 2019, and from Erzurum to Kars on June 1, 2019.²¹⁸ He was later subjected to disciplinary proceedings and sanctioned with a "relocation," the second most serious sanction in judicial disciplinary proceedings after dismissal from the profession by the HSK.²¹⁹ HSK Vice President Mehmet Yılmaz defended the HSK sanction, describing his acquittal as "arbitrary" and saying that "the judge gave the impression that he shared the same worldview as the defendant."²²⁰

With an authorization decree published by the HSK on July, 29, 2019, the

215 Hürriyet, [in Turkish] Cezaevinde vekil seçilen HDP'li Leyla Güven'e tahliye kararı (2) [Release decision for HDP's Leyla Güven, who was elected as an MP while in prison], June 29, 2018, at <https://www.hurriyet.com.tr/cezaevinde-vekil-secilen-hdpli-leyla-guvene-t-40881757>

216 Cumhuriyet, [in Turkish], Tahliye veren başkan değişti [President who issued release decision is changed], December 28, 2018, at <https://www.cumhuriyet.com.tr/haber/tahliye-veren-baskan-degisti-1182740>

217 OdaTV, [in Turkish], Türkiye'nin konuştuğu kararı veren hakimler sürüldü mü? [Have the judges who issued the judgment Turkey is talking about been demoted?], September 20, 2018, at <https://odatv4.com/turkiyenin-konustu-gu-karari-veren-hakimler-suruldu-mu-20091802.html>

218 Notkon, [in Turkish], Muhalif Hakimler yer değiştirildi [Dissident judges are reassigned], June, 01, 2019, at <http://notkon.com/haber/muhalif-hakimler-yer-degi-12845/>

219 Diken, [in Turkish], HSK, cumhurbaşkanına hakaret davasında berate hükmeden hakime ceza verdi [HSK sanctions the judge who issued acquittal in the libel suit against the president], by Kemal Göktaş, March 04, 2019, at <http://www.diken.com.tr/hsk-cumhurbaskanina-hakaret-davasinda-beraat-veren-hakime-ceza-verdi/>

220 T24, [in Turkish], HSK, 'Erdoğan'a hakaret' davasında beraat veren hakime cezayı savundu [HSK defends the sanction imposed on the judge who issued acquittal in the libel suit against Erdoğan], March 07, 2019, at <https://t24.com.tr/haber/karara-degil-gerekceye-ceza-hsk-baskan-vekili-aydin-basar-a-ceza-verilmesini-savundu.811191>

HSK reassigned the panel of judges from the İstanbul 30th High Criminal Court hearing the Gezi protest case in which philanthropist Osman Kavala was also being tried.²²¹ The HSK decided that the İstanbul 30th High Criminal Court would work with two panels of judges and reassigned Judge Mahmut Başbuğ, who had voted in favor of releasing Kavala, and the other judges to the second panel. More interestingly, the HSK further decided in the same decree that Case No. 2019/74 and 2019/313 (Gezi protest cases) and other cases that might come up in connection with these files would be tried by the first panel of judges and all the other files by the second panel.²²² The HSK clearly intervened in the distribution of case files, first by changing the composition of the panel of judges and then by assigning specific cases to a specific panel of judges in violation of the principle of natural justice as well as the independence of the judiciary.

Lt. Gen. Metin İyidil had been sentenced to aggravated life imprisonment by the Ankara 2nd High Criminal Court, where he was tried

on coup-related charges.²²³ He was later released pending trial after the 20th Criminal Chamber of the Ankara Regional Appeals Court overturned the conviction and acquitted him of the charges. Following İyidil's release, Erdoğan criticized the acquittal, stating:

"This has been a very upsetting step for our judiciary, and the interesting thing here is of course we had given them instructions [referring to the judges]. The severity of the situation is that the persons who issued the acquittal decision are 'FETOists.' It also shows what kind of concoctions can be behind this. Justice is always served sooner or later. Think about it, they dare acquit a person who was given life imprisonment. How come a court could take such a step? It is incomprehensible. Thankfully, our Ministry of Justice and prosecutors took the necessary steps and apprehended him in an operation, and he will start to serve his sentence again. As you know he is now in prison."²²⁴

The chief prosecutor of the Ankara Court of Appeals objected to the

221 Ahval, [in Turkish], Osman Kavala'nın tahliyesini istedi, HSK müdahale etti, davadan alındı [He voted in favor of releasing Osman Kavala, HSK intervened, he was removed from the case], July 31, 2019, at <https://ahvalnews.com/tr/gezi-davasi/osman-kavalanin-tahliyesini-istedi-hsk-mudahale-etti-davadan-alindi>; Cumhuriyet, [in Turkish], Gezi heyeti dağıtıldı [Gezi panel is dispersed], July 30, 2019, at <https://www.cumhuriyet.com.tr/haber/gezi-heyeti-dagitildi-1512297>

222 Ahval [in Turkish] Osman Kavala'nın tahliyesi istedi, HSK müdahale etti, davadan alındı [He voted in favor of releasing Osman Kavala, HSK intervened, he was removed from the case], July 31, 2019, at <https://ahvalnews.com/tr/gezi-davasi/osman-kavalanin-tahliyesini-istedi-hsk-mudahale-etti-davadan-alindi>, Cumhuriyet, [in Turkish], Gezi heyeti dağıtıldı [Gezi panel is reshuffled], July 30, 2019, at <https://www.cumhuriyet.com.tr/haber/gezi-heyeti-dagitildi-1512297>

223 Haberler.com, [in Turkish], Cumhurbaşkanı Erdoğan, eski Korgeneral Metin İyidil'in tahliye edilme kararına tepki gösterdi [President Erdoğan reacts to release decision of former Lt. Gen. Metin İyidil], January 01, 2020, at <https://www.haberler.com/cumhurbaskani-erdogan-eski-korgeneral-metin-12831515-haber/>

224 Haberler.com, [in Turkish], Cumhurbaşkanı Erdoğan, eski Korgeneral Metin İyidil'in tahliye edilme kararına tepki gösterdi [President Erdoğan reacts to release decision of former Lt. Gen. Metin İyidil], January 19, 2020, at <https://www.haberler.com/cumhurbaskani-erdogan-eski-korgeneral-metin-12831515-haber/>

acquittal, and the court's 21st Criminal Chamber examined the motion of the prosecution and issued an arrest warrant based on the nature of the offense and the existence of a flight risk (clichéd reasoning).²²⁵ Gen. İyidil was put under arrest and sent back to prison again. Furthermore, the HSK hurriedly opened an investigation into the panel of judges of the 20th Criminal Chamber who had acquitted and released İyidil. The HSK also reassigned the president and judges of the 20th Criminal Chamber to other positions and appointed new judges to the chamber.²²⁶ A group of 64 bar associations published a joint press release strongly criticizing the president and the HSK, accusing them of interference in the judicial guarantees of members of the judiciary and violation of the presumption of innocence.²²⁷

6. CONCLUSION

The Judicial Council occupies a critical position in the Turkish judicial architecture and is one of the most contentious issues in the political debate. As the Turkish government is a centralist administrative body with the concentration of all powers in the

central government, so is the Turkish judiciary, which is mostly controlled and managed by the HSK. This centralist nature of the HSK with significant powers over all members of the judiciary makes it all the more powerful in the functioning of the judicial system. The HSK is key to securing the independence and impartiality of the judiciary but may be turned into a tool to control the entire judiciary.

Prior to the changes made in its October 2010 formation, the HSYK was often portrayed by the ruling AKP and its allies as an “oligarchy” representing the “old judiciary” with its predominantly secularist members. Partly this perception of the “old judiciary” but more importantly the AKP government's desire to control the judiciary to further its Islamist-nationalist agenda and to entrench its autocratic rule were influential in the change in the composition of the 2010 HSYK.

The de facto alliance formed in the HSYK supported by the AKP government was shattered with the December 2013 corruption investigations into the government. Taking full control of the HSYK and the judiciary became the main goal of Erdoğan's government to avert the

225 Haberler.com, [in Turkish], Cumhurbaşkanı Erdoğan, eski Korgeneral Metin İyidil'in tahliye edilme kararına tepki gösterdi [President Erdoğan reacts to release decision of former Lt. Gen. Metin İyidil], January 19, 2020, at <https://www.haberler.com/cumhurbaskani-erdogan-eski-korgeneral-metin-12831515-haber/>

226 Milliyet, [in Turkish], Son dakika! HSK Metin İyidil'e beraat kararı veren hakimleri görevden aldı [Last minute! HSK removes the judges who acquitted Metin İyidil], January 16, 2020, at <https://www.milliyet.com.tr/gundem/son-dakika-hsk-metin-iyidile-beraat-karari-veren-hakimleri-gorevden-aldi-6124042>

227 Adana Barosu, [in Turkish], Barolardan Yargıya Müdahaleye ve HSK'ya Ortak Açıklama [Joint statement from bar associations on the intervention in the judiciary and the HSK], January 23, 2020, at <https://adanabarosu.org.tr/barodan-haberler/barolardan-yargiya-mudahaleye-ve-hsk-ya-ortak-aciklama-hakim-savci-teminati-ile-masuniyet-karinesine-uyulmali-ihlaller-sonlandirilmalı>

danger posed by the corruption investigations. The HSYK reshuffling in January 2014, the change in the HSYK law in February 2014, the HSYK appointment decrees and the creation of the SCHs in the summer of 2014 have all greatly damaged the independence and impartiality of the judiciary.

The October 2014 judicial election was heavily influenced by the Justice Ministry through the Platform for Judicial Unity (YBP). The circumstances of this election and its results accelerated the end of the separation of powers and judicial independence in Turkey. Despite the rhetoric of being representative of all worldviews, the new HSYK following the 2014 judicial election was ultimately controlled and dominated by the government. The HSYK had been turned into a political mechanism of the government's "war" against the members of the Gülen movement, but it has eventually become the AKP government's stronghold against all other opposition groups.

An overall purge and persecution of the judiciary took place in the wake of the July 15, 2016 coup attempt. On the night of the coup attempt, the HSYK quickly suspended 2,745 judges and prosecutors including its own members without due process of law. This suspension also paved the way for subsequent arrests and dismissals of the members of the judiciary.²²⁸ The sweeping dismissals, arrests and prosecutions of the judiciary following the coup attempt have been used

as a means to punish and silence dissent in the Turkish judiciary.

The 2017 constitutional amendments have dramatically changed the composition of the HSK, in complete contrast to the 2010 amendments. The appointment of almost all members of the HSK is basically made by the president, either directly or through his party's majority in parliament. Therefore, President Erdoğan directly controls the composition of the HSK, which constitutes a major obstacle to the independence and impartiality of the judiciary.

Since the emergence of the December 2013 corruption probes, the government's interference in the judiciary and in its functioning through the HSYK (now HSK) has become an institutional reality and the new normal in Turkey. The HSK has been in full cooperation with the government's political agenda in a manner that has ended the separation of powers and the independence and impartiality of the judiciary in Turkey. Many judges and prosecutors have faced arbitrary appointment by the HSK simply because of judicial decisions that are not viewed as favorable or expedient for the government.

The Turkish judiciary is out of order, dysfunctional and in disarray. It can only be fixed through significant changes in domestic politics or by way of intervention by a powerful international legal mechanism. The social, economic and financial indicators have been ringing the alarm bells for

228 Turkey Purge, Turkey's post-coup crackdown, <https://turkeypurge.com/>

quite some time, somehow weakening the strong position of Erdoğan and his governments. However, the current and prospective political and social actors within Turkey have yet to present meaningful alternatives to Erdoğan and his power circles.

The only viable option for reviving the rule of law and an independent judiciary in Turkey may potentially come from the actors of international law, including the European Court of Human Rights (ECtHR) and various United Nations bodies. The UN Human Rights Council and various working groups have in fact adopted a robust approach to the cases emanating from Turkey. They have

strongly spelled out human rights violations in a great number of cases without hesitation. The ECtHR has nevertheless been reluctant to embrace judicial activism in the cases originating from Turkey and is hiding behind the excuse of non-exhaustion of domestic remedies.

As this report, albeit not comprehensive in all violations of the independence of the judiciary, has clearly demonstrated, the Turkey's Judicial Council and the Turkish judiciary are not independent. It is incumbent on the ECtHR to confirm this reality and move on to considering the substance of many individual applications from Turkey awaiting its mercy.