


JUDICIAL INDEPENDENCE NO MORE

THE STEP-BY-STEP DESTRUCTION OF THE RULE OF LAW IN TURKEY



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Judicial independence in Turkey has been dying for a long time, but it was annihilated after the July 15, 2016 coup attempt. A comprehensive portrait of how the country, once a beacon of democratic hope for the Middle East, lost its rule of law requires revisiting the corruption probe of December 2013. This probe implicated then Prime Minister Erdoğan's family and cabinet members; the evidence clearly revealed a scandal involving bribery, smuggling, and violations of UN sanctions against Iran. Instead of allowing the investigation to proceed, Erdoğan fought back, changing the state structure, especially law enforcement and the judiciary, to avoid prosecution.

Erdoğan has taken many steps to obliterate the rule of law and separation of powers, which are the backbone of any healthy democracy. He has done the most damage to the judiciary. Any judge or prosecutor assigned to a case pitting the government against any opposition groups, but especially against the Hizmet Movement, has faced overwhelming pressure from the executive branch to ignore the rule of law and side with the government, regardless of the evidence. Any judge or prosecutor siding with the opposition groups has been dismissed, and many have been arrested and charged with being members of a terror organization, the so-called FETO, a name constructed after US-based cleric Fethullah Gülen.

This meddling by the government has impacted all levels of the judiciary, from first level judges and public prosecutors to military judges, and from members of the State Council and Supreme Court of Appeal to members of the Supreme Constitutional Court. No judge or prosecutor who has decided in favor of opposition groups, and against government claims, remains unpunished.

This article examines some of the most egregious abuses of power the Turkish president has committed in his brazen efforts to consolidate his authoritarian regime.

Establishing project courts – Penal Courts of Peace

The Turkish government has established new project courts (Pe-

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nal Courts of Peace) just for the investigations and lawsuits against Kurdish and left-wing opposition groups, and especially for those against the Hizmet Movement, which the government blames not just for the coup attempt of July 15, 2016, but for the December 2013 corruption probe. The judges and prosecutors assigned to these new courts are loyal to the government, not the law. Since the Court of Appeals is another Penal Court of Peace, there is a closed-circuit system. Hizmet has become the main target of these courts, for the media outlets and civil society organizations that were affiliated with Hizmet have criticized the government's illiberal policies, as well as its support of groups like ISIS and Al-Nusra. As a result, Hizmet

members have been harassed, arrested, and had their property illegally seized with the help of these decisions.

Restructuring the HSYK (the Supreme Council of Judges and Prosecutors)

After the December 2013 corruption probe, the government placed great importance on electing the members of the HSYK (the Supreme Council of Judges and Prosecutors). The government supported the establishment of a group called Yargıda Birlik Platformu (YBP – Platform for Unity in the Judiciary) before the 2014 HSYK elections. YBP threatened independent and opposition candidates, including those who joined YARSAV, a rival judiciary platform. In the end, the government-backed group won the elections by around 1,000 votes. Independent candidates and YARSAV members have been profiled and almost all of them were discharged and/or arrested after the coup attempt. No evidence has been provided against them.

While independent judges and prosecutors have been targeted and intimidated by the pro-government media and HSYK collaboration, the government has recruited its proponents as judiciary staff. In order to replace more than 4,000 discharged judges, all the interim judges and prosecutors have been assigned to actual duties, regardless of the minimum required duration of service.

The National Security Council and the Red Book

After being elected President, Erdoğan declared the Hizmet Movement a “terrorist organization” in the National Security Policy Document (also known as MGSB or the “Red Book”), which is a classified document discussed by the National Security Council. On May 12, 2015, the President told reporters, “The judiciary will adjudicate per the Red Book from now on.” This meant the courts

would not adjudicate per the Constitution, the laws, and universal norms, but per what is written inside the Red Book, a classified document which is not accessible by or known to the public. It's also not a legal source for law.

About a month after the President's instructions, on June 23, 2015, the Istanbul 5th Penal Court of Peace issued grounds for arrest to be based on the MGSB. On September 8, 2015, the Istanbul Anatolian 3rd Penal Court of Peace cited these grounds in its decision (2015/2983). Several more examples could be given, and they are clear indicators that the judiciary is taking instructions from the executive branch.

Government pressure on the judiciary

The government publicly intervened when two judges released 63 detainees, mostly law enforcement officers who had been involved in investigating the December 2013 corruption probe. Unhappy with the decision, the HSYK started an investigation of these two judges. Nevertheless, President Erdoğan declared on April 26, 2015, that “the HSYK was too late.” The HSYK Chair of the 2nd Office, Mehmet Yılmaz, publicly apologized for being late. During a rally in Gümüşhane province, Prime Minister Ahmet Davutoğlu referred to the adjudications as “coup attempts against the government” and stated that “they will never be allowed to put these decisions into practice.” Because of pressure from the executive branch, the decisions to release the detainees were not put into practice and the two judges were arrested. This is the clearest evidence yet of the executive branch intervening in the judiciary (Ref: Venice Commission Declaration on Interference with judicial independence in Turkey, adopted on June 20, 2015).

On May 12, 2015, the HSYK dismissed four public prosecutors and a judge. These persons were executing the December 2013 cor-

ruption investigation. Then-Prime Minister Ahmet Davutoğlu stated, “We have returned (the corruption) case to its owners,” referring to the dismissed prosecutors and judge. This statement shows that the dismissal was not decided by HSYK, but by the Prime Ministry.

On May 29, 2015, Can Dündar, Editor-in-Chief of the government-opposed daily *Cumhuriyet*, reported about an event on January 19, 2014, when MIT (Turkish intelligence agency) trucks were stopped trying to transport weapons to opposition groups, including ISIS, in Syria. The government claimed these trucks were carrying humanitarian aid to Turkomans, but the *Cumhuriyet* report showed evidence of weapons inside the trucks.

Following this report, on May 31, 2015, President Erdoğan declared during a live broadcast on state TV channel TRT-1 that:

These slanders against the intelligence agency, these illegal operations, are sort of acts of espionage. This newspaper is also part of this espionage. They give some numbers; what is the source of these numbers? From whom did you get these numbers? From the “parallel state.” I gave instructions to my lawyer and opened a lawsuit. This is a perception management operation on behalf of certain people. The person who wrote this report, I guess, will heavily pay the price; I will not let him away.

On November 26, 2015, Can Dündar and Erdem Gül, Ankara representative of *Cumhuriyet*, were arrested on the aforementioned accusations (espionage and supporting a terrorist organization/parallel state). No evidence was provided, but Can Dündar and Erdem Gül were detained for 92 days and were released by a decision of

the Supreme Court based on freedom of speech, personal freedom, and the right of security. After their release, the President declared:

This incident has nothing to do with freedom of speech. This is an affair of espionage. For me, media cannot have unlimited freedom... I don't abide by the decision. I don't respect it either. This is a decision of release... These steps taken are not the correct steps.

The lower court that had originally ruled against Dündar and Gül acted on the President's advice and overruled the Supreme Court. They sentenced the journalists to five years in prison.

The Supreme Constitutional Court (AYM) has also been targeted by the President and pro-government media over the incident with the MIT trucks. According to a *Cumhuriyet* report dated April 26, 2016, President Erdoğan had a meeting with AYM members concerning their decision on Can Dündar and Erdem Gül. He rebuked them, saying, “Your decision is wrong. Because that matter (the report on MIT trucks) is a national security matter. We were expecting that you would decide by considering our sensitivities.”

Supreme Court, seized

Dr. Alparslan Altan and Dr. Erdal Tezcan were two members of the Supreme Court who voted that the recently established Penal Courts of Peace were against the Constitution. On August 4, 2016, they were discharged based on Statutory Decree No.667, which was issued during the early days of the State of Emergency established after the coup attempt. The decision was not based on solid evidence but on the opinions of other members and the social circle of the two members. Considering that the Supreme Court discharged its own members based on an unlaw-

ful Statutory Decree, and with no solid evidence, one can conclude that the Supreme Court has lost its independence. From now on, applications to it will be ineffective and a waste of time.

The judiciary, seized

Professor of Constitutional Law Ergun Ozbudun spoke at the conference on the Rule of Law held by the Freedoms Research Association in Istanbul on October 15, 2015. In his talk, he stated:

In recent years, the biggest wounds in our democracy are in the judiciary system, judicial independence, and rule of law... The triggering event for regression and deterioration is the December 2013 corruption investigation. A series of laws intended to cover it up has eliminated judicial independence. The first step was the change of laws on law enforcement. Then, the well-known HSYK Law, followed by the law establishing the Penal Courts of Peace, which, I believe, caused the greatest wound... Finally, laws and regulations changing the structure of higher courts in favor of the executive power filled those courts with government loyalists... the seizure of judicial organs or the creation of a dependent judiciary has been successful to a great extent... The duty of the judiciary is not to work in coherence with the executive and legislative powers but to check them...

These comments can be viewed as a summation of what has happened to the Turkish judicial system over the previous 30 months.

Democracy, no more

On May 13, 2016, Rıza Türmen, representative from the main opposi-

tion-party CHP and former European Commission on Human Rights (ECHR) judge, wrote an article on the T24 internet portal. He said:

There is a consensus both inside and outside Turkey that the regime in Turkey is not a democracy any more. It is impossible not to see that Turkey is being driven off a cliff as there's no independent judiciary; basic human rights like freedom of media and speech, and right of assembly, are constantly violated; every criticism is suppressed under the pretext of a "parallel structure" or the "fight with terrorism"; there is rampant fear and oppression; people are dying in a civil war where we know, from international experiences and our own, there will not be a winner; the cities are evacuated; the country is gradually becoming introverted and buried in its darkness. The ruling party also sees it. But they have a "cause" which is more important than everything else: To establish a new religious-based authoritarian Turkey dependent on a single man...

After the Coup Attempt

Immediately following the coup attempt, 2,745 judges and prosecutors were detained based on charges of allegedly being a member of a "terrorist organization," the so-called FETO/PDY. All these judges and prosecutors were also simultaneously laid off by HSYK. With three HSYK decrees, judges were discharged without any notification or right to defend themselves. Approximately 5,000 judges and prosecutors, including those from the military judiciary, the Supreme Court of Appeals, State Council, Court of Auditors, Supreme Court

and other administrative courts, have been discharged. Almost all of them have been detained, except those who managed to escape the country.

It was immediately clear the lists of purged judges were prepared long before the coup attempt. They included the name of Bandırma province prosecutor, Ahmet Biçer, who actually died two months before the coup attempt. The HSYK had published a letter of condolence on May 24, 2016. It is understood that the HSYK either forgot to update the list or believed the prosecutor was supporting the coup attempt from beyond the grave.

The names of judges Metin Özçelik and Mustafa Başer were also in the list, but they had already been detained on April 30 and May 1, 2015. As described above, these judges had decided to release journalist Hidayet Karaca, head of a Hizmet-affiliated media group, and the police officers in charge of the December 2013 corruption investigation.

Public prosecutors Süleyman Bağrıyanık, Aziz Takçı, Özcan Şişman, and Yaşar Kavacıklıoğlu were also on the list. These prosecutors, who were involved in the investigation into the MIT trucks allegedly carrying weapons to Syria, had already been laid off by the HSYK on January 15, 2015. It is evident that HSYK had forgotten to remove their names from the list.

There are countless more examples – like judge Kemal Karanfil, who had applied to the Supreme Court for the cancellation of the law establishing Penal Courts of Peace based on their violation of the fair trial principle. It is understood that these citizens, and especially public servants, were profiled for years by MIT, and files were prepared on each democratic and liberal judge, prosecutor, academician, and military or civil bureaucrat. The coup provided the pretext for

dismissing opponents of the government.

The Turkish General Staff reported on its website that the coup attempt started on the evening of July 15, 2016, and was not completely suppressed throughout the country until 4 pm on July 17, 2016. If these lists had not been prepared in advance, the HSYK members should explain how they could identify the names of these judges and prosecutors, as well as private information about them, including their addresses and their spouses, by the morning of July 16, 2016, while the coup attempt was still on-going.

Higher courts, seized

Higher courts have also been captured by the government. All the members of the Supreme Court of Appeals and State Council were discharged by a law ratified by the President on July 23, 2016. Afterwards, 25% of the State Council members were appointed by the President and the rest were selected from among pro-government YBP members. In September 2016, the State Council 5th Office was identified as the court overseeing the cases of the dismissed judges and prosecutors. Thus, there is no impartial or independent court left in compliance with European Commission on Human Rights criteria.

Conclusion

All of Turkey's judiciary organs have been captured through the actions of the executive branch, the HSYK, and the media. More than 4,000 judges and public prosecutors have been detained or discharged in the witch hunt following last summer's attempted coup. In such an environment, it is impossible for any judge or prosecutor, including those on the Supreme Court, to decide in favor of defendants in lawsuits related to the Hizmet Movement or other opposition groups. The independent judiciary is dead in Turkey. ▀