Ek-4:

REPORT ON THE LACK OF INDEPENDCE AND IMPARTIALITY OF JUDICIARY IN TURKEY BASED ON CONCRETE EVIDENCES (ADMINISTRATIVE JUDICIARY)

Introduction

1. This report, mainly focusing on the administrative judicial system has explained the current situation in the Turkish Judiciary based on concrete findings occurred since January 2014. The administrative judiciary has a three-level court system: administrative courts (first instance), regional administrative courts (second instance), and a supreme administrative court (the Council of State). Also, the Constitutional Court, as last instance, resolves constitutional complaints over the allegations of fundamental rights violations. Administrative and regional administrative courts perform under the supervision of the High Council of Judges and Prosecutors (hereinafter "HCJP" or "HSYK"). Therefore, to conclude whether the administrative and regional administrative courts and the judges of these courts are independent and impartial, HSYK and its stand is the most essential element to observe. The HSYK carries out all duties related to judges of those courts as well as judges and prosecutors in general judiciary. From their appointment and assignment to transfer, from promotion to disciplinary and criminal proceedings against judges, and permanently discharge of judges and prosecutors are some of the main authoritative functions of the HSYK. The 3/4 members of the Council of State are appointed by the HSYK while 1/4 of them are appointed directly by the President. The disciplinary proceedings about the members of the Council of State are carried out by the Council of State's own bodies and are concluded. The Constitutional Court members are determined in accordance with the provisions of the Constitution; disciplinary and criminal proceedings about the members, including removal from membership, are also carried out and concluded by the Constitutional Court. In sum, any authority dominating the HSYK can control the judiciary as well.[1]

2. As a fundamental right, every person shall enjoy his/her right to bring any dispute related to her civil rights and obligations before a court as well as those people charged with criminal offenses (Right to access to a court). Not only administrative disputes but also criminal and civil disputes may fall into the jurisdiction of administrative courts (*Konig v. Germany*, *Öztürk v. Germany*). To guarantee the right to a fair trial and the right of access to a court, there should be courts that meet basic requirements of Article 6 of the ECHR. Indispensable aspects of such a right are as follows: Courts must be established previously by law (*Coëme and others v. Belgium - Lavents v. Latvia*), and, must be impartial and independent (*D.N. v. Switzerland - Nikolova v. Bulgaria*, para. 49). An organ that is not impartial and independent, particularly of the Executive, cannot be considered as a court within the meaning of Article 6 of the ECHR even if this organ holds such a name (*Beaumartin v. France - Chevrol v. France*). In considering compliance the right to a fair trial and the right of access to a court, there should be courts that previously established by law and that are independent and impartial. If there is no independent, impartial and pre-established court by

[1] 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, 15th March, 2017).

law, it cannot be said that the right of access to a court is guaranteed. Therefore, it cannot be said that there is an effective remedy that can be exhausted in domestic law. Administrative and regional administrative courts in Turkey are not independent, nor is the Council of State and the Constitutional Court. Therefore, there is no effective domestic remedy in Turkey to protect the right of access to a court since the courts in Turkey do not satisfy the requirements of a "tribunal" in the sense of the ECHR.

3. On the other hand, national authorities within the meaning of Article 13 of the Convention must be independent, in particular of the Executive in order to be considered effective (*Kayasu v. Turkey - Özpınar v. Turkey*). In terms of the admissibility test under Article 13, domestic legal procedure is deemed as ineffective if the organs are not impartial and independent especially of the Executive. Ineffective and inappropriate legal procedures that are far from providing necessary remedies should not necessarily be exhausted within domestic level.

4. In order to conclude that whether the judiciary is independent, a few basic tests should be applied. Among those are the appointment and assignment procedures of judges, tenure of judges, protection of judges against external pressures, and prima facie independence of courts (*Findlay v. The United Kingdom*, para. 73). The ECtHR sees the principle of tenure of judges that they cannot be transferred or dismissed before the end of their term of office as one of the basic elements of the independence under Article 6 of the Convention. According to the Court, the substantial matter is that whether the principle of tenure of judges is respected in practice, alongside with the other principles related to the independence of judiciary (*Campbell and Fell v. The United Kingdom*, para. 80. Also see *Lauko v. Slovakia*, para. 63). As upheld by the Court, dismissal of judges before their pre-determined term of office shall not comply with the principle of the rule of law and the independence of judiciary. As a general principle, judges may be transferred only when they are appointed to a higher court, or with the consent of judges. Judges can only be dismissed or permanently discharged because of a criminal offense or their incompetence in their performance **after** fair proceedings.

5. Every person whose civil rights is violated or who faces accusation has a right of access to a court that is established previously by law, independent, and impartial. These requirements must be guaranteed at every instance of judiciary; at administrative tribunals of first and second instances, at the Council of State and the Constitutional Court trials. As argued below national tribunals no longer satisfy the fundamental features of a "court" in the sense of Article 6 of the ECHR, based on specific facts and concrete evidences. These facts and evidences should be taken into account during the admissibility test of the application including the exhaustion of domestic remedies as well as when considering during the merits of the complaints.

I. FACTS PROVING THAT NEITHER HSYK NOR THE TRIBUNALS OF FIRST AND SECOND INSTANCES ARE INDEPENDENT

6. The HSYK carries out all duties related to member judges and chief judges of all administrative and regional administrative tribunals. From their appointment and assignment to transfer, from promotion to disciplinary and

criminal proceedings against judges, and permanently discharge of judges are some of the main authoritative functions of the HSYK. The HSYK has a supremacy function over the first and second instances' judges in both civil and criminal judiciary as well as administrative judiciary. In terms of HSYK's legal authority, there is no difference between administrative, and civil and criminal judiciary. Any threat to a judge because of his/her judicial capacity is also a threat to judges in administrative judiciary. Therefore, the actions of the HSYK related to judges in both general and administrative judiciary should be taken into account as a whole.

A. The structure of the HSYK and its reconstruction process through the October 13 elections in 2014

7. The structure of the HSYK was changed by the 2010 constitutional amendment, came into effect after the referendum voted on September 12, 2010. Under the amended article 159 of the Constitution, the majority of its members have been elected by first instance tribunals and Court of Cassation's judges, and the Council of State members separately from among themselves for a period of four years. The total number of members is 22 regular and 11 substitute members. 10/22 regular members are elected from among judges and prosecutors of first instance tribunals, three regular members are elected from among members of the Court of Cassation, and two regular members are elected from among members of the Council of State. While four regular members are appointed by the President, one regular member is elected by the plenary session of the Justice Academy. While the Secretary of the Justice Minister is a neutral member, the Minister of Justice assumes the presidency of the HSYK.

8. After the end of the four-year period of first- elected members, the second election was held on 13th of October in 2014. Before the elections, some judges linked to the ruling party and organized by the government established the *Platform for Unity in Judiciary* (hereinafter YBP or YBD). This Platform named and declared some judges and prosecutors as the candidates of the Platform.

9. Just before the elections, *Mahir Ünal* and *Mustafa Şentop*, then - deputy speakers of the ruling party's leadership at the Turkish Parliament told the press that "*they would not recognize the results if the list of the Platform loses the elections*".[2] Justice Minister *Bekir Bozdağ* announced that "*the salary of judges and prosecutors would be increased if the candidates of the Platform win the elections*".

10. The government financed and sponsored the Platform's campaign. In addition to this, all bureaucrats working at the Justice Ministry was forced to actively work in favour of the Platform. They were sent to the cities for meetings under official tasks and they, in reality, campaigned for the Platform. The campaign was covered by official missions and therefore, all expenses of those meetings were provided from the state's budget.

11. On 4th of October, just nine days before the elections, then - Prime Minister *Ahmet Davutoğlu* had the speakers and the candidates of the YBP in his office, and declared his strong support. Following this meeting, the representatives of the YBP announced that "*they would be working in harmony with the government*" and also, "*they would ensure to raise by 1000 Turkish Liras*

[2] www.cumhuriyet.com.tr/.../AKP_demokrasisi___Kazanirsak_mesru__kaybedersek_gayrimesru_.html

salary of judges and prosecutors, they would bring disciplinary forgiveness with legal regulation for judges and prosecutors who received disciplinary punishment", so that the entire disciplinary penalties of about 1,500 judges and prosecutors would be forgiven as a means of inducement to guarantee the results.[3] The YBP also pledged an increase in the number of members of the Court of Cassation and the Council of State alike. Those statements and meetings occurred in front of the public eye.

12. As a result of inducement and pressure of the government, - the YBP got 8/10 seats at the HSYK. Justice Minister *Bekir Bozdağ* expressed his pleasure because of the results on the evening of the elections. Following the elections, the President appointed four members, and the Justice Academy, a state institution elected one member. With the Justice Minister and his Secretary, 15 out of 22 members of the HSYK included pro-government judges who had previously declared to be coherent to the government, or directly appointed by Executive.

13. Following the government's triumph in the HSYK elections, a new Law including a rise in judges' and prosecutors' salary and amnesty for disciplinary record of judges came into effect. Around 1500 judges and prosecutors' discipline records, which were precluding their promotion were completely cleaned through this new law. Among those judges are prosecutor *Ekrem Aydıner*, who closed the December 17&25 graft and probe operations in which four ministers were involved. Another example is Judge *Uğur Kalkan*. While he was working as an associate judge at Tarsus Assize Court and he was the one who issued arrest warrant for four prosecutors and a colonel conducted the weapon-loaded truck operations, also known as trucks of MIT investigation occurred in Adana province on January 19, 2014. After his disciplinary record was cleaned, judge *Uğur Kalkan* was promoted by the HSYK and transferred to Istanbul and was appointed to the Bakırköy 2nd Assize Court. This Court arrested the two judges who ordered the release of 61 police officers who had conducted said probe operations.

14. After disciplinary amnesty, Judges salaries were increased with extra 1.154 Turkish liras, as declared by members of Judicial Union Platform. Through another Law that came into effect on 12 December 2014, the number of justices at the Council of State and the Court of Cassation was increased as previously promised by the YBP and the ruling party.

15. As it is obvious, the pledges that YBP had made needed statutory work of the Parliament and therefore, should be supported by the ruling-party who holds the majority at the Parliament. If the government, based on its majority to pass any law, did not commit those pledges, the YBP could not have openly declared to undertake. It became so apparent that YBP and members of the HSYK have been working as partners of the government since all promises of the YBP became real by the votes of the ruling-party. However, such a cooperation is in clear conflict with the principles of the separation of powers and the rule of law.

16. Since the 2014 elections, the HSYK made tens of thousands of decisions and those 15 members influenced by the government have been voting at the same direction with no or just few exceptions. Members of the Court of

[3] www.memurlar.net/haber/482227//.

Cassation and the Council of State were appointed by 15 HSYK members in unanimous votes of same way like any other decision made by the HSYK.

17. Because of those facts, the YBP, now is an association (YBD), has been considered as a "*government - oriented*" organization in the Council of Europe documents.[4]

18. Pursuant to the Turkish Constitution, the members of the Council of State and the Court of Cassation are elected by the Plenary Session of the HSYK. However, the ruling party drafted a court-packing bill and that bill became law on 23 July 2016. This Law ended the tenure of the Supreme Court justices. Two days after, the Plenary Session of the High Council (HSYK) re-elected 75 members to the Council of State and the President Erdoğan appointed 25 members. The same process worked for the Court of Cassation and the HSYK elected 267 members for this Court. The two re-election processes were completed at one session within a day by the members of the HSYK that dominated by the members who previously promised they would be working in harmony with the government.

19. One of the members of HSYK Turgay Ateş, an YBP-supported member, at a meeting he attended in Malatya Province on 13 June 2016, stated as follows: "*Our main and one mission **as HSYK** is to clear the judiciary from the judges affiliated with the Gülen Movement with the support of the YBD. While the HSYK has some legal tools for that mission, they only work within legal terms and therefore **our fight against them** will need a long time under current legal system. The Presidential State Supervisory Council **asked** the HSYK to **fight** these people and, within this context, I, for one and my colleagues have said that we need a new law that empowers us to sweep the judiciary off these people within a short time. Otherwise, this task cannot be achieved shortly.*"[5] His statements clearly show that the HSYK and its members were asked to fight against some judges by the State Supervisory Council, function under the authority of the President. He admitted that they were given orders by the Executive from which they have to be independent. His words that the HSYK's main and prior mission is **to fight against some judges** proves that the members of the Council have not been impartial in their work.

20. Then - under-secretary of the Justice Ministry Yüksel Kocaman echoed Turgay Ateş's words at the same meeting. He added that "*the Justice Ministry, HSYK, and YBD has been working together, in absolute harmony.*" He told the attendees that "*in order the members of the so called "parallel structure" to be swept, each partner in judiciary and the Ministry has their own agenda. While we are aware of our mistakes, we are trying to do our best and I hope this mission to be accomplished shortly.*"[6] His speech was an obvious evidence that the YBD (formerly YPB) was founded and supported by the government and the HSYK has been performing under the influence of the government.

21. According to the article 159/1 of the Turkish Constitution, the HSYK carries out its duties in compliance with the principles of "the independence of judiciary and the security of tenure of judges. An indispensable element of the independence is that judges shall not be dismissed or discharged

[4] See GRECO "*Evaluation Report - Turkey*", p. 31 (12-16 October 2015).
[5] http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz
[6] http://www.cnnturk.com/turkiye/hakim-ve-savcilar-iftarda-bulustu-devletin-yanindayiz

from cases before the end of their pre-determined term. However, just a few hours after the July 15 coup attempt, five regular members of the HSYK were permanently discharged without any legal disciplinary or criminal action. They were immediately arrested even though the warrant had been ordered by a judge who had no jurisdictional power over the HSYK members. The four substitute members were also discharged and as a result of these discharges, only those members who had been appointed directly or under the influence of the Executive remained at the Plenary Session of the HSYK. In sum, the explanation above proves that the HSYK has not been impartial and independent.

B. Concrete facts showing that tribunals of first and second instances have lost their independence and impartiality

22. Since the beginning of 2014, thousands of judges and prosecutors have been either purged or dismissed from their cases without completing their pre-determined period and without their consent, because of their judicial decisions. Furthermore, some judges were dismissed during the trials because of their judicial capacity. Between 15th July 2016 and 15th March 2017, more than 4000 judges and prosecutors were permanently discharged without respecting their rights to defence, minimum guarantees and due process. Judges in general have no longer been independent for a long time and they have lost their impartiality. Therefore, courts in Turkey do not even have minimum prima face independence and impartiality (*Findlay v. The United Kingdom*, para. 73). Below, you will find some concrete examples.

23. Following the December 17&25 operations, at the Plenary Session of the HSYK held on January 15, 2014, the government reshaped the 1st Chamber of the HSYK and replaced some of the members based on their inclination to politics, which means picked members politically affiliated with the ruling party from other chambers.[7] The 1st Chamber is crucial chamber since it carries out appointment and assignment issues of judges and prosecutors. Once the government got influence over the 1st Chamber, the judges and prosecutors involved in the December 17 and 25 operations were either dismissed or purged. Even though shoe boxes which contained millions of US dollars were found, the government named these operations as a coup attempt against the President Erdoğan and accused the Gülen Movement, what the ruling party called as "parallel state" and its member's operating within the police and judiciary.

24. Following these events, The Code of Criminal Procedures (CCP) was amended and new criminal peace judgeships with limited numbers were established within each jurisdiction so as to accelerate the fight against what Executive called "parallel structure." These criminal peace judgeships (super judges) were regarded as project courts to spread the fight against the Gülen Movement. This amendment came into effect on June 28, 2014. The new law assigned criminal judges of peace for any kind of pre-trial decisions such as search and seizure, arrest, appeal to arrest, custody, detaining orders, seizure of freezing of assets, seizure of any kind of communication, confiscation.[8] Also, any

[7] See Venice Commission, *Turkey - Opinion on Criminal Peace Judgeships, No. 852/2017*, (13 March 2017), para. 49.

[8] See PACE Report on "*The functioning of democratic institutions in Turkey*" (Doc. 14078, paras. 5 and 69, 6 June 2016). This report was approved by the PACE on 22 June 2016 with some amendments (*Resolution 2121(2016*). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22957&lang=en

motion to dismiss or revoke a criminal peace judgeship's order may be submitted to another judgeship instead of a higher court. As an interesting example, in İstanbul province with a population of 18 million, only about ten criminal judges of peace perform. Such a system has been deemed as a dark circle by many lawyers. Therefore, the criminal peace judgeship has been criticized as it is not in conformity with the rule of law, the rule of neutral (legal) judgeship, right to fair trial principles. The criminal peace judges were appointed from among judges closed to the government by the 1st Chamber of the HSYK.

25. The 1st Chamber of HSYK assigned six judges as criminal judge of peace on July 16, 2014 in İstanbul as well as other courts. Mr. Erdoğan at his meeting in Ordu Province on July 20, 2014, stated that "*legal actions will be launched against police and judges conducted the graft operations*."[9] *"You know,* ***the appointments were made to criminal peace judgeships in order to fight "parallel structure"****. The criminal peace judges will conduct and carry out this purge and criminal investigation process. They will begin their mission tomorrow. We are going to watch and see what will happen to those people in the police and the judiciary.*"[10] Certainly, those criminal judges of peace who had been declared as a tool by the Executive could not be expected to be independent and impartial.

26. Criminal peace judges began their work on July 21, 2014. A criminal peace judge issued search and seizure orders for more than 100 police officers the same day over the charges of being members of the "*parallel structure*." What was interesting and suspicious is that that investigation includes thousands of pages of documents, 106 folders, seven hard disk drives, and wire-tapping documents belong to 238 suspects. The same night of July 21, at around 1:30 am, search and seizure orders were begun to be enforced. Tens of police officers were arrested that night and then detained by the magistrates.

Judges that purged or moved before the end of their term of office

27. One of the essential components of an independent judiciary is that whether judges assigned to a particular court have the security of tenure during their pre-determined term of office (*Campbell and Fell v. The United Kingdom*, para. 80 - *Lauko v. Slovakya*, para. 63.)

28. However, following the October 2014 elections, the first purge wave came 11th of November, 2014 and many judges especially those who had run for the HSYK elections were purged. As an example, Judge Ayşe Neşe Gül, who had run for the HSYK and got 4816 votes, almost 40% of total votes, was appointed to Edirne province from Ankara without her request or consent, five years before the end of her term in Ankara.

29. As an unusual and unprecedented action, the HSYK announced another list on 15th January 2015, in the middle of winter and 888 judge and prosecutors were transferred to different cities without their request and consent.

30. With the summer appointment decree dated 12 June 2015, 2665 judges and prosecutors were appointed to different provinces. As a rule, about 1600-1700 judges and prosecutors are appointed with each summer appointment decree, about 900 more judges and prosecutors were appointed to various cities

[9] http://www.internethaber.com/yarginin-yeni-hakimlerinden-ilk-icraat-cemaate-1227131y.htm
[10] http://haber.star.com.tr/politika/basbakan-erdogan-paralel-yapiyla-mucadele-etmeyen-bedelini-agir-oder/haber-915819

without their request and consent with the stated decree. For instance, Judge *Bahaddin Aras* was moved five times in one year.

31. Similar decisions were taken on the dates of the summer appointment decree of 06 June 2016. The duty place of 3228 judges and prosecutors was changed without their request and without waiting for expiration term of office. This number is almost twice of a normal appointment decree. The vice president of YARSAV Judge *Murat Aydın* and his wife Judge *Gülay Aydın* were appointed from Karşıyaka (İzmir) to Trabzon without their request and consent. Murat Aydın was the judge who applied to the Constitutional Court for the cancellation of the law - article 299 of the Turkish Penal Code, insulting the President of the Republic - on the grounds that it was unconstitutional. Whereas *Hulusi Pur* who released *Reza Zarrab*'s collaborator *Abdullah Happani*, the CEO of Halkbank *Süleyman Aslan* and the other four men within the scope of a corruption investigation dated 17 December, 2013 while he was working as a criminal judge of peace, was promoted as a Chief Judge of an Assize Court in Istanbul. CHP deputy *Mahmut Tanal* evaluated the 2016 summer appointment decree as follows: "*Many judges and public prosecutors were transferred without their consent and request before the end of their tenure. Now, judicial decisions are evaluated with grudge and hatred. Judges who will take decisions that are favourable to the government will be rewarded. While the non-governmental judges and prosecutors were dismissed, detained, and jailed, those who released the men of Reza Zerrab were rewarded*."

Judges who have been replaced due to the decisions they have given

32. Judge *Kemal Karanfil* applied to the Constitutional Court for the annulment of the law about criminal peace judgeship on the grounds that these courts were unconstitutional, against the principle of the natural judge and they were not in compliance with independence and impartiality. Although he was appointed to Eskişehir six months before his application to the Constitutional Court, he was appointed to Zonguldak province on 15 January 2015.

33. Judges *İsmail Bulun* and *Numan Kılınç* who returned a verdict of not guilty in a case which is related with bugs founded at Prime Minister's office, they were purged without their consent and request before the end of their tenure with an appointment decree dated 25th of July, 2015. Judge *Fatma Ekinci* who released the defendant named Hasan Palaz, was appointed to another court after her decision.

34. Judges *Hülya Tıraş, Seyhan Aksar, Hasan Çavaç, Bahadır Çoşlu, Yavuz Kökten, Orhan Yalmancı, Deniz Gül, Faruk Kırmacı* are the first criminal judges of peace who were appointed at Ankara Courthouse with the appointment decree dated 16 July , 2014. Between 16 July 2014 - 28 July 2017 only one of them has been able to remain (judge of 8. Criminal Court of Peace). Firstly, Judges *Yavuz Kökten* and *Süleyman Köksaldı* were relieved of their duty because of the fact that they rejected to arrest some police officers. Judge *Orhan Yalmancı* was dismissed from his court because of his refusal to arrest some police officers on 1st of March, 2015. *Hasan Çavaç* who dismissed the motions about Judge *Orhan Yalmancı*'s decision was also relieved of his duty. *Seyhan Aksar* who released cops was relieved of his duty on 09 March, 2015. Judge Hülya Tıraş who released 110 cops who had been under arrest for 110 days was relieved of her duty two weeks after her decision. Judges *Yaşar Sezikli* and *Ramazan Kanmaz* were

relieved of their duty for the same reasons on 23 July, 2015. Judge Osman Doğan who did not arrest 18 cops who were detained within the scope of illegal wiretapping investigation was also relieved of his duty due to the same reasons. Similar practices have been observed in other provinces, especially in İstanbul and İzmir.

35. Associate judge of Bakırköy 7th Assize Court *Nilgün Güldalı* who made her opinion on release about arrested judges Mustafa Başer and Metin Özçelik under the evaluation of arrest on 24 July, 2015, was appointed as a Labour Court judge only **after a day** by the HSYK.

36. Chief Judge of Istanbul 10th Administrative Court *Rabia Başer* and associate judge *Ali Kurt* who repealed Gezi Park & Taksim Square Projects were appointed to different courts and different cities after their decision before the end of their term.

37. Judge *Cemil Gedikli* who arrested the suspects related Corruption Invesatigation dated 17th of December, 2013, appointed to Erzurum than to Kastamonu within a year and a half without his request and consent.

38. Judge of Bakırköy 2nd Criminal Court of First Instance *Osman Burhaneddin Toprak* who admitted the indictment including that the news stating that assassination allegations against Sümeyye Erdoğan were slander was appointed to Konya without his request and consent on 15 October, 2015 before the end of his tenure.

39. Before the general elections dated 1st of November, 2015 some TV channels were arbitrarily removed from the Digiturk Platform and some of these channels named STV and Bugün TV sued against Digiturk at Consumer Court. Judge of 1st Consumer Court of Mersin Province *Mustafa Çolaker* decided in favour of applicant channels. Due to his decision, he appointed to Çorum Province and also, a disciplinary procedure has been started against him.[11]

40. Court of Cassation prosecutor *Mazlum Bozkurt* who gave an opinion towards an approval about the verdict of conviction of defendants colonel Hüseyin Kurtoğlu and other five military officers suspended on 1 December, 2015 by the HSYK.

41. Judge of Ankara Criminal Peace of Judgeship *Süleyman Köksaldı*, who made a disavowal decision about Fetullah Gülen's passport cancellation and spy at TIB news, was appointed as Ankara 21st Labour Court Judgeship, without his request and consent before the end of his term.[12]

42. Pro-government newspaper named Sabah Daily made a news on 26 July 2015 titled "*tuned hesitant judges in*". The content of the news was as follows: "*Judges who takes a firm stand on parallel structure are rewarded. They are appointed as a judge of Assize Court. On contrast with that the judges who are indecisive about parallel structure are going to work as judge of court of first instance.*"[13] These news were guidance of promotion to judges. Judge *Hulusi Pur* is quintessence while he was working as a criminal judge of peace he released six

[11] http://www.baroturk.com/hsyk-begenmedigi-kararlari-veren-hakimleri-cezalandirmaya-devam-ediyor-15115h.htm
[12] http://www.halkinhabercisi.com/suleyman-aslani-birakan-hakime-odul
[13] http://t24.com.tr/haber/sabah-paralelle-mucadelede-kararsiz-hakimlerin-yetkileri-alindi,304066

suspects of 17 December corruption Investigation on 14 February 2014. Than he issued more than a hundred search and seizure warrants for the cops of 17 December corruption investigation. Later he also arrested many of them. After his decisions, he was promoted as a Chief Judge of Istanbul Assize Court.

43. Two judges of Administrative Court who granted a motion for stay of execution about mining license belonging to Pro-Government businessman *Mehmet Cengiz* were appointed to different provinces (*@farukmercan* 28.02.2016 14:06)

Pieces of Concrete evidence which prove that the Judiciary is not independent of the Executive

44. After the investigations towards cops, Prime Minister addressed the public in Gaziantep Province on 7 August 2014 as follows "*We said we'd raid their lairs; did it entered? We will keep on raiding*". It became clear from this statement who the real decision makers in matters of law are. Similarly, after appointing a trustee to a newspaper named ZAMAN, President Erdoğan addressed the public on 4 March 2016 with the same sentences as follows "*We said we'd enter their caves; they were entered, and we will continue*".[14] So it became clear who the real decision making body is.

45. After Mr. Erdogan was elected as President of the Republic of Turkey he addressed that he would declare the Gülen Movement as a terrorist organization in National Security Policy Document (MGSB or Red Book), and a few National Security Council (NSC) meeting, he declared that Gülen Movement was renounced as a terrorist organization by National Security Council and this matter put in National Security Policy Document. On 12 May 2015, while he was on his flight from Belgium to Ankara, his statement was as follows:" *From this day forth, **judiciary will make its decisions in accordance with the Red Book***".[15] It means that, from that day forth, courts will not make their decisions based on Constitution, Statutes and universal norms (Art 138/1 of the Constitution), instead they will make their decisions in reference to a confidential Red Book which is neither publicly accessible nor foreseeable. The Red Book is not a source of law and is not available to members of the public. After President's comments, courts started making decisions based explicitly on the *Red Book*. For instance, Istanbul 5th Criminal Peace Judge when arrested certain people on 23 June 2015 made express references to the Red Book. Istanbul Anadolu 3rd Criminal Peace Judgeship issued arrest warrants for people with decision dated 8 September 2015 (No: 2015/2983), on the grounds that Gülen Movement has been recognized as a terrorist organization by MGSB and by the Council of Ministers. Similar decisions were made at Anadolu 9th Criminal Peace Judgeship dated 7 September 2015 (No: 2015/1291). It is possible to increase these examples. This clearly suggests that judiciary take into account the requests (even illegal requests) of the Executive in performance of its duties.

46. **Ankara** 5th Criminal peace judge who appointed trustees to 18 companies of Koza Group, wrote his decision dated 26 October 2015 as follows: "*Appointing supervisor trustees to a company which supports, a gigantic and intensive organization that aims to abolish, replace the constitutional order of*

[14] http://www.milliyet.com.tr/cumhurbaskani-erdogan-burdur-gundem-2208110/
[15] http://www.habererk.com/siyaset/erdogandan-u-donusu/15294

Republic, to abolish the government or to prevent it, in part or in full, from fulfilling its duties named FETÖ/PDY is not adequate for collection evidences and find the truths." After three months and fifteen days, **İstanbul** Anadolu 1st Criminal Peace Judge who appointed trustees to some companies, wrote his decision dated 11 February 2016 with exactly the same sentences. It is clear that these decisions were not made by judges, instead they were noted by "*state officials*" and these notes were conveyed to judges in order to be made.

47. On 12 May 2015, while President was flying back to Turkey from Belgium, he talked about arrests of four prosecutors and one colonel related stopped trucks of National Intelligence Service (MİT) investigation as follows: "*The arrest warrants may continue with other (judges and prosecutors); apparently.*"[16] After that, Süleyman Karaçöl who took part as a judge in the 17 December corruption investigation was arrested on 15 September 2015.[17] An arrest warrant was issued dated 12 September 2015 for prosecutor *Muammer Akkaş* in his absentia. Taking into consideration that judges shall issue arrest warrants only based on concrete evidence, how can the President know these arrests in advance? These examples clearly show that these decisions were not made by judges, but they were first decided by the Executive before they were issued by judges. It shows that judiciary is not independent of the Executive. (See, Venice Commission Declaration on Interference with judicial independence in Turkey, adopted on 20 June 2015).

48. President, on his way to Ukraine on 20 March 2015, announced as follows: "*We are following judges who make decisions in cases concerning the parallel structure".* With his statements, President warned the judges and gave them a message deemed as a soft tuning. After this statement, any judge who knows that the High Council of Judges and Prosecutors (HSYK) consists of 15/22 pro-government members, cannot make his/her decisions about "parallel structure" without fear.

49. Judges Metin Özcelik and Mustafa Başer who released 62 cops and a journalist allegedly linked to "parallel structure" were arrested without any concrete evidence other than their verdict on 30 April and 1 May, 2015 (see Turkish Constitutional Court Decision dated 20.01.2016, para. 135 and justification of dissenting opinion). These two judges were **arrested within five days of their decisions** on the grounds of being member of an armed terrorist organisation and attempt to overthrow the government. The content of the President's message was understood by judges as he meant to.

50. After these judges were arrested, the executive continued to intervene in the judiciary, and HSYK launched a disciplinary investigation against them. Nevertheless President Erdoğan made a statement and told that HSYK had been late, **24 hours after the release decision**. After that statement, Mehmet Yılmaz, head of the 2nd Chamber of HSYK made a statement as follows "*Yes, we are late and apologize for it.*" During those days Prime Minister addressed to public at Gümüşhane Province referring Metin Özçelik and Mustafa Başer as follows: "*Their release decisions should be accepted as a coup against the government. We will not allow their decisions to be enforced certainly*." Head of 1st Chamber of HSYK Halil Koç, issued a statement through Sabah Daily

[16] http://www.aksam.com.tr/siyaset/paralel-yargiya-karsi-tutuklamalar-surecek/haber-404841
[17] http://www.trthaber.com/haber/turkiye/eski-hakim-suleyman-karacol-tutuklandi-203815.html

referring two judges' release decisions as follows: "*It is clear that **there will be reprisal for this***". Kenan Ipek who was Minister of Justice in those days issued a statement as follow: "***Their actions will be punished via what they deserve in the scope of law***." As a result of the pressure from the government, the release decisions dated 25 May 2015 were not enforced and worse, both judges were arrested only five days after their decisions. Actually even this alone is enough evidence for the executives interfering in the judiciary's work and putting pressure on it (see Venice Commission Declaration on Interference with judicial independence in Turkey, adopted on 20 June 2015).

51. Four public prosecutors and a judge responsible from 17-25 December Corruption Investigation were dismissed on 12 May, 2015 by HSYK. After this decision, Ahmet Davutoğlu, then - prime minister, made a statement referring this event as follows: "***We have given back*** *the 17-25 December operations to its perpetrators.*" It is understood from this speech that dismissal of the five members of judiciary was asked by the executive power.

52. On 12 June 2015, in his interview to the Yeni Şafak daily, Secretary General of HSYK, *Bilgin Başaran* stated that the Council would observe to judges investigating so called "parallel state", and, referring to judges Mustafa Başer and Metin Özçelik, he added that "***they would respond harshly to such an attempt if recurs***". His statement not only was a threat to judges, but also a clear evidence showing that judges have not been independent of the HSYK.

53. A confidential document was sent to the HSYK on 20 November 2015 by the Ministry of Interior (*No: ... -2043.(31420) 152488 – Subject: Judicial decisions*). This document included complaints against several judges from around 78 administrative courts that had repealed the actions of the Ministry. The 3rd Chamber of the HSYK immediately launched an enquiry against listed judges, and the 2nd Chamber suspended the promotion process of 12 judges pending before the Chamber. Many state governors such as Siirt, Sakarya, and Diyarbakır governors sent complaints against judges who had disfavoured the State in their verdicts.[18] These examples show clearly that judiciary has been placed under the control of executive organs.

54. On 29 May 2015, journalist *Can Dündar*, then - Chief Editor of Cumhuriyet Daily made news about evidences of the "MİT Trucks" case, that weapon loaded trucks en route to armed groups in Syria were stopped by prosecutors in Adana province on 19 January 2014. However, President Erdoğan, in a live-TV interview just two days after this report, publicly said that: "*He will pay for it, I will not let him go.*"[19] Without any further accusation, Can Dündar was arrested and detained on 26 November 2015 by 7th Criminal peace judge in İstanbul.

55. On 4th of April, 2016, a pro-government journalist *Fatih Tezcan* sent a Twitter message to the Justice Minister and publicly shared a judge's name and wanted him to do what was needed to do because of a PKK terrorist's release by judge Ayşe Özel (*@fatihtezcan* 10:02 - 04 April 16).[20] The HSYK immediately

[18] www.haberdar.com/gundem/bakanlik-aleyhimizde-karar-veriyorlar-diye-hakimleri-sikayet-etti-kurul-harekete-gecti-h17382.html
[19] http://www.sozcu.com.tr/2015/gundem/erdogandan-can-dundara-tehdit-846822/
[20] https://twitter.com/fatihtezcan/status/716883579821809664

launched an investigation against the judge (*@defnebulbul1* 6.04.16 16:00).[21] This investigation following a Twitter message, shows that how much Turkish judiciary is vulnerable and open to external pressure.

Concrete facts affecting judiciary independence occurred after the July 15, 2016 coup attempt

56. The article 139 of the Turkish Constitution has established guarantees for the independence of judiciary and security of tenure for judges however Article 3 of the Emergency Decree Law No: 667, came into effect on July 23, 2016 has suspended these key safeguards. Decree Law No: 667 stipulates that judges, prosecutors, and even Supreme Court justices including the Constitutional Court may be permanently discharged through one-single unilateral decision without any legal investigation or proceeding. Under Decree Law No: 667, more than 4000 judges and prosecutors have been permanently removed from their office until March 15, 2017 without respecting minimum guarantees. In a democratic society, "*judges can be suspended or removed only on serious grounds of misconduct or incompetence* ***after*** *fair proceedings*" (@UNHumanRights – 27/7/16 – 09.00). The Decree Law No. 667 has created a climate of fear and therefore judges and prosecutors have been working under pressure and threats of the Executive. As long as Article 3 of the Decree Law No: 667 is in effect, this climate of fear does not seem to end, and the security of tenure of judges is not guaranteed. In order court decisions to be recognized as fair and just given through a fair trials, courts must satisfy essential features of independence and impartiality. Therefore, verdicts given under the climate of state of emergency and fear of discharge have not been in compliance with the essential features of the right to a fair trial within the meaning of the established case-law of the ECtHR (*Beaumartin v. France*).

57. Moreover, After 16th April referendum, Turkish Judiciary got under an absolute control of the Executive authority as it was underlined in Venice Commission Report (Opinion no: 875/2017, 13th March, 2016). According to the Commission, the proposed constitutional amendments are not in conformity with the character of a democratic regime founded on separation of powers and the amendments in question involve "*the dangers of degeneration of the proposed system towards an authoritarian and personal regime. The constitutional amendments weaken, instead of strengthen the Turkish Judiciary. Six of the thirteen members are appointed by the President, who would no more be a pouvoir neutre. The amendments would weaken an already inadequate system of judicial oversight of the executive. The enhanced executive control over the judiciary which the constitutional amendments would bring about would be more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary.*" (See paras. 119, 128, 129, 133).

58. After the July 15 coup attempt, more than 2500 judges and prosecutors were also arrested and more than 4000 permanently discharged without any legal action in blatant violation of Articles 129/2 and 139 of the Constitution. Under the Turkish Law, judges and prosecutors may only be arrested if there are circumstances which give rise to strong suspicion that they have committed a crime AND they have been caught *in flagrante delicto*. Some

[21] https://twitter.com/defnebulbul1/status/717698529762869248

judges were arrested during a hearing before their colleagues. It should not be expected that any judge who witnesses an unlawful arrest of a colleague can perform his or her duties in an independent or impartial manner.

59. In Kırşehir, during a trial on 7th February 2017, Judge *Fatih Mehmet Aksoy* who had previously arrested the prosecutors who had conducted weapon-loaded MIT trucks operations in Adana province, referring the defendants who were on trial at that time, raised his voice and said as follows: "*I can't stand any more, I will release them.*" Whereupon the trial's prosecutor threatened the judge with labelling him as using *Bylock* and being *Gülenist*. Police Chief of Kırşehir Province, who were in the courtroom contacted Ankara and Judge Fatih Mehmet Aksoy was suspended by the HSYK before the hearing was adjourned (*@Demokrrasi*, 5/3/2017).

60. On March 31, 2017, the chief judge and two associate judges of İstanbul 25th Assize Court, which decided to release 21 of the 26 journalists who were detained for eight months, and the prosecutor proposing the release of these 8 journalists were suspended just 3 days after their decisions on April 3, 2017 and a disciplinary investigation launched against them, only because of their decision. Thus, an extremely heavy message was given to other judges that their decisions are closely supervised by the HSYK and by the Executive.

61. By referring to the release of 21 journalists, on April 1, 2017, at 00:17, the Undersecretary of the Ministry of Justice and member of HSYK 1st Chamber, Kenan İpek made the following comment on his twitter account: "***The struggle conducted by TURKISH JUDICIARY and HSYK against FETÖ/PDY*** *armed terrorist organization will continue with the first day's DETERMİNATION and STABILITY.*" (*@kenanipek53*, 1/04/2017, 00:17). HSYK 1st Chamber is the office where the appointments of judges and prosecutors are made.

62. According to the information released by HSYK Vice President Mehmet Yılmaz and reflected in the media dated 7 April 2017, "*HSYK has removed four members of the judiciary from the mission on the grounds that the release decision was not based on reasonable, valid reasons… aroused sadness in society and harmed the people's conscience*." Thus, a judicial decision was unappreciated by the HSYK, an organ an executive body, and the holders were suspended; this practice ended judicial independence (See *Cooper v The United Kingdom*). Moreover, if a court members are suspended by the HSYK due to their decision, this shows that judges in Turkey are not independent of the HSYK and extremely vulnerable to external influences. One of the indicators of the independence of the courts is that the judges are protected against external influences (*Findlay v. The United Kingdom*, para.73)

63. Antalya 2nd Assize Court decided on March 17, 2017, to release 20 policemen[22] and released 8 more arrested people on March 30, 2017.[23] Immediately after these release decisions, the 2nd Assize Court President Yücel Dağdelen was unseated and assigned to the province of Manisa as an ordinary judge by HSYK and the other two members were assigned to other courts, in the

[22] http://www.cumhuriyet.com.tr/m/haber/turkiye/700771_FETO_davasinda_20_tahliye.html
[23] http://www.antalyakorfez.com/guncel/21362/2/gazetecileretahliye

first few days of April 2017.[24] Thus, an extremely heavy message was given to those who would decide to release.

64. All of these concrete examples show that the judges of tribunals of first and second instances, performing under the authority of the HSYK, are not independent at all.

II. CONCRETE FACTS SHOWING THAT THE COUNCIL OF STATE HAS NOT BEEN IMPARTIAL AND INDEPENDENT

65. As it was emphasized above, during the elections of HSYK, one of the commitments of (YBP) was an increase in the number of members of the Court of Cassation and the Council of State. These commitments immediately became as laws by the members of Parliament dominated by the ruling party. On 15 December 2014, 144 new members were elected to the Court of Cassation, and 38 members were elected to the Council of State by the Plenary Session of HSYK who had promised to work in line with the executive authority.

66. After this election, Mr. Ergun Özbudun who is professor of Constitutional Law and ex-member of the Venice Commission, in a constitutional law conference on 15 October 2015, addressed that "*Recently, our democracy has been subjected to negative impacts especially in terms of impartiality and independence of judiciary, and the rule of law". The landmark event that leads to a deformation of judiciary was the December 17&25 investigations. The government unconstitutional effort to enact laws to close that investigations, had an adverse effect on the independence of judiciary. The first move was to change the rules related to the judicial police. The amendments of the Law of HSYK (Law Number: 6087) and the Code of Criminal Procedure were among the worst since criminal peace judgeship was established. The regulations and laws that reshaped the two Supreme Courts helped the government obtain a dominant status in these courts. It can be said that the ruling party created a dependent judiciary. It is known that the absolute majority group of HSYK, which the government had publicly supported* (as explained above), *admitted that they would perform in a harmony with the Executive. It is known that judiciary's role is to enquiry legislature's and executive's actions, not to cooperate with them. So, it can be seen that the government's mission to seizure the judiciary was completed*."

67. On May 2016, a new bill, which provided amongst other things the termination of the membership of all members of the Court of Cassation and the Council of State as well as the election of new members, was submitted to the Parliament. *Prof. Ergun Özbudun* in his interview to the *Meydan* Daily on 14 May 2016 underlined the possible implications of such an amendment as far as the formation of the two supreme courts. He stated that such an action should be called as dissolution which was absolutely not in conformity with constitutional provisions of judicial independence and security of tenure for judges. He added as follows: "*According to the Constitution, judges shall not be retired or discharged before the age of 65. I am sure that if this proposal successfully passes and becomes law, the Constitutional Court will strike it down. Moreover, not just striking down the law declaring null and void to the law is possible, too. Because it is obvious that that political aim of this law is to create a judiciary which works*

[24] http://antalyakorfez.com/guncel/21514/2

in a total harmony with them." In sum, this bill will greatly injure the independence of the judiciary."[25]

68. Pursuant to the Turkish Constitution, the members of the Council of State and the Court of Cassation are elected by the Plenary Session of the HSYK. However, the ruling party drafted a court-packing bill and that bill became law on 23 July 2016. This statute ended the tenure of the two Supreme Courts members. The Plenary Session of the High Council (HSYK) elected 75 members to the Council of State and the President Erdoğan appointed 25 members. The same process worked for the Court of Cassation and the HSYK elected 267 members. The two re-election processes was completed within a day by the members of the HSYK that dominated by the Executive. As obvious, re-elected members were chosen from among those closed to the government by the HSYK members who had committed to cooperate with the government. That reshaping process has undermined the essential elements of security of tenure for judges and clearly violated the right of access to an impartial and independent court previously established by law. After the election of new members, a new court, Council of State has been established on 25 July 2016.

69. On 16th July, 2016 at nearly 04:15, Necip Cem İşçimen, Deputy-chief prosecutor of Ankara, indicated that several judges including 48 members of Council of State were going to be taken into custody. In the following hours, many of the 48 justices were arrested and jailed. The same thing happened to 140 members of Court of Cassation and two members of the Constitution Court. How to launch and maintain a disciplinary or criminal proceeding against Supreme Court justices have been established in a detailed way in specific statutes. According to these statutes, justices shall be arrested *in flagrante delicto* if what they have committed is a felony. Otherwise, justices cannot be arrested or searched and magistrates cannot issues search and arrest orders in such a case. Therefore, the arrest of Supreme Court justices is clearly unconstitutional and such an arrest has abolished the independence of judiciary. After the arrest of 48 justices, remaining justices should not be expected to be independent.

70. In such atmosphere of fear, in which thousands of academics accused of being a member of terrorist organisation such as *Prof. Dr. İbrahim Kaboğlu* and *Prof. Dr. Yüksel Taşkın*, there is no impediment or remedy for a member of Council of State to be put into prison arbitrarily or to be discharged. It cannot be mentioned about independence of members' of the Council of State or other supreme courts. The judges, with fears and anxious, cannot be independent.

71. Because of all reasons explained above, the Council of State, does not have the fundamental features of a court within the meaning of the ECHR (being independent and impartial and previously established by law). The Council of State therefore as far as the right of access to a court is concerned, cannot be considered "a court" to which one may apply. As it is not independent and impartial, it cannot be considered as a "tribunal" (*Beaumartin v. France*) within the meaning of Article 6 of the ECHR, and then the right of access to the court cannot be guaranteed.

[25] http://www.haberdar.com/gundem/ergun-ozbudun-yargidaki-degisiklik-teklifi-tam-anlamiyla-tasfiye-kanunu-h29393.html

III. FACTS AND EVIDENCES SHOWING THAT THE CONSTITUTIONAL COURT LOST ITS INDEPENDENCE

72. The last domestic remedy that every individual whose rights has been violated can resort after the Council of State is constitutional complaint mechanism before the Constitutional Court. As noted above, two justices of the Constitutional Court were arrested and discharged the following days after the July 15 coup attempt. Even though any criminal action against the Constitutional Court members should be pursued under specific rules established by the Law of Constitutional Court, the two justices were arrested and jailed under the order of a criminal peace judge that has no jurisdiction over these justices. Following these, they were discharged permanently by the Plenary Session of the Constitutional court on 4 August 2016.

73. According to Article 147 of the Constitution, membership in the Constitutional Court shall terminate automatically if a member is convicted of an offence requiring his/her dismissal from the judicial profession, and by a decision of an absolute majority of the total number of members of the Constitutional Court if it is definitely established that he/she is unable to perform his/her duties on account of ill-health. Even though they had not been convicted or there had been no evidence of ill-health, the two justices were permanently discharged without any criminal or disciplinary action.

74. In the case of the two justices alongside the other judges, there is no trial that has been completed and concluded. Therefore, the tenure of the constitutional court justices were arbitrarily ended. Following this discharge, two new justices allegedly linked to the government were appointed. Thus, the principles of the rule of law, judicial independence, and security of tenure for judges have been destroyed.

75. In some court judgements, the two members of the Constitutional Court who allegedly wrote dissenting opinions were arrested and detained without complying with the laws and constitutional guarantees or without any legal actions. Undoubtedly, the arrest and discharge of the two justices created a climate of fear and directed a clear threat to other justices.

76. The concrete findings that the Constitutional Court is not independent and impartial are not limited to these. One of the essential aspects of independence of the courts is that the members of the court shall be secured from external pressures. The following example shows that Constitutional Court is not protected against external pressures. It should not be forgotten that the statements of the members of the executive body may lead to legitimate doubt in terms of the principle of independence and impartiality of the courts. In the case of *Sovtransavto Holding v. Ukraine* (No: 48553/99, 25.7.2002) appeal, that the President of Ukraine had taken the attention of the High Board of Arbitration to the necessity of protecting the interests of the state, regardless of whether the litigation affected the outcome, was appraised by ECtHR as “the legitimate doubt about the independence and impartiality of the arbitral tribunal."

77. After the news published by Can Dündar (para. 58 above), the President was in a live broadcast on May 31, 2015. He addressed as follows: "*These news are slander on the National Intelligence Agency, it was an illegal operation and publishing that operation and pictures of the trucks also establishes spying and espionage. This newspaper gets also involved in this espionage*

activity through publishing it. ... He will pay for it and I do not let him go".[26] After his interview, Can Dündar was arrested on 26 November 2015 by indicating the same grounds.

78. Can Dündar was released after 92 days of detention upon the Constitutional Court's decision favouring his application. However, the President publicly expressed his anger because of the decision and said that his case was not about freedom of expression, but about spying. He emphasized that the media cannot have unlimited freedom, and added that he would not respect or obey the decision of the Constitutional Court. He said that the criminal peace judge might choose to insist and refuse to release Can Dündar.

79. At the Embassy of Turkey in Nigeria on 4 March 2016, the President of the Republic said: "*The President of the Constitutional Court said: the decision of the Constitutional Court is binding force; everyone is under obligation to obey it. Yes, in the Constitution and in the amendments to the law, it is binding, but you cannot suggest anything about individual applications. If it is binding, it should not go to the first instance tribunal again. There is no decision that the Constitutional Court can make if the district court upheld the previous decision. Where does this* go*? If they want, they may apply to the ECtHR. If the ECtHR decides on the direction given by the Constitutional Court, it is only binding in terms of compensation. The State shall also make such objections to compensation or pay compensation. If the courts release those who put confident state secrets in danger, the state unable to go through it.*"[27]

80. In a speech he made in Burdur on 11 March 2016, the President said: "*The Constitutional Court has made a decision irrespective of the Constitution, which is irrelevant to the right of individual application, putting itself in court of first instance. What is the rush? ... Look at this statement: The Constitutional Court requested to lift detention order of them "on the grounds that there is no strong evidence for criminal suspicion". In this regard, the Court is not authorized to make a decision. ... The first-instance court was able to make a decision of persistence. Do it, then what will the Constitutional Court do? And see it. ... This matter is in no way connected to the judicial independence. ... I take a stand against those who exceed its limits. If the Constitutional Court goes such a way, I would not hesitate to express my objections to it on behalf of the nation. ... The Constitutional Court has not hesitated to make a decision against the country and the nation in a matter which is a concrete example of one of the biggest attacks against Turkey in recent years by the members of the Court, including also President of the Constitutional Court. What did I say to an institution that does not respect its own country and interests? I said, I don't accept this ruling. I neither obey nor respect it. I wish that the Constitutional Court not resorted to again that such ways to open up debate about its own existence and legitimacy.*"[28]

81. Immediately after these statements, the Venice Commission issued a declaration dated 16 March 2016 entitled "*Declaration by the Venice*

[26] http://www.sozcu.com.tr/2015/gundem/erdogandan-can-dundara-tehdit-846822/

[27] http://www.milatgazetesi.com/uygunsuz-kararlarin-altindan-kalkamazsiniz-haber-79417

[28] http://www.gazete8.com/politika/cumhurbaskani-erdogan-burdurda-anayasa-mahkemesi-baskanini-elestirdi-h157253.html. - http://www.milliyet.com.tr/cumhurbaskani-erdogan-burdur-gundem-2208110/

Commission on undue interference in the work of the Constitutional Courts in its Member States". In summary, the Commission has stated that they have been seriously concerned about the statements made by the politicians and that the declarations and threats to the Constitutional Court clearly violate the fundamental values of the Council of Europe (democracy, the rule of law and the protection of human rights and fundamental freedoms).[29]

82. According to the news of Daily *Cumhuriyet* newspaper dated 26 April 2016, the President met with the Chief Justice of the Constitutional Court (*Zühtü Arslan*) and its members. Erdogan said them "*the decision of the Constitutional Court on Can Dündar and Erdem Gül was wrong, because the news of the National Intelligence Agency's case (also known as the MIT Truck case) is a national security issue for us, and we expect you to make a harmonious decision to our sensitivity*". The Chief Arslan echoed the President's concerns and showed the dismissal of applications against the curfew declared in many parts of the Southern part of Turkey as an evidence of the court's adherence to the Erdogan's words. Arslan also said to Erdogan that the Court had been and would consider and dissolve the applications within the context of the state's national security policy".[30] This news has not been refuted as of this application was made.

83. Finally, as long as Article 3 of the Emergency Decree Law No: 667 remains in effect, it cannot be said that the security of tenure of members of the Constitutional Court (and the Council of State), one of the fundamental features of independence of judiciary, is protected.

84. For all these reasons, The Constitutional Court also lost the qualifications of independence and impartiality that provided under Article 6 of the ECHR, and the deficiencies that the Council of State is not independent and impartial cannot be solved by the Constitutional Court.

IV. OTHER FINDINGS THAT HAS AFFECTED JUDICIAL INDEPENDENCE

85. Finally, although they remain outside of the above, there are some facts and findings that have affected the independence of the judiciary as a whole. The following are just a few examples: on 05 April 2016 on a news channel named A Haber, *Galip Ensarioglu*, an influential member of the AKP and deputy chair of the Parliament, who participated in a program called "Background" (Arka Plan in Turkish), in his statements to defend the Presidential System, he expressed the following thought: "*The parliamentary system has providing much more to our business. We have been able to control not only the legislature, but also the executive and the judiciary*". Thus, he admitted that the judiciary is under the government control. In the same program, *Burhan Kuzu*, Constitutional Law professor, AK Party deputy for the last three terms and also former President of the Constitutional Committee of the Parliament, made a statement in the same direction with the Galip Ensarioglu. Mr. Ensarioglu and Mr. Kuzu are in AK Party's administration and their statement should be regarded as AK Party's comments. In addition, the ruling party has not rejected such comments.

86. After the National Security Council (MGK) meeting held on 26 May 2016, President Erdogan, made a speech in Kırşehir on 27 May 2016 and

[29] http://www.venice.coe.int/webforms/events/?id=2193
[30] http://www.cumhuriyet.com.tr/haber/siyaset/522133/Sizin_isiniz_Guvenlik__bizim_isimiz_Ozgurluk.html

said as following: "*Yesterday, we took a new decision. We have advised that the Gülen Movement shall be named as Fethullahist terrorist organization and listed among the terrorist groups. We sent this recommendation to the government. Now, we are waiting for the government's decision. They will be judged as a terrorist organization, at the same category of PKK, PYD and YPG*". This statement clearly shows that courts in Turkey, where the Gülen Movement is concerned, comply with the resolutions of the MGK rulings and are not independent from the executive. In this meeting, Presidents of the Court of Cassation and Council of State were also in the front lines and they applauded after some statements of the President. This incident reflected on the media.

87. After the meeting of the Council of Ministers dated 30 May 2016, Deputy Prime Minister and Government Spokesman *Numan Kurtulmuş* said: "*At the previous MGK (NSC) meetings, it has been stated that combating parallel state structure (PDY) is a state policy. With the recommendation of the MGK, the new phase of the struggle has launched against this parallel structure. PDY was described as a terrorist organization for the first time at the MGK meeting with a recommendation decision and the main frame of the next round of fighting will be declaring a fight against that terrorist organization. Therefore, **everything that it requires will be fulfilled** by both the Government **and the judicial organs** and this practice will continue without interruption."* There is no doubt that this statement was made on behalf of the executive body and bound the entire executive. It is understood from these statements that the whole state, including the judiciary, has been fighting against the Gulen movement and what need to be done in this fight have been also fulfilled by the judicial organs. Thus, the executive body has officially declared that the decisions taken by the MGK and the Council of Ministers have been carried out by judicial organs. Judicial bodies that implement the decisions of the MGK and the Council of Ministers cannot be considered as independent; not even o court (*Beaumartin v. France*).

88. From all these concrete findings, the tribunals of first and second instances, the Supreme Administrative Court (the Council of State) and the Constitutional Court, which can be exhausted in domestic law, lack the minimum features of a "tribunal" within the meaning of Article 6 of the Convention, such as "previously established by law, independence and impartiality".

89. The obvious lack of independence and impartiality of the judiciary is based on concrete strong evidence. This situation is reflected in numerous independent reports by various international organizations and dates back to early 2014.

Conclusion

90. In the light of all of the above it should be concluded that there is not a single independent or impartial body in the Turkish judiciary which is established previously by law. There is no "court" within the meaning of Article 6 of the ECHR. Accordingly, there is no effective domestic remedy (independent courts) to exhaust, in the sense of the civil rights violation of which have been complained against in the Application Form and the right of access to a court in particular.

20th April, 2017