

# JUDICIAL INDEPENDENCE **UNDER THREAT**



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**UMUT ORAN**

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# WHAT HAPPENED AFTER THE REFERANDUM?

<b>12 September 2010</b>	58 percent of the people accepted the 26 proposed changes in the Constitution, including the changes regarding the Economical Social Council, the stature of the Court of Constitution, and the High Council of Judges and Prosecutors (HSYK)  CHP was objecting change proposals about the HSYK, Court of Constitution and the regulation regarding the banning of the parties.
<b>17 October 2010</b>	HSYK election held. All of the Members of the Minister of Justice List chosen as members of the HSYK.
<b>9 February 2011</b>	Parliament accepted the law that changes the stature of the High Court (Yargıtay) and the Council of State (Danıştay). New chambers established in both of the courts.
<b>18 February 2011</b>	Journalists Soner Yalçın, Barış Pehlivan and Barış Terkoğlu taken under custody. Prosecutor claimed that they were members of a terrorist organization.
<b>25 February 2011</b>	High Council of Judges and Prosecutors appointed 160 new judges to the High Court and 51 new judges to the Council of State.
<b>6 March 2011</b>	Ahmet Şık and Nedim Şener taken under custody. Prosecutor claimed that they were members of a terrorist organization.
<b>7 March 2011</b>	Journalist Doğan Yurdakul taken under custody in regard of the ODA TV case.
<b>24 March 2011</b>	Police force with the order of the Specially Authorized Prosecutor went to Radikal Newspaper and deleted the copies of the unpublished book of Ahmet Şık.
<b>30 March 2011</b>	Turkish Parliament accepted the law that changes the stature of the Court of Constitution
<b>2 June 2011</b>	Presidency Election of the High Court held. With the block vote practice of the newly appointed 160 members of the court, Nazım Kaynak was elected president. Vice Prime Minister Bülent Arınç celebrated this event by saying "I am very happy. My dear brother , my classmate is elected as president of the High Court"
<b>8 June 2011</b>	Presidency Election of the Council of State held. With the votes of the newly elected 51 members, Hüseyin Hüsnü Karakullukçu was elected as president. Vice Prime Minister Bülent Arınç said "Thanks to my God, he gives again and again." Karakullukçu was also a classmate of the Bülent Arınç
<b>3 July 2011</b>	Several high profile football managers and administrators including the president of Fenerbahçe and the deputy president of Beşiktaş are taken under custody with the accusations of founding an organization to fix the matches. Special Authorized Courts took the case.
<b>12 October 2011</b>	According to the Progress Report 2011, freedom of expression is at danger in Turkey because of the number of court cases against writers and journalists, rule of fair trial violated in several of cases, long periods of raised serious concerns.
<b>31 October 2011</b>	Newly established chamber numbered 14 in the High Court approved the decision of the Mardin Criminal Court that rules discount in the punishment of the 26 people that rapes a 13 year old girl claiming that the girl showed consent

<b>13 November 2011</b>	Member of Turkish Intelligence (MIT) Kaşif Kozinoğlu died in prison before attending even a single trial after 8 months of custody regarding the case of ODA TV.
<b>14 December 2011</b>	İbrahim Şahin and other 6 special armed force members are released by the court with the reasons of the lack of a concentrate evidence. They were accusing to be a member of an interstate illegal organization that has made extrajudicial killings and kidnappings during the nineties.
<b>16 December 2011</b>	Murderer of the Hrant Dink, Ogün Samast, released from the case that accuses him as a member of a terrorist organization. He is still in prison for murder.  35 journalists arrested with the accusations of being a member of a terrorist organization.
<b>24 December 2011</b>	Committee to Protect Journalist send a letter to Prime Minister Erdoğan that says <b>"Our list of eight journalists jailed should be seen as a black mark on your record and a source of shame."</b>
<b>6 January 2012</b>	Court again dismissed the release demands of Ahmet Şık and Nedim Şener in ODA TV case.  Ex Chief of the Staff İker Başbuğ taken under custody with the accusations of being a member of a terrorist organization.
<b>9 January 2012</b>	Special Authorized Public Prosecutor demanded to stripe out the parliamentary immunity of the main opposition leader Kemal Kılıçdaroğlu.
<b>29 January 2012</b>	Prosecutors of the Denizfeneri E.V case accused to misuse of their authority and another prosecutor wanted a punishment of 11 years of prison for them.
<b>8 February 2012</b>	Undersecretary, Ex- Undersecretary and Deputy Undersecretary of the National Intelligence Agency called to give testimony by the Special Authorized Public Prosecutor. They have been accused to help the PKK – KCK.
<b>10 February 2012</b>	Special Authorized Public Prosecutor ordered to arrest the Undersecretary, Ex- Undersecretary and Deputy Undersecretary of the National Intelligence Agency
<b>11 February 2012</b>	HSYK deprived the authorization of the Special Authorized Public Prosecutor Sarıkaya that orders the arrests of the high officers of the National Intelligence Agency
<b>17 February 2012</b>	TBMM accepted a legislative proposal given by the AKP that gives the right to Prime Minister to not allow any court to trial any public officer ordered by the Prime Minister in a special duty.  There are now 12.897 people in prison allegedly to be a member of a terrorist organization in Turkey. In 2005 the number was only 273. According to the Human Rights Foundation of Turkey, between the years of 2002 to 2011, 127 people murdered by unidentified perpetrators, 426 people murdered by the officers without a trial. According to the sources, 8710 people tortured during these years. There are now 8 members of the parliament, 107 journalist, 500 university students, hundreds of local government officers are under custody.
<b>18 February 2012</b>	

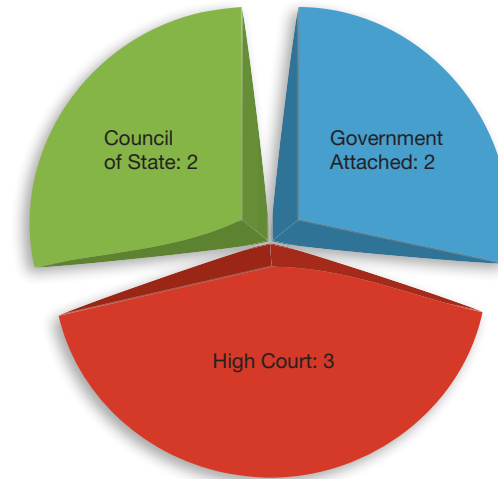
## JUDICIAL INDEPENDENCE

Judicial Independence is a hot topic in Turkey. From Hrant Dink case to the Balyoz Case we see conflicting decisions, from ODA TV case to the cases of the university students we see ill practices. For example in the Denizfeneri case public prosecutors striped from their authorizations with the accusations of misusing their authority and making distortations in the official papers. According to the accusations public prosecutors “hide” some names and by making this they distort the official documents. High Council of Judges and Prosecutors (HSYK) taken away the prosecutors from the case and after 177 days while sending the official precept it is seen that the same practice is made by the HSYK itself.

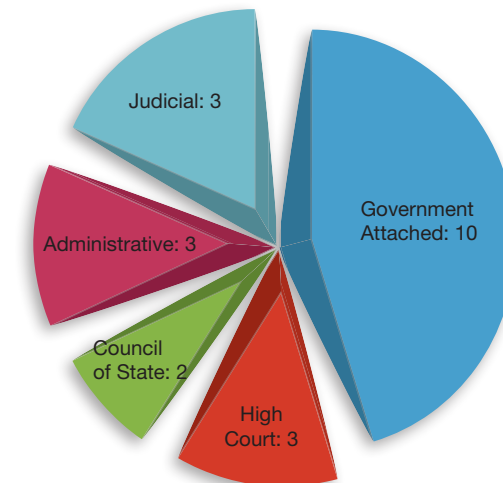
All of the conflicting judgements are occur mainly after the change of the composition of the HSYK. Before the general referendum, HSYK was composed from 7 members. Minister of Justice and Undersecretary were the members of the HSYK and 5 members were chosen from the High Court (3

From the High Court and 2 from the Council of State)

COMPOSITION OF THE HSYK BEFORE THE REFERANDUM



COMPOSITION OF THE HSYK AFTER THE REFERANDUM



After the general referendum, HSYK's composition changed and number of the members of the council increased to 22. Minister of Justice and Undersecretary is still the members of the HSYK and in addition to this, 4 members are chosen by the President from the lawyers and academics of law, 3 members are chosen by the High Court, 2 members are chosen by the Council of State, 1 member is chosen by the Academy of Justice that is governed by the Ministry of Justice, 7 members from the first degree judges and prosecutors by the judicial judges and prosecutors, 3 members from the first degree administrative judges and prosecutors by the administrative judges and prosecutors.

In the election time a list called the “**Ministry of Justice list**” sent to the first degree judges and prosecutors, any other election campaign declared illegal and after the election, all the members of the list elected to the HSYK.

Now, the ex director of the Staff of the Ministry of Justice, ex vice undersecretary of the Ministry of Justice and the ex Chairman of the Justice Academy is also in the council.

Direct representation of the government in the HSYK increased due to this election process, in addition to the 2 members of the government, ex government representatives and government attached people are elected with the help of Minister of Justice and President.

The laws regarding the High Council of Judges and Prosecutors and the Organisation of the Constitutional Court might be seen more democratic than previous laws. But these institutions lost reliability during the election period and with the result of the election of the High Council members and the Court members.

Case by case we see the problems that occurred because of the loss of independence. Public prosecutors demanded to strip out of the parliamentary immunity of the main opposition leader Kemal Kılıçdaroğlu because of his remarks about the specially authorized courts, accused ex chief of the staff İlker Başbuğ as a member of the terrorist organization and the pressure on the opposition forces rise to an unmatched level. After the referendum number of the imprisoned journalist dramatically increased to 107 which is higher than any other nation, 8 members of the parliament are still in prison, from students that demand free education to the village people that opposes hydro electric power plants list goes on to the all the branches of the democratic opposition.

International community also criticizes these politically motivated judicial actions in various levels.



## REPORT OF THE THOMAS HAMMARBERG, ADMINISTRATION OF JUSTICE AND PROTECTION OF HUMAN RIGHTS IN TURKEY

Mr. Thomas Hammarberg, Commissioner for Human Rights, published a report about The Administration Of Justice And Protection Of Human Rights In Turkey that states:

**“The Commissioner observes that the composition and actions of the HSYK, as well as the independence of judges and prosecutors in practice, remains a major concern.** This is linked to the fact that, as pointed out by the Venice Commission, ‘in comparison with most European countries, the system for the organisation of the judiciary in Turkey is highly centralised, rather strict, provides for wide powers of supervision and inspection [...]. Combined with a certain tradition for politicising the administration and controlling the judiciary, this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general’.

**The Commissioner notes that the Minister of Justice continues to preside over the HSYK, that the Undersecretary of the Ministry continues to be a natural member, and that four members are appointed directly by the President of the Republic.** It is noted that according to the opinion of the Venice Commission appointment of members, who are not representatives of the Turkish judiciary, should be entrusted to the Parliament, rather than the executive.

**The Commissioner also noted with concern allegations voiced by several interlocutors that the executive sought to exert some influence during the election process of the new HSYK after the constitutional referendum in 2010, and that the candidates favoured by the Ministry of Justice were elected in the majority of cases.** He was also informed that former staff members from the Ministry of Justice hold key positions within the new HSYK. The uniform voting patterns of judges newly appointed by the HSYK to high courts was seen by some as evidence of an increasing influence of the executive on the judiciary.”



## PROGRESS REPORT 2011

WProgress Report 2011 prepared by the EU Commission also states some concerns about the judicial independence and the acts of the judiciary.

“In elections of members of the High Council, every judge and prosecutor has the right to cast as many votes as the number of full and substitute Council members to be elected. In this system imposed by the Constitutional Court, **candidates who are voted by the majority could take all the seats, thus excluding those supported by voters from a minority.** Nomination of the four non-judicial members of the High Council is left to the discretion of the President of the Republic, whereas the National Assembly is not involved. The current provisions do not ensure permanent representation of members of the Bar in the High Council.



**The Minister can veto the launching of disciplinary investigations against judges and prosecutors by the High Council.** The judicial review does not cover all first-instance decisions of the High Council, potentially affecting judicial independence or impartiality (e.g. decisions concerning promotions, transfers to another location and disciplinary sanctions). Rules on dismissal of judges and prosecutors from the profession lack clarity and precision. **Assessment of the professional performance of judges and prosecutors is overcentralised.** Assessment criteria applied by the inspectors need to guarantee judicial independence in practice

**In the polarised atmosphere that followed the adoption of the constitutional amendments and relevant legislation by parliament, the presidents and members of the high courts voiced criticism of the judicial reforms.** Independent associations of judges and prosecutors expressed concern about the reforms, notably with regard to the **independence of the judiciary.** Some Bar associations also expressed concern”

## GROUP OF THE PROGRESSIVE ALLIANCE OF SOCIALIST & DEMOCRATS IN THE EUROPEAN PARLIAMENT CONDEMNS POLITICAL TRIALS IN TURKEY

13/01/2012

Group of the Progressive Alliance of Socialist & Democrats in the European Parliament made a statement after the launch of a political trial against CHP Leader Kemal Kılıçdaroğlu which states:

“Socialists & Democrats in the European Parliament are gravely concerned about the decision of the Turkish judiciary to launch a probe against Mr Kemal Kılıçdaroğlu, the leader of Turkey’s main opposition People’s Republican Party (CHP). The public prosecutor asked for the revocation of Mr Kılıçdaroğlu’s parliamentary immunity in order to charge him with ‘attempting to influence a fair trial’ and ‘insulting public servants on duty’ following remarks Mr. Kılıçdaroğlu made after a visit to two elected CHP MPs, Mr Mustafa Balbay and Mr Mehmet Haberal, who have been held in pre-trial detention for several years as suspects in the Ergenekon case.

Hannes Swoboda vice-president of the S&D Group said: **“We see this move as part of an ongoing crackdown on people engaged in legal political activity in Turkey.** Over the past few years, dozens of journalists critical of the government, thousands of people associated with the pro-Kurdish Peace and Democracy Party (BDP) and the Union of Kurdistan Communities have been arrested and charged with alleged links to terrorist organisations. **Most of these cases are based on an excessively broad definition of terrorism in Turkey’s anti-terror law. Moreover, the overly restrictive attitudes of judges and prosecutors, and long pre-trial detention periods which obstruct freedom of expression and the rule of law in Turkey.**

**“We call on the Turkish government to build on the legacy of the earlier reforms that brought Turkey closer to the EU standards and demonstrate the central importance of human rights, freedom of expression and the rule of law.** In this context, as a matter of priority, we urge the reform of those provisions of Turkey’s anti-terror law and criminal law that – coupled with the restrictive and often politicised attitudes of judges and prosecutors – lead to persistent violations of freedom of expression in Turkey.”

# PARTY OF EUROPEAN SOCIALIST (PES) CONDEMNS POLITICALLY MOTIVATED LEGAL PROCEEDINGS AGAINST CHP LEADER KEMAL KILIÇDAROĞLU

23/01/2012

Party of European Socialist's made a statement after a probe against CHP Leader Kemal Kılıçdaroğlu

"Following the recent launch of a probe into Mr Kemal Kilicdaroglu by the Turkish judiciary, **there is growing concern regarding the impartiality of the Turkish judiciary.** The Turkish public prosecutor has requested that Mr Kilicdaroglu waive his right to parliamentary immunity so that charges can be brought against him for 'attempting to influence a fair trial' and 'insulting public servants on duty'.

10 These allegations were made following remarks by Mr. Kilicdaroglu about two CHP members, who have been held in pre-detention for several years for alleged involvement in the Ergenekon case. In a show of support for Mr Kilicdaroglu, the leader of the Republican People's Party (CHP), all of the MPs from the party have asked for the lifting of their parliamentary immunity.

PES President Sergei Stanishev has stated that **"this decision against the CHP leader Mr. Kemal Kilicdaroglu is unacceptable and raises even more concerns about the independence of the judiciary in Turkey.** I regret that we face once again the presence of political motives behind the decisions of fundamental state institutions which are meant to be impartial. Furthermore the ambiguous position of the Anti-Terror and Criminal Law in Turkey places severe restrictions on politicians and journalists, effectively resulting in a gagging order on all dissent".

He added that; **"The PES believes that a separation of powers between the judiciary and government is a cornerstone to any democracy and the Turkish government must take necessary steps to ensure full independence of the courts.** The PES condemns politically targeted legal proceedings and continues to support the CHP and its leader in the ongoing struggle for the necessary reforms in the field of rule of law and universal freedoms in Turkey and Mr Kilicdaroglu in this time of politically motivated attacks."

# SOCIALIST INTERNATIONAL STATEMENT ON FREEDOM OF SPEECH AND INDEPENDENCE OF THE JUDICIARY IN TURKEY

23/01/2012

Socialist International also declared a statement about the freedom of speech and the independence of the judiciary in Turkey

**"The Turkish judiciary has taken the deplorable decision to launch a probe against Mr Kemal Kılıcdaroğlu, the leader of Turkey's main opposition People's Republican Party (CHP).** The public prosecutor asked for the revocation of Mr Kılıcdaroğlu's parliamentary immunity in order to charge him with 'attempting to influence a fair trial' and 'insulting public servants on duty' following remarks Mr Kılıcdaroğlu made after a visit to two elected CHP MPs, Mr Mustafa Balbay and Mr Mehmet Haberal, who have been held in pre-trial detention for several years as suspects in the Ergenekon case.

This move by the public prosecutor is the last part of a long term of oppression on any dissenting voice since 2007. The list comprises students demanding free education to environmental activists struggling against hydroelectric power plants in the Black Sea region. In Turkey there are currently over 3500 web sites banned by court ruling. According to the Progressive Journalists' Association there are currently over 60 journalists in prison. In addition tens of elected officials of the BDP are being detained as part of the notorious KCK trial that has been going on since 2009. **Following the referendum of 12 September 2010, supported by many in Europe, which claimed to make the judiciary more independent and its composition more representative, the judiciary only became more linked to the government. Regrettably, the separation of powers is no more in Turkey: the judiciary branch has been seized by the executive branch.**

Freedom of expression is a basic value in democratic societies and any act against this freedom is unacceptable for the socialist, social democrats and progressive forces around the world.

**The Turkish government should respect freedom of speech and the independence of the judiciary and protect democratic values and human rights in Turkey."**

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The PES believes that a **separation of powers between the judiciary and government** is a cornerstone to any democracy and the Turkish government must take necessary steps to ensure full independence of the courts.

We call on the Turkish government to build on the legacy of the earlier reforms that brought Turkey closer to the EU standards and demonstrate the central importance of **human rights, freedom of expression and the rule of law.**



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