

# **“CONQUEST OF JUDICIARY”**

## **2010-2019**

### **All in 1 Look...**

Jurisdiction in Turkey has unfortunately never been “independent and impartial.” However, it has also never been this unlawful, illegal, courageous and impertinent. In order to understand the reasons for this situation, it’s important to know how the judiciary was seized, step by step. Below you will find a summary of this story, and later, details...

- Coming to power alone in **2002**, the Justice and Development Party (AKP) issued successive harmonisation packages in its initial years of power, when the goal of EU membership was still extant, in order to widen its room to maneuver both in the domestic and in foreign politics. However, as the goal of EU membership weakened in the following years.
- Number of chambers and members at the Court of Cassation and the State Council were increased on **February 14, 2011**. The new members were of course elected by the Supreme Council of Judges and Prosecutors (HSYK). These assignments lead to a wide change in judicial bureaucracy.
- With privatisation processes, the Council of Ministers were given the authority to not apply judicial decrees in **2012**. With an amendment made in the same year, monitoring authority of the Court of Accounts was restricted.
- With the judicial bill that passed the Parliament on **June 18, 2014**, Criminal Courts of Peace were revoked and replaced with Criminal Judicatures of Peace. Many legal processes, from arrests to internet bans, were bound to decrees by judges at these institutions.
- The number of Court of Cassation members decreased from 516 to 310 and the number of State Council members decreased from 195 to 116 in **July 2016**. All memberships in high judicial bodies were changed due to “elimination of religious sect members.” Erdoğan became the first President to have assigned one fourth of high court members.
- With the State of Emergency issued on **July 21, 2016**, Erdoğan effectively gathered all authorities and hundreds of amendments made with Statutory Decrees during the two years were enacted *without any monitoring from the legislation or judiciary*. 4,836 judges and prosecutors were dismissed during the State of Emergency period. The number of high judicial body members, which were previously decreased, increased this time - not even a year later.
- As the “Parliamentary system” ended on **April 16, 2017**, the criteria to be elected as a member to the Court of Cassation and the State Council were changed. The structure of the Council of Judges and Prosecutors (HSK) (previously the Supreme Council of Judges and Prosecutors - HSYK) was changed once again as well; the number of its members decreased to 13 and the number of chambers to

two. With the Minister of Justice and the Undersecretary taking part as members in the council, four other members are assigned by the President himself. The President now has the authority to assign or remove high ranking public officers, including members of the judiciary.

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### **First Years of the AKP Rule...**

Coming into power in November 2002, the AKP embarked on reforms within the progress process for EU membership. Various international conventions were approved at the GNAT. With harmonisation packages, regulations were made on minority rights, children's rights and social gender equality.

The Turkish Penal Code (TCK) was completely changed with the “democratisation packages” issued; the new text involved regulations preventing systematic torture as well as restricting the authority of security officers to use weapons ([Turkish Penal Code](#)). Crimes against physical integrity, sexual integrity and private life were identified. It was previously claimed that the new Criminal Code would prevent the chaotic situation in criminal law and that the Anti-Terror Law will be revoked. However, following heavy criticism from the military and the police, a step was taken back from this claim. On the contrary, these laws were made heavier afterwards. The [Anti-Terror Law](#) (TMK) today stands as a fundamental obstacle against rights like freedom of expression and free trial.

On the other hand, significant steps were taken in order to remove military tutelage. The National Security Council has been made a sort of advisory body with civilian members in majority through changes in its function, duty and structure. Military memberships in high councils like the Radio and Television Supreme Council (RTÜK) and Council of Higher Education (YÖK) were removed. Military courts were banned from prosecuting civilians. State Security Courts (DGM) were revoked, Regional Assize Courts were established. However, these changes remained only in theory. Assize Courts continued their duty in the same way; the State Security Councils (DGM) were soon replaced by “specially authorised” courts.

Therefore, the politics of “zero tolerance for torture” has turned into a policy that is mostly based on contradicting reports issued by human rights organisations on torture. Prime Minister at the time, Erdoğan were targeting rights organisations and saying, “There is no torture, prove it if possible.” The law draft authorising the police with use of arms and with restricting freedoms without judicial decree was enacted ([Amendment on the Law of Police Powers](#)).

On the other hand, judges, who were supposed to be elected to the Court of Cassation and the State Council could not be identified for months. For a Supreme Council of Judges and Prosecutors (HSYK) member representing the political rule, the Minister of Justice, as well as the Undersecretary were not attending the meeting. The politics intervened in

the judicial system, which was already disabled, as needed, more and more - forcing the limits of law.

### **2010 Referendum...**

With a referendum in 2010, amendments were made at the Constitution. Besides the President being elected directly by the public, significant changes were made in the membership structures and election procedures of especially the Constitutional Court and the Supreme Council of Judges and Prosecutors (HSYK). The number of members at the Constitutional Court increased from 11 to 17; with 14 of them assigned by the President himself and three of them elected by GNAT ([Constitutional Amendment](#)).

Besides the Supreme Council of Judges and Prosecutors (HSYK) attaining a more pluralist structure and judicial remedies were made possible against its decrees, the Minister of Justice and his undersecretary continued to take place in the council to “monitor” - with their responsibilities comparatively lower than before. Applications like HSYK elections and prosecutors being dismissed before the prosecution of certain critical lawsuits proved suspicions on the independence of the council right.

With new amendments made in February 2011, the number of chambers at the State Council increased from 13 to 15 and the number of members increased from 95 to 156; the number of chambers at the Court of Cassation increased from 32 to 28 and the number of members increased from 250 to 387 ([Law Amendment](#)).

With newly enacted developments, the increase in high judicial body members and chambers, the HSYK influence on the identification of these members as well as soon to be made assignments by the President (especially the assignments of the Chief Public Prosecutor of the Court of Cassation as well as Constitutional Court members) led to an extensive change in judicial bureaucracy following the year 2010.

This change has revealed itself in the elections made soon after for high judicial body chairmanships. In the elections resulting with Nazım Kaynak as the Chief Judge at the Court of Cassation with 197 votes, the media covered allegations on block votes used by 160 newly assigned members. In the elections for the Council of State held on the same dates, the winner was Hüseyin Hüsnü Karakullukçu with 83 votes of 154 members, where one third of the members were newly assigned as well. The new Chief Judge was one of the judges issuing a revocation against the permission for an investigation opened against Erdoğan during Erdoğan’s mayorship. The evaluation of former Deputy Prime Minister on these elections was, “*How great is Allah, he brings more and more.*”

With new judicial bills enacted, reforms were made on the criminal law as well. However, these amendments were not sufficient to eliminate deficiencies in independence, impartiality and effective judgment. Articles leading to the most number of right violation verdicts by the European Court of Human Rights (ECHR) against Turkey with regards to freedom of expression were kept and are still used during prosecutions.

## Parliament at “Omnibus Bill”...

A new strategy was put into place in the legislative process, especially after the year 2017. Giant omnibus bills, predicting amendments in different laws, steered the public away from the process of legal construction and rendered debates almost impossible. Only two of 570 laws were omnibus bills in the period between 2002 and 2007; whereas 23 of the 53 laws passing the GNAT between the years 2015 and 2017 were omnibus bills. This method almost became the only way to construct new laws.

On February 7, 2012, Erdoğan reacted against the Undersecretary of Turkish National Intelligence Agency (MIT) to testify at the Prosecutor’s Office within an investigation opened against him. Following this reaction, the law draft binding testimonies of MIT officials to direct permission by the Prime Minister was enacted.

Turkish National Intelligence Agency (MIT) Trucks, loaded with ammunition and headed to Syria, were not permitted to be searched by Prosecutors. The Prosecutors attempting to order these trucks to be searched were assigned elsewhere. Prime Minister at the time, Erdoğan stated, “What these trucks are loaded with is nobody’s business;” threatening journalists covering news on the ammunition being transported. The MIT Law was amended in 2014 and it was made possible for the Agency to conduct both domestic and foreign operations ([Related legal amendment](#)). Even this is a confession that the operation against the trucks was legal and that operations conducted by the MIT were against the law.

“Government secrets” were re-evaluated; the last fifty years were even locked away from the judiciary. Assigned the authority to make general monitorings and collecting information without judicial decree through an amendment, the MIT was turned into a systematic intervention tool in the intelligence-security-monitoring triangle. It was banned to cover any news on the MIT. The new internet law was approved, predicting government bans on the internet; legislative and judicial authority on the matter was transferred to the political administration ([Related legal amendment, from Article 85](#)).

As the government stamped all attempts of judicial monitoring as “coup attempt” or “treason,” an article placed in an omnibus bill in 2012 assigned the Council of Ministers with the authority to not execute judicial decrees on privatisation processes ([Related decree](#)). With an amendment made in the same year, monitoring authority of the Court of Accounts was restricted; the new law preventing it from conducting efficiency monitorings and allowing it to only conduct financial monitorings passed the Parliament ([Amendment of the Law on the Court of Accounts](#)). Even that is impossible in execution; for expenses are almost completely non audit.

With an amendment made in June 2014, Criminal Courts of Peace were revoked and were replaced with Criminal Judicatures of Peace ([Amendment on the Criminal Code](#)). These individual judges decide on about 100 different cases, from arrests to internet bans. Various arbitrary procedures are ongoing with the contributions of such judges, each assigned personally by the Ministry of Justice. The structure of the Supreme Council of Judges and Prosecutors (HSYK) was changed once again and almost the entire court was

bound to the Minister of Justice, who is also the chairman of the council ([Related Legal Amendment](#)). The high judiciary was shaped once again in 2016. Members of the Court of Cassation and the Council of State were left out of duty. Both the number of chambers and the number of members at high judicial bodies decreased.

### **Erdoğan in a Palace...**

Erdoğan had announced in 2014, that when he is elected as President, that he will “not be a usual President.” He did exactly as promised and continued to impose orders on the Parliament and the judiciary whenever possible. Despite his impartiality being a requirement in the Constitution, Erdoğan continued to conduct propaganda activities like a party leader as President. He even made it possible to renew elections after his party could not with the elections on June 7, 2015 alone. He put the “Resolution Process” he started himself in Kurdish provinces on the shelf; started the war once again. An amendment was made in the internal bylaw of the Parliament with an order by Erdoğan; restrictions were brought on the freedom of expression of Parliament members ([Related legal amendment](#)). Parliamentary immunities were revoked ([Related legal amendment](#)).

Today, chief judges at high judicial bodies accompany Erdoğan even during his domestic travels. This situation reflects on assignments as well. For instance, Ankara Press Prosecutor was promoted after opening official investigations and lawsuits against criticisms and protests against Erdoğan on HSYK 2016 Summer Decree; whereas the judge applying at the Constitutional Court for the revocation of Article 299 of the Turkish Penal Code (TCK), regulating the crime of insulting the President, was exiled ([Details](#)).

Today, even decrees by the highest judicial body of the country can be ignored by the political power. The President has recently announced that he “[does not abide with and does not respect](#)” a Constitutional Court he didn’t like. The President even announced local administrators to “[leave legislation aside, when necessary](#).”

Erdoğan even complained about the weak and currently dysfunctional legislation, judiciary and monitoring. He wanted to strengthen the power of execution and gather all power in one hand. Enacting this “Turkish-type Presidential System” he brought on the agenda was only possible under the State of Emergency conditions announced following the coup attempt (which he would later describe as “God’s grace”).

### **From State of Emergency to “Permanent State of Emergency”...**

As the country was ruled with Statutory Decrees issued during the two-year State of Emergency period, all authority gathered in one hand, at Erdoğan. Permanent legislative amendments were made with Statutory Decrees that are unrelated to reasons of the State of Emergency; such as establishing new institutions, revoking existing institutions and authority transfers. Hundreds of amendments were enacted in at least 154 laws were enacted without facing any mechanism of checks and balances.

The following are some examples in the judicial area:

- All public officers, including members of the judiciary, can now be dismissed from work with administrative processes. More than 130 thousand public officers, 4836 of them judges and prosecutors, were dismissed. Thousands of institutions were sealed, including organisations of judicial members.
- The political administration was recognised legal, financial and criminal exemption of responsibility. Administrative courts were banned from issuing stay of execution against State of Emergency applications, however unlawful.
- Judicial monitoring on investigative measures were weakened and rendered dysfunctional. Restrictions were brought on the right to defense.
- The authority in institutions of intelligence was transferred to the President, especially with the Law on the National Intelligence Agency. Amendments were made at the Anti-Terror Law as well as the Turkish Penal Code (TCK); investigations and lawsuits against Parliament members were made possible.
- The authority of the Supreme Electoral Council (YSK) to monitor media organs during periods of election in accordance with the principle of equality was revoked.
- 16 new member positions were assigned at the Council of State; 100 new positions were assigned at the Court of Cassation. However, the number of members in high judicial bodies were decreased immediately before the State of Emergency due to “lack of necessity.”

[Please click here](#) for details and more.

Structures of all institutions, especially in the judiciary, were changed during the State of Emergency and everything was bound to the same person. With the legal regulation that provided that all State of Emergency applications to remain in action for at least three more years, the State of Emergency was replaced with a “Permanent State of Emergency.” With amendments made on the Anti-Terror Law, the Law on Meetings and Demonstrations and the Law on Provincial Administrations, the State of Emergency was effectively made permanent - except its name. [Please click here](#) for details and more.

The Constitutional Court crisis in the beginning of 2018 summarised the point reached. The Constitutional Court issued the release of arrested journalists Şahin Alp and Mehmet Altan; whereas lower courts resisted against the decree. The court that was “not respected” by Erdoğan was also not respected by local courts. Being the highest judicial authority in terms of the Constitution, the court’s decrees that are binding for each and every institution and person in the country were not being applied when not liked by the government. It was therefore an announcement that there was no legal security any longer. The decree issued by the European Court of Human Rights (ECHR) on Demirtaş, which faced another Erdoğan comment that it “does not bind them,” was also not recognised by the local court. A “counter attack” was made following the order of Erdoğan. As Demirtaş is now convicted in prison, not arrested, the ECHR decree was rendered null and void... Or was it?

Erdoğan, on the other hand, ordered this “independent judiciary” to act against oppositional leaders, academics demanding peace as well as arrested journalists under every opportunity. These names were frequently accused of being “terrorists,” “coup-organisers,” “spies” by Erdoğan; and continue to face such accusations. Erdoğan is currently making the prosecution himself and decides on the fate of individuals, not even needing the “independent judiciary.”

Arrested foreign citizens, especially journalists, were almost made subject to a “hostage diplomacy.” So the reasons on why a person would be detained, arrested and remains under arrest in Turkey are usually explained through elements outside of the law, instead of legal documents.

### **“Turkish-type” President...**

This change in the system, that gave this effectively applied situation a legal status, was completed under “Emergency” conditions, before the State of Emergency ended. Besides all violations, just the High Electoral Council (YSK) decree on the day of elections was enough to reveal the atmosphere present in Turkey. As voting procedures were ongoing, the YSK decided to accept unsealed ballot envelopes, which is an application that is clearly against the law. This revealed that when the government wanted, the rules of the game could even be changed as the game was ongoing.

General elections were then rescheduled to a sooner date and the country went to ballot boxes once again before even the harmonisation laws required by Constitutional amendments were made or the procedures and processes of candidacy for Presidency were clearly defined. Becoming the first “President” of Turkey within the new Presidential system, Erdoğan became the sole executive power, almost without being bound to any mechanism of checks and balances.

- The President has the authority to assign and remove all high ranking public executives. From nearly the entire high ranking judicial members to the Central Bank Chairman, from Governors to high ranking military personnel, the President makes all assignments himself ([Details](#)).

- Three Constitutional Court members are assigned by the Parliament and 12 are assigned by the President. All members of the Court of Cassation and three fourth of the Council of State members are assigned by the President. Four members of the Council of Judges and Prosecutors, with 13 members in total including the Minister of Justice and his undersecretary, are assigned directly by the President ([Details](#)).

- The entire government acts were replaced with “Presidential Decrees” and other decisions. There is no need for an authority assignment or approval by the President for the enactment of these decrees ([Details](#)).

- The President has no political or criminal liability except “treason” - and there is no such crime as treason defined in the law, therefore one can not be penalised with an undefined charge. Liability of the cabinet assigned by the President is also only towards himself.

- More authority was assigned to the State Supervisory Council, bound to the Presidency. The Council will not be able to supervise NGOs and remove executives. [Please click here](#) for details and more.



The latest link of this story was the elections on March 31, 2019; which was the first local elections within the new “Turkish-type” Presidential system. Experiences of the election revealed that Erdoğan did not accept election results until the AKP won the elections; and the High Electoral Council (YSK) didn’t even see a necessity to be bound to currently existing anti-democratic law. The elections, once again and even more tragically this time, revealed that Turkey is steering away from being a state of law and is turning into a “one-man” regime. [Please click here](#) for details and more.

## **Conclusion...**

When the power of law has the authority to monitor and execute the law, without being bound to any mechanism of checks and balances, leads to a situation where there is no law present. For one who has such power may change opinions every day, depending on each case, reversing today what was decided yesterday. The picture of the country today therefore reveals this situation once again. In order to understand the situation Turkey is in at this point, it is imperative to know the story of how the judiciary was conquered, step by step. Yes, the judiciary was never “independent or impartial” in Turkey. However, by the point reached as a result of the process described above, it has also never been this unlawful, illegal, courageous and impertinent...