How Turkey's Leaders Dismantled the Rule of Law

Merve Tahiroglu

ABSTRACT

Turkey's democracy has suffered a dramatic decline under the seventeen-year rule of President Recep Tayyip Erdogan, the country's longest-serving leader. As both a target and weapon of political power, the judiciary has been central to Erdogan's efforts to dismantle key democratic institutions and establish an all-powerful presidential system with few checks against executive rule. For over a decade, Turkey's political elites have systematically undermined the rule of law and strengthened the structural obstacles to judicial independence. To demonstrate the role of the judiciary in enabling Erdogan's increasingly authoritarian rule, this article traces the multi-layered process through which Erdogan and his allies worked to hollow out and co-opt the courts since 2008. Turkey's highly politicized judiciary functions today as a primary facilitator of Erdogan's assaults on the media, political opposition, and civil society. By examining two contemporary case studies—one about the prosecution of civil society leaders, and the other about the prosecution of an opposition party—this article seeks to identify some of the main methods through which Turkey's ruling elites weaponize the judiciary to neutralize their critics and opponents.

INTRODUCTION

Last year, a court case sparked an unprecedented crisis between the

Merve Tahiroglu *is the Turkey Program Coordinator at the Project on Middle East Democracy (POMED), a Washington-based research and advocacy NGO. Prior to POMED, Merve was a research analyst at the think tank, Foundation for Defense of Democracies, where she focused on Turkey's domestic politics, foreign policy, and relationship with Washington. Merve has authored several monographs on Turkey and published articles in various outlets such as* Foreign Affairs, The Washington Post, The Wall Street Journal, Foreign Policy, Politico, *and* The Huffington Post. *Born and raised in Istanbul, Merve earned her Master of Arts in History from Georgetown University and her Bachelor of Arts in Political Science from Duke University.*

United States and Turkey.[1] On October 2016, Turkish authorities arrested Andrew Brunson, an American pastor who ran a small church in Izmir for twenty-one years, charging him with espionage and coup-plotting. Two years into the pastor's imprisonment, President Donald Trump declared Brunson a "hostage," and imposed sanctions on Turkey that triggered a currency crisis.[2] The saga lasted for two weeks, until the Turkish court, following high-level negotiations between Washington and Ankara, finally convicted Brunson of aiding terrorism and deported him to the United States.[3]

Brunson's unjust prosecution was a symptom of the breakdown of rule of law under the seventeen-year rule of President Recep Tayyip Erdogan, Turkey's longest-serving leader.[4] The judiciary has been both a target and weapon of Erdogan's efforts to consolidate power. Through waves of show trials, interventions, and purges, Erdogan and his allies worked to systematically hollow out and overtake Turkey's institutions, including the judiciary.

Today, the highly politicized judiciary functions as a primary weapon against government critics and opponents—particularly in the media, parliament, and civil society.[5] Sham trials against political detainees abound. Indictments are unserious and based on years-old offenses. Evidence offered is thin, arbitrary, or non-existent. Disinformation campaigns stimulate and precede judicial proceedings. Due process is routinely denied. Grossly long pre-trial detentions are now commonplace. Judges and prosecutors seen as delivering fair judgments on political defendants are routinely replaced. High courts are strategic in ignoring or granting requested appeals. In short, the rule of law has been dismantled.

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The impact of this breakdown in the rule of law in Turkey has been vast, with more than 100,000 people being caught in the dragnet.[6] Crucially, these practices have also helped induce a climate of fear, which, as in other authoritarian countries, serves to scare the public away from dissent by selectively prosecuting and silencing certain individuals.

The Turkish government continues to claim that it is upholding the rule of law and touts a set of judicial reforms that it passed in October 2019. While these moves provide minor remedies, they fail to address the structural problems needed to rebuild judicial independence.

This essay will trace the multi-layered process through which Erdogan and his allies have co-opted the judiciary since 2008. Two short case studies, one about the prosecution of civil society leaders and the other about the prosecution of opposition parties, will demonstrate some of the main methods through which the judiciary today targets the fundamentals of democracy. Building on these discussions, the conclusion will explain why piecemeal reform packages fail to address the structural obstacles to rule of law in Turkey.

TURKEY'S JUDICIAL SYSTEM: STRUCTURAL CHALLENGES

The main problem with Turkey's judicial system is its structural inability to guard against political influence in the courts and guarantee judicial independence.

The Council of Judges and Prosecutors (HSK) is among Turkey's most powerful legal institutions; it its responsible for appointments, promotions, transfers, and suspensions of all judges and public prosecutors. The Constitutional Court is the country's highest legal authority; it issues final rulings on any law or presidential decree and can annul constitutional amendments. The republic's two other high courts are the Court of Appeals and the Council of State.

The political appointments of the HSK and the Constitutional Court by Erdogan's government have served to undermine the independence of the judiciary.[7] Not only is the HSK headed by the minister of justice, a political appointee, but its thirteen members are also elected by the president and parliament—six by the former and seven by the latter (Article 159 of The Turkish Constitution). The HSK elects all members of the Court of Appeals and 75 percent of the members of the Council of State, while the remainder are appointed by the president (Articles 154 and 155). Meanwhile, the president and parliament appoint all fifteen members of the Constitutional Court—selecting twelve and three of the members, respectively (Article 147).

Currently, President Erdogan's party enjoys a majority in parliament, allowing for total control of parliamentary and presidential appointments to the judiciary. Through the HSK, Erdogan and his party can determine the composition of the Court of Appeals and Council of State. This exposes all three of Turkey's highest legal authorities—the Constitutional Court, Appeals Court, and the Council of State—to the executive branch's influence.

Other structural problems include the unchecked powers judges enjoy over judicial proceedings. Judges can close trials to the public for

reasons of "public morality" or "security" and ban press coverage of investigations. In 2018 alone, Turkish judges issued 175 such media bans.[8] This fall, they prevented a courtroom artist from drawing pictures during a high-profile hearing.[9] Presidential decrees, meanwhile, are immune to reviews by the Constitutional Court under a state of emergency or at wartime.[10] This is especially problematic given the continuous state of crisis in Turkey over the last seven years. Since May 2013, Erdogan has survived nation-wide protests, a massive corruption scandal, and a military coup attempt. In addition, he has also declared war on three transnational designated terror groups and launched three military operations in neighboring Syria.[11]

CO-OPTING THE COURTS: THE POLITICIZATION OF THE JUDICIARY

Early on, the rise to power of Erdogan's Justice and Development Party (AKP) in 2002 appeared to present an opportunity to strengthen rule of law in Turkey. As part of his bid to join the European Union, Erdogan introduced a series of political and legal reforms, adopting a new Criminal Code and Criminal Procedure Code better aligned with the European Convention for the Protection of Human Rights and Fundamental Freedoms.[12] Through a constitutional amendment in 2004, Turkey also recognized the supremacy of the European Court of Human Rights (ECHR) on matters relating to fundamental rights.

As the ensuing assaults on rule of law show, however, Erdogan was motivated less by democracy and more by power. Turkey's traditionally pro-secularist courts were hostile to parties like the AKP and its Islamist predecessors, shutting them down for seeking to overturn the secular order.[13] As a politician from Turkey's erstwhile Islamist Welfare Party, whose members went on to found the AKP, Erdogan had been jailed in the 1990s for reciting a religious poem during a campaign speech, and understood well the threat that the judiciary posed to his career.[14] In order to secure his rule, he undertook a concerted effort to break the secularists' tutelage over the judiciary and institute his own. Through waves of sham trials and purges over a decade, he successfully co-opted the judiciary.

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The First Show Trials

When Erdogan rose to power, he entered an alliance with the influential Turkish imam, Fethullah Gulen, with whom he shared a common enemy in the secular establishment, particularly the military. Gulen, with his large following, offered Erdogan a cadre of educated technocrats who could serve as allies in the bureaucracy.[15] Gulen's network thrived in the years following the establishment of the alliance; by 2008, members had reached top positions in law enforcement, particularly among the police and prosecutorial ranks. In addition, Gulen-affiliated newspapers were widely circulated.[16] After this successful infiltration of the law enforcement establishment, the show trials began.[17]

In January 2008, Gulen-affiliated prosecutors launched a mass operation against the Ergenekon, an alleged network accused of plotting to overthrow the government.[18] Under the series of investigations and indictments—one of them 1,909 pages long—that followed, the police rounded up some 400 people, including military officers, police officers, politicians, lawyers, academics, and journalists.[19] In 2010, prosecutors brought forward a second coup-plot case. Within months after publication of a January report by the Gulen-affiliated daily *Taraf* detailing an alleged 2003 conspiracy–dubbed Sledgehammer (Balyoz)—365 serving and retired high-ranking military officials were detained. Nearly 300 of them stood trial.[20]

The Ergenekon and Sledgehammer trials were part of a political witch-hunt that began to break down the rule of law.[21] Much of the evidence presented by prosecutors was obviously manufactured—documents allegedly produced in 2003 were in fact written on software launched years later and contained anachronistic information.[22] The judges, too, were complicit. They refused to hear key defense witnesses, ignored claims of forgery, and even filed criminal complaints against the defendants' lawyers for their speeches.[23]

As the coup trials proceeded, Turkish courts launched mass investigations into an umbrella organization of Kurdish insurgents, including designated terror groups. Using these investigations, they targeted the Kurdish opposition, civil society, and media. The 4,800 detainees caught up in the investigations included Kurdish lawyers, politicians, academics and journalists.[24] The arrests represented a brutal crackdown on the Kurdish political opposition amidst the Turkish state's stepped-up military campaign against the outlawed Kurdistan Workers' Party (PKK) in Turkey and neighboring Iraq—all despite Erdogan's previous vows to improve the legal, economic, and social status of Kurdish citizens, Turkey's largest minority.[25]

In September 2012, judges convicted some 300 military officers in the Sledgehammer case. Hundreds of others were convicted under the Ergenekon case in August 2013.

The trials not only allowed Erdogan to rid the military of secularist generals but also helped him push major constitutional reforms aimed at overhauling the judiciary in 2010. The twenty-six amendments that Erdogan proposed appeared largely pro-democratic—including a provision to empower civilian courts over military ones, a particularly popular measure in the wake of widespread allegations of military conspiracies.[26] The package, which was passed by a popular referendum, also re-structured the HSK (then called HSYK) and the Constitutional Court, granting the parliament a role in the appointments of judges and prosecutors, including three members of the then-nineteen-member Constitutional Court.[27] However, neither the constitutional amendments nor the AKP's judicial reform strategy of 2009-2013 managed to fix the structural challenges facing the Turkish judicial system, a UN Special Rapporteur found in 2012.[28]

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OVERHAUL

Soon after the trials that effectively purged the Turkish military of secularist opponents and the reforms that weakened the military courts, Erdogan's alliance with Gulen fell apart. As the alliance imploded, the Gulen network in the judiciary pulled the same trick again, only this time against Erdogan's government.[29] Between December 17 and 25, 2013, Gulen-affiliated prosecutors unsealed three separate indictments targeting dozens of influential businessmen and the sons of two ministers, charging them with massive corruption.[30] The scandal, coming on the heels of months-long, nation-wide anti-government protests that summer, seriously threatened Erdogan's government as well as members of his family.[31]

Erdogan called the indictments a "judicial coup" and launched a counter-attack against the instigators. His allies had become enemies, rendering a politically-motivated judiciary once again a threat to the AKP. This time, Erdogan took matters into his own hands, setting out to cleanse the courts of the very individuals he had welcomed just a few years earlier.

In the months following the December 2013 arrests, the AKP embarked on a massive reshuffling of the judiciary and police force. A power struggle between factions of the judiciary with loyalties to Gulen and to Erdogan ensued— with each side issuing conflicting orders of arrests and releases that were ignored by the other.[32] Through the HSK, the government removed hundreds of judges and public prosecutors from their posts, reassigning many to faraway cities.[33] In the meantime, the government replaced more than 2,000 police officers with appointees.[34] As a result of these appointments, all key suspects of the December 2013 corruption indictments were released by April 2014.

Besides reshuffling the judiciary, Erdogan also attempted to once again re-structure it. The AKP introduced a bill amending laws governing the HSK to allow the minister of justice to replace HSK members, effectively subordinating the judiciary to the executive branch.[35] The bill passed in February, and while it was partially annulled by the Constitutional Court in April 2014, it reinforced the Ministry of Justice's dominance over the HSK.[36] During the new round of HSK elections that October, the AKP promoted a list of candidates who ended up winning eight out of the ten seats available.[37] Between 2014 and July 2016, the AKP also pushed for legislation aimed at restructuring the Court of Appeals and Council of State to further tighten control over judicial appointments.[38]

The fallout between Erdogan and Gulen ultimately unraveled the verdicts of the initial 2008-2010 sham trials. Ergenekon convicts were released in March 2014, along with Sledgehammer convicts in 2015.[39] Facing arrest for facilitating the 2013 corruption cases, the former Ergenekon prosecutor, a Gulen affiliate, fled to Armenia in August 2015. In the following spring, an appeals court overturned all Ergenekon convictions, declaring the conspiracy null and the evidence illegally obtained by Gulen-affiliated operators.[40]

The Final Wave

The purges and overhauls of 2014 largely subdued the Turkish judiciary. Erdogan grew increasingly emboldened and began to openly attack the Constitutional Court, the body that had once posed the greatest threat to his political career. In February 2016, he publicly decried and vowed "not to respect" an order by the Constitutional Court to release Can Dundar and Erdem Gul, the editor-in-chief and the Ankara bureau chief, respectively, of Turkey's main opposition newspaper *Cumhuriyet*.[41] It was a watershed moment.

Yet Erdogan's power struggle with Gulen had only just begun. His early gambit with the Gulenists had repercussions beyond the breakdown of due process. After the military had been purged of secularists, the Gulenists had filled the vacuum. In a final challenge to Erdogan, Gulenist officers led a coup attempt in 2016, another nail in the coffin of Turkish democracy.[42] As the plot failed, Erdogan declared a state of emergency, granting himself the right to rule by decree. More than 150,000 people were detained.[43] In the next two years, the Turkish cabinet issued thirty-two state-of-emergency decrees to amend laws, including the Criminal Procedure Code and Law on International Protection.[44]

The state of emergency after the coup afforded Erdogan the opportunity to finally cleanse the bureaucracy of political opponents through further mass purges. By the following summer, more than 4,000 judges and prosecutors, a quarter of the total number, had been dismissed, including two members of the Constitutional Court.[45] Despite several applications to review government decrees upon request, the Council of State did not issue "a single decision."[46] Many of the suspended judges and prosecutors were convicted of terrorism charges. To fill their spots, nearly all lower court judges were promoted to appeals courts and were replaced by newcomers to the judiciary. Among Turkey's 14,000 judges, the average experience practicing law fell to two and a half years, according to the Turkish Bar Association.[47] Some 500 administrative personnel were also dismissed from the Constitutional Court, Council of State, Court of Accounts, and HSK.[48]

The Constitutional Court took an especially stark turn after the coup. After unanimously voting to suspend two of their colleagues for alleged links to Gulen, the justices sided firmly with Erdogan in the post-coup period.[49] In November 2016, the court rejected calls to review the legality of certain state-of-emergency decrees, arguing that they exceeded its jurisdiction.[50]

These moves ultimately also paved the way for Erdogan's long-held dream of instituting an executive-style presidency—a system that effectively eliminates the separation of powers. Erdogan had attempted to institute his presidential system for several years, but was thwarted by a strong opposition from his own officials and top members of the AKP.[51] In April 2017, however, the Turkish president shrewdly brought a constitutional-reform referendum to voters amidst the climate of fear reinforced by daily arrests of dissidents under the post-coup state of emergency and enhanced censorship justified by Turkey's military operation in Syria.[52] The new system has rendered the parliament a rubber stamp.[53] The new appointment systems of the HSK and high courts deeply trouble global watchdogs

such as the Human Rights Watch, World Justice Project, and the Human Rights Foundation.[54] With few checks against the executive, the president now enjoys broad powers and the ability to rule by decree. Since transitioning to an executive presidency in June 2018, Erdogan has issued more than thirty-nine executive decrees.[55]

THE JUDICIARY AS A POLITICAL WEAPON

Today, the hundreds of ongoing cases against Turkish journalists, politicians, academics, civil society leaders, and artists are testament to the politicization of the judiciary. Given the hollowing out of the court system, many of these judicial processes follow common trends that betray both their political motivations and strategies to ensure the denial of due process and fair trial.

The pro-Erdogan judiciary of today follows a similar playbook to that of the Gulen-run one of 2007-2013. As he had done with the Ergenekon and Sledgehammer trials, Erdogan often speaks publicly about ongoing political trials, signaling his approval or discontent to the judiciary. The more empowered Erdogan of today, however, also directly names his targets, many of whom are then swiftly arrested and indicted based on the president's remarks.

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Pro-Erdogan media also plays a critical role in naming targets and facilitating political trials. Today, Erdogan's friends and family control more than 90 percent of the media sector.[56] Just as Gulen-affiliated newspapers were largely seen as the driving force behind the Ergenekon and Sledgehammer trials by systematically leaking purported "evidence" against defendants, today, Turkey's pro-government and government-owned media claim to expose so-called coup-plotters or terrorists and spread conspiratorial narratives against targets who later face indictments. Social media, too, has become a key tool in today's witch-hunt for dissidents, real and imagined.[57] Pro-Erdogan trolls, commonly called "AK Trolls," amplify the traditional media's efforts to target individual government critics with harassment, hate-speech, and slander, as well as spread disinformation to discredit Erdogan's critics.[58] Meanwhile, Turkey's courts blocked nearly 3,000 online articles in 2018 alone and ignored dozens of appeals.[59] Freedom House's annual *Freedom on the Net* reports have classified Turkey as "not free" since 2016.[60]

Once targets are established, prosecutors launch hasty investigations to order detentions. Lengthy indictments run hundreds of pages, filled with flimsy "evidence" and arguments that strain credulity. Complaints are often attributed to anonymous witnesses, impeding defense lawyers' ability to challenge the evidence. Prosecutors seek charges for years-old acts to punish Erdogan's opponents during politically critical periods, issuing strategic sentences to prevent or delay appeals.[61] Defendants are subject to lengthy pre-trial detentions, sometimes lasting years, as prosecutors fail to release indictments. Too often, as one court sets a prisoner free, another issues his or her arrest within hours.[62] In some cases, judges who order a release are themselves subjected to investigation. The high courts ignore or deny most appeals requests.

A review of two key cases—one against a philanthropist, and the other against an opposition leader—illustrate these trends in the judiciary's political maneuvers.

Osman Kavala and the Gezi Trial

On October 18, 2017, Osman Kavala, a prominent Turkish businessman and philanthropist, arrived at the Istanbul airport on a flight from Gaziantep, a city in southern Turkey.[63] Before he could leave the plane, police took him into custody. At the same time, authorities raided the Istanbul office of Anadolu Kultur, the cultural education NGO that Kavala heads. As human rights groups sounded alarm bells, prosecutors accused Kavala of organizing the anti-government "Gezi Park" protests of May 2013. On November 1, 2017, Istanbul's First Criminal Court of Peace formally arrested him for attempting to abolish the constitutional order and government. He faces life imprisonment without the possibility of parole.[64]

Kavala's arrest was shocking to many observers. He was a model citizen. Kavala was a well-known philanthropist who managed charities, schools, and civil society initiatives that promote democratization and had no prior criminal record. Law enforcement had no reason to target Kavala. Moreover, the Gezi protests had taken place more than four years earlier, with the authorities having already prosecuted and then acquitted dozens of protestors in 2014-2015.[65]

But Kavala's leadership in Turkish civil society was a political nuisance for Erdogan. His membership on the board of the Open Society Foundations' Turkey office appeared to particularly offend the Turkish president. On October 24, 2017, a week after Kavala's arrest, Erdogan

publicly called Kavala "Turkey's Soros," referring to George Soros, Chair of the Open Society Foundations.[66] He accused Kavala of being "behind" the Gezi protests and transferring resources to it. The Istanbul prosecutor would repeat those allegations against Kavala the following week.

A year later, in November 2018, police arrested thirteen other people in connection to Kavala's case, including several employees of Anadolu Kultur.[67] Although only Kavala is currently behind bars, sixteen people remain defendants in the trial, and all face life imprisonment.[68]

Kavala's arrest and the so-called Gezi trial took place against a backdrop of mass crackdowns on Turkey's civil society, which intensified under the state of emergency declared after July 2016. Erdogan's decrees shut down dozens of media outlets and more than 1,000 nongovernmental organizations.[69] Kavala's co-defendants alone represent major civil society organizations, including the Turkey offices of the Open Society Foundations, Bernard Van Leer Foundation, Anadolu Kultur, Sivil Toplum Gelistirme Dernegi, Diyalog ve Uzmanlasma Dernegi, Hakikat ve Adalet Hafiza Merkezi, and the Nesin Foundation.

As is typical of cases launched under the state of emergency, the Gezi case's indictment is lengthy and tenuous. The 657-page document is entirely unsubstantiated, alleging a fantastical conspiracy between individuals based on loosely connected and largely circumstantial evidence. The indictment cites, for example, phone calls made between late 2013 and early 2014, long after the Gezi protests ended, between two protestors contemplating whether to ask Kavala for money. It establishes no direct contact between these protestors and Kavala. Cell phone signals are similarly offered as evidence of secret meetings between the suspects. The prosecutors point to cell phone signals that were detected from the same base station as proof of a conspiracy among defendants. Perhaps most controversial is that much of the technical evidence appears to have been obtained through illegal wiretappings akin to those in the Gulenist-led corruption investigations of 2013, authorized by authorities who have since been accused of Gulen affiliation.[70]

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In addition to the lack of sound evidence in the indictment, due process has also been denied to the main defendant. Kavala's detention process was extraordinary from beginning to end. His initial transport from the airport to police custody was itself problematic. Selina Dogan,

a deputy of the main opposition Republican People's Party (CHP), asked the parliament to explain why Kavala had not been issued a normal request of court appearance, as would be standard had there been a proper investigation.[71] It also took the police thirteen days to interrogate him after his detention. And when the prosecutor finally ordered Kavala's official arrest, he did so without taking Kavala's testimony. Throughout all this, Kavala's lawyer could not access the claims made against his client due to a confidentiality order on the case.[72]

It took prosecutors sixteen months to issue an indictment against Kavala, which finally came in February 2019.[73] In the meantime, the court denied repeated requests to hold hearings on Kavala's pre-detention. Even when, on April 27, 2018, the defense argued that the detention constituted a violation of personal liberty (citing a recent ruling of the Constitutional Court on a similar pre-trial detention case), the court dismissed requests for a hearing and ruled, without consulting Kavala or his lawyers, for his continued detention. The court also held a review hearing on August 3—with a lawyer appointed by the Istanbul Bar Association—without notifying Kavala's defense lawyers and then ignored an objection filed by Kavala's team. The court only granted Kavala a detention hearing on April 30, a year and a half after his arrest, and six weeks before the trial began.[74]

Kavala was finally able to present a defense on June 25. Yet oddities in the legal process persisted. At the end of the hearing, when the court ruled by a majority vote for continued detention, Mahmut Basbug, the presiding judge, dissented, favoring release. A month later, on July 30, the HSK issued a decree forming a second court board within the penal court's body.[75] Assigning the Gezi case to the newly formed board, the HSK moved Judge Basbug to the other board, effectively removing him from the Gezi case.

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Media disinformation played a critical role in justifying Kavala's continued detention. In the week following Kavala's arrest, Turkish media reported that Kavala's case was tied to the coup attempt of July 2016, though no such charge ended up in the indictment.[76] Other allegations swirled in pro-government newspapers. "The key name of the terror fund," ran the headline of the Islamist daily *Yeni Safak*, which argued that Kavala had funded the PKK and "played a key role" in "all covert operations against Turkey."[77] *Aksam* depicted Kavala as the brains behind the opposition

Peoples' Democratic Party (HDP)'s campaign against Erdogan's bid for executive presidency.[78] Similar examples of slander abound.[79]

In the politicized judiciary, these state-sponsored media attacks did not fall on deaf ears. In his order for Kavala's arrest, the Istanbul prosecutor reproduced much of the media's slanderous language. Not only did he describe the Gezi protests as "an insurgency" attempting to overthrow the government and allege that "all terrorist organizations" had "actively joined and supported" them,[80] he also repeated libelous media allegations that the July 2016 coup had been organized on an Istanbul island by American scholar Henri Barkey, asserting that his office had uncovered "abnormal levels of contact" between Kavala and Barkey, an accusation that is unsupported by the 675-page indictment.

Meanwhile, several papers directly targeted Kavala's connection to George Soros after his detention. The pro-Erdogan *Gunes*, for example, called Kavala "the Turkey arm of George Soros, architect of chaos." The pro-government *Star* described the "native Soros" Kavala as "one of Turkey's darkest names," while the government-owned *Turkiye* went a step further and dubbed Kavala the "Red Soros."[81] This propaganda quickly made its way to Erdogan, who repeated the "native Soros" term a week after Kavala's detention.[82] In November 2018, Erdogan directly accused George Soros of bankrolling the Gezi protests; Open Society Foundations shut down its Turkey office days later.[83]

Kavala's plight also shows the inability of Turkey's higher courts to offer remedies to political cases. On December 29, 2017, Kavala's lawyers lodged a complaint with the Constitutional Court. A month after the government submitted its observations to the Court on April 1, 2018, the Court ruled that Kavala's detention did not violate his right to liberty and security. In a dissenting opinion, the president and the vice president of the Court recognized the lack of convincing evidence that the protests were financed by the defendant or that they even intended to overthrow the government.[84]

Selahattin Demirtas and the Crackdown on Political Opposition

A similar failure of due process pervades the case of another prominent Turkish figure, a young Kurdish politician who, like his colleagues, faces politically motivated charges. On November 4, 2016, Selahattin Demirtas, a Kurdish human rights lawyer and co-chair of the HDP, was detained alongside his fellow co-chair, Figen Yuksekdag, and nine other party members, as part of a counter-terrorism investigation.[85] The public

prosecutor in Diyarbakir, a Kurdish-dominated province in southern Turkey, demanded a 142-year prison sentence due to Demirtas' alleged terrorism links.

The move was a shock to Turkish politics. Demirtas, a young politician who rose to prominence in 2014 when he ran for president, had reached unprecedented popularity within a year.[86] Demirtas' master move was to position himself against Erdogan's bid for an executive-style presidency and increasingly authoritarian rule. Thanks to those campaigns, he managed to earn thirteen percent of votes from a coalition of political factions, doubling the traditional support of Kurdish politicians in Turkey.[87] In June 2015, the HDP became the first majority Kurdish party in history to enter the Turkish parliament.[88]

The legal proceedings against Demirtas and Yuksekdag followed a pattern similar to other political cases. First, they earned Erdogan's ire through the HDP's success in the June 2015 elections, which cost the AKP its parliamentary majority for the first time since 2003. Erdogan called for a re-election to be held in November, determined to win back the AKP's majority. In July, he scrapped a two-year peace process with the PKK, a designated terror group, resuming Turkey's decades-old war with Kurdish insurgents. Erdogan then moved to brand the HDP as a front for the PKK. Eventually, in 2017, he would tell a G20 summit in Germany, "Demirtas is a terrorist."[89]

Unlike for journalists and civil society leaders, Demirtas' status as a lawmaker afforded him protection against prosecution. Erdogan first needed to strip him of his parliamentary immunity. On July 28, 2015, the same day that he dropped the peace talks with the PKK, Erdogan called for the lifting of parliamentary immunities, pointing to the HDP.[90] The courts followed the president's cue. On September 5, 2015, within weeks of Erdogan's call, the public prosecutor in Diyarbakir opened an investigation into Demirtas, issuing a request to the Ministry of Justice for the lifting of his immunity. The prosecutor cited offenses involving incitement to crime, insulting the president, and terror propaganda.[91]

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purported links to terrorism. In one example, on September 10, 2015, *Yeni Safak* published a photo of Demirtas on its front page, captioned, "Yes, you are a murderer."[92] Directly underneath, it placed an unrelated story titled "The HDP's bombs," a report on an alleged PKK plot, which it dubbed "the 157-kilometer plot to massacre." In case readers missed the message, the editors spelled it out: "Whenever Demirtas speaks, Turkey turns into a blood lake." Such incitements continue to make rounds in pro-government media and TV channels today.[93]

Amidst the continuing propaganda, Erdogan once again called for the prosecution of HDP members in a speech on January 2, 2016. Between January and May, an average of seventy-three investigation reports per month on HDP parliamentarians were submitted to parliament. Ten prosecutors prepared sixteen new investigation reports against Demirtas.[94]

In the meantime, Erdogan succeeded in securing a 367-vote majority by eliciting the support of nationalist deputies from opposition parties. In May 2016, the parliament voted to lift immunities, allowing for indictments to proceed in the 137 active investigations into parliamentarians.[95] One hundred and thirty-one of the cases targeted the HDP. The next month, an Istanbul district court unsealed an investigation report against Demirtas for insulting Erdogan and issued an indictment for insulting then-Prime Minster Ahmet Davutoglu, "opening the way for Demirtas' imprisonment," as one pro-government newspaper put it.[96]

Cases against Demirtas poured in. Between November 2016 and 2017, prosecutors filed ninety-six investigation reports against the Kurdish leader.[97] They issued dozens of indictments, including in Diyarbakir, Istanbul, and Ankara. Charges ranged from creating propaganda and praising criminal activity to insulting Erdogan. The main case accuses Demirtas of "leading an illegal organization" and consists of thirty-four investigations, eighteen of which are based on propaganda charges. In fact, Demirtas' lawyers say, none of the thirty-four investigations actually contain charges of "leading" an illegal organization.

Much of the evidence, meanwhile, is based on Demirtas' political speeches made as a parliamentarian—a role he has held since 2007 and a status that should normally afford additional free speech protections. Other evidence, lawyers say, was obtained by illegal wiretapping. Ten prosecutors responsible for twenty-eight of the ninety-six investigations into Demirtas turned out to have been previously detained for their ties to Gulenists.[98]

In addition to serious questions about the evidence and the circumstances of its collection, procedural irregularities have compromised Demirtas's right to a free trial. Demirtas was only able to make the case for

his defense 460 days after his detention.[99] Until an Istanbul court sentenced him to prison in 2018, he was held in pretrial detention for over two years.

Critically, prosecutors appear to demand strategically timed sentences in order to maximize jail terms while impeding appeals. Turkey is infamous for its freedom of expression trials. Even so, such convicts normally face a sentence of less than a year, or a maximum of 1.3 years. For Demirtas, however, Turkish prosecutors demanded an unprecedented maximum sentence of up to five years.[100]

At the same time, prosecutors moved strategically around Turkey's judicial system to circumvent appeals. Since July 2016, Turkey has divided appeals cases between those with prison terms below five years and those above five years. Convictions involving sentences of more than five years can be taken to the Court of Appeals, but a regional appeals court—created by law in 2004, though established only in 2016—must review cases with less than five-year sentences.[101] These courts provide some benefits, such as the ability to submit further evidence. Yet they are under the jurisdiction of the minister of justice, and from the state's point-of-view, preferable for appeals. Conveniently, the court handed Demirtaş a term of four years and eight months, ensuring that the verdict could only be overturned by the decision of a regional appeals court.[102]

The Constitutional Court has offered no remedy in Demirtas' case. Demirtas and Yuksekdag submitted their first application to the Constitutional Court on November 17, 2016—within ten days of their detentions.[103] The court took thirteen months to rule against their release in December 2017. Demirtas then submitted several other requests in the next two years. These requests, like those of his fellow deputies, were ignored or denied.[104] Fourteen HDP lawmakers appealed to the body in total; the Court ruled to reverse only two cases—and both violations in question were based on rights other than freedom of expression. The twelve other cases, including one by Demirtas, were appealed, invoking freedom of expression rights.

This October, the Court granted a rare exception and ordered the release of HDP parliamentarian Sirri Sureyya Onder by a unanimous vote of 16-0.[105] Onder had been convicted along with Demirtas in the propaganda case that landed Demirtas his 4.8-year sentence, though Onder had received a shorter sentence of 3.6 years. This order to release Onder marked the third favorable decision in a row by the Constitutional Court regarding freedom of expression. In May, the Court had found violations of freedom of expression rights in the case of, first, a schoolteacher and then nine academics, all of whom were jailed for making statements against the war

with Kurdish insurgents.[106] The October ruling on Onder was undoubtedly also welcomed by HDP supporters. But the HDP questioned why the other twelve deputies were not afforded the same protection of their right to free expression and why Onder's case was bumped up ahead of that of Demirtas.[107]

Another one of the Turkish judiciary's most scandalous transgressions concerns its efforts to circumvent the ECHR with strategically timed rulings.[108] In February 2018, Demirtas and Yuksekdag took their lengthy pre-trial detentions to the ECHR. In November 2018, the ECHR issued a judgment demanding Demirtas' immediate release, finding that his prolonged pre-trial detention constituted a rights violation.[109] Erdogan responded the next day by vowing to defy the decision and "finish the job." A month earlier, an Istanbul court had handed Demirtas his 4.8-year sentence.[110] Within a month of the EHCR judgment, the appeals court ruled to uphold that 4.8-year sentence, forcing Demirtas to remain jailed even if the court prosecuting his main case were to follow the EHCR decision and order the lawmaker's release.[111]

This fall, in an apparent bid to preempt the September 18 hearing of Demirtas' case at the ECHR's Grand Chamber, an Ankara court ruled for his release on September 2 for the rest of his case.[112] Although Demirtas, still serving his 4.8-year sentence, could not walk out of the courtroom free, the move was nevertheless welcome. On September 10, the court rejected the prosecutor's objections, finalizing the release verdict.[113] But in a major twist on September 20, a court issued a fresh arrest warrant against Demirtas as part of a new investigation based on the same events concerning his main case but containing slightly different charges.[114] In a detailed statement, Demirtas' lawyers argued that their client, in fact, was not and could not be a suspect in that investigation, as he was already investigated for the same offenses.[115] "There is no judiciary, no justice, no law, no judges," Demirtas warned his followers on Twitter, "Not just for us. For none of you."[116]

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CONCLUSION

The practices described in the two cases studies above are no exceptions. They are typical of politically charged judicial cases against Turkey's

civil society leaders, journalists, and political figures.[117] Kavala and his co-defendants are just sixteen of the many NGO leaders, including the Turkey directors of Amnesty International and Reporters Without Borders, who have all been prosecuted under equally dubious charges and improper circumstances. And Demirtas is one of many politicians prosecuted: fifty-five out of fifty-nine HDP lawmakers have faced a total of 510 court cases.[118] This fall, judges convicted the CHP's Canan Kaftancioglu, campaign manager of the Istanbul mayor who won a historic election in March (and re-election in June), for offensive tweets she posted six years ago. She faces nearly ten years in prison.[119]

As in other systems that use the judiciary as a weapon against dissidents, such politically motivated cases aim to serve as examples to other government critics and opponents in order to dissuade the broader public from exercising its fundamental democratic right to peaceful dissent. The jailing of journalists serves as a cautionary tale to other independent reporters and editors, who are thus incentivized to self-censor.[120] Every new investigation into an opposition politician due to political speech intimidates other opposition figures from performing their duties and signals to the electorate that their democratic will can be ignored arbitrarily. Every day that political detainees like Kavala spend behind bars, other pro-democratic activists in Turkey feel that they, too, could be locked up unjustly anytime.

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When the judiciary is politicized and fails to uphold legal principles that guarantee the rule of law, no individual can be free from political persecution, or trust that the legal system protects his or her rights. Indeed, public confidence in the judiciary is extraordinarily low.[121]

With no remedy in sight, defendants have increasingly turned to international institutions, flooding the ECHR with petitions for retrial. With 321 cases in total, of which 297 were brought under Erdogan's rule, Turkey has had the most cases related to the violation of freedom of expression brought to the European court.[122] In 2018 alone, Turkish applicants brought more than 7,000 cases against Turkey at the ECHR—making Turkey the fourth top defendant after Russia, Romania, and Ukraine.[123] Most cases accuse the government of the denial of freedom of expression or

rights concerning due process. Yet the court is steadily losing its leverage on Turkey's justice system as Erdogan openly defies its decisions and Turkish courts devise strategies to circumvent ECHR verdicts.

This October, the AKP pushed a judicial reform package through the parliament in a bid to "promote and expand" rights and freedoms in Turkey. The amendments provide some important reforms to restore due process by allowing certain defendants to take their cases to the Court of Appeals if regional appeals courts reject their petitions. They also limit pre-trial detentions to a maximum of two years in terror-related cases.[124]

Ultimately, however, these reforms fail to address the problem of separation of powers under Erdogan's constitution or guard against political pressure over the judiciary.[125] The only real reform relating to freedom of expression, for example, allows for the protection of "statements made within the limits of providing information or made with the purpose of criticism" against the country's otherwise broadly defined anti-terrorism laws. As a recent Amnesty International report shows, however, such clauses are unlikely to remedy the abusive use of Turkish laws to criminalize dissent.[126]

As this essay has tried to demonstrate, after several waves of mass purges, reshuffles, and legal restructuring under Erdogan's seventeen-year rule, Turkey's judiciary has become largely subdued and heavily politicized. Erdogan's so-called presidential system of 2017 has only helped codify and institutionalize Turkey's one-man regime, in which the legislative branch and judiciary fall under the executive's will. A decade of sham trials, intensified over the last four years, has established a climate of fear that will be hard to unravel in the years to come. In order to regain citizens' trust in the legal system, Turkey's leaders must urgently work to restore the rule of law in their country. They could start by extending due process to political detainees like Kavala, Demirtas, and their colleagues. ***f***

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