Perceptions and Mentality Structures

# JUST EXPECTATIONS

## A Compilation of TESEV Research Studies on the Judiciary in Turkey

Suavi Aydın, Meryem Erdal, Mithat Sancar, Eylem Ümit Atılgan

TESEV
PUBLICATIONS

# JUST EXPECTATIONS

## A COMPILATION OF TESEV RESEARCH STUDIES ON THE JUDICIARY IN TURKEY

TESEV
PUBLICATIONS

# JUST EXPECTATIONS:
# A COMPILATION OF TESEV RESEARCH STUDIES ON THE JUDICIARY IN TURKEY

ISBN 978-605-5832-63-6

TESEV PUBLICATIONS

**Authors:** Suavi Aydin, Meryem Erdal, Mithat Sancar, Eylem Ümit Atilgan
**Editor (in Turkish):** Asena Günal
**Translator:** Suzan Bölme
**Publication Coordinator:** Koray Özdil

**Cover Design:** Bora Tekoğul

**Page Layout:** Serhan Baykara, Myra

**Printed by:** Mega Basım


**Türkiye Ekonomik ve**
**Sosyal Etüdler Vakfı**
*Turkish Economic and*
*Social Studies Foundation*

**Demokratikleşme Programı**
*Democratization Program*

Bankalar Cad. Minerva Han No: 2 Kat: 3
Karaköy 34420, İstanbul
Tel: +90 212 292 89 03 PBX
Fax: +90 212 292 90 46
info@tesev.org.tr
www.tesev.org.tr



TESEV would like to extend its thanks to the Swedish International Development Cooperation Agency (Sida), the Open Society Foundation, and the TESEV High Advisory Board for their contributions with regard to the publication and promotion of this book.

# JUST EXPECTATIONS

## A COMPILATION OF TESEV RESEARCH STUDIES ON THE JUDICIARY IN TURKEY

**SUAVİ AYDIN**

**MERYEM ERDAL**

**MİTHAT SANCAR**

**EYLEM ÜMİT ATILGAN**

TESEV
PUBLICATIONS

# Contents

# Foreword

Since the European Union membership process has gained a central position in politics, Turkey has become focused on reforms and change. However, this requires not only political will but also social acceptance, as Turkey's drawbacks originate also from the social mentality as much as from the state tradition. Therefore, how social perception is changing in the areas expected to go through restructuring and how ready the society is for the possible reforms is a very important question. TESEV studied this issue within the scope of a research on "Social Perceptions and Mentality Structures" a few years ago and presented the results of this research to the public in the format of four separate books. In addition to ideological frameworks such as religiousness, secularism and nationalism, these studies addressed the general approach to the state and the patriarchal environment evident in families, and revealed how perceptions are changing at the individual and collective level.

However, there is another very important stratum between political will and social ownership, and Turkey's need for reform perhaps shows itself most keenly at this point. This stratum is the state institutions. It looks like it is a must for virtually the entire bureaucracy, and mainly the armed forces, the judiciary and the police, to restructure in terms of mentality, organization and functions. Taking this into consideration, Turkish Economic and Social Studied Foundation (TESEV) Democratization Program (DP) decided to continue its studies on "Perceptions and Mentalities" with bureaucratic institutions and address the judiciary as the first institution.

One of the main reasons behind this choice was that there were very few studies on the judiciary, an institution that is in a central position in terms of democratization, law, and state-citizen relations in Turkey. Taking this shortcoming into account, a research series comprised of three separate studies that complement each other were prepared with the aim to inform and guide the public debate on the judiciary in Turkey. Based on these research projects conducted between early 2007 and mid-2009, TESEV DP published three separate books on the judiciary in Turkey. It should be noted that the study does not cover the developments taking place in the judiciary after the first half of 2009.

The first book authored by Mithat Sancar and Eylem Ümit Atılgan attempted to shed light on the mentalities of judges and prosecutors and how they approach

the concepts of state, justice and rights. The second book authored by Mithat Sancar and Suavi Aydın aimed to determine the perception of justice in the society and the functionality attributed to the judiciary as an institution in the public mind. The book demonstrates that terms such as equity and criminality are interpreted within a pragmatic framework, and reveals the social perceptions that hamper the establishment of an understanding of law based on universal principles. The third book authored by Meryem Erdal takes a look at the press as an essential area that functions as a bridge between the judiciary as a bureaucratic institution and the way justice and law are perceived in the society. This is mainly because the support of a powerful media is a requirement for the institutional transformation of the judiciary based on democratic principles and norms as well as for the formation of the social perception that seeks a transformation as such.

This English edition consists of an extensive summary of each of these three books with the aim to present their core findings in one volume.

Turkey's requirements in its democratization process are the formation of a citizenship in conformity with the universal norms recognized today, along with its administrative mechanisms. The bureaucracy of law and, hence, the judiciary are in a central position as the indispensible guarantees of such a transformation. We hope that this study will make serious contributions to discussions on the reforms that will be made in such an important area...

**Etyen Mahçupyan**
Director of the Democratization Program,
TESEV

# Introduction to the Compilation

*Just Expectations: A Compilation of Tesev Research Studies on the Judiciary in Turkey* consists of summaries of the studies carried out under the main project on "Perception and Mentality Structures in and on the Judiciary". The purpose of this main project is to contribute to the discussions revolving around the judiciary, which have recently grown quite intense in our country and which are closely related to all aspects of social life and particularly to political developments, by shedding light on the matter via data collected from the field. Undoubtedly, identifying what sorts of problems are encountered in the realm of the judiciary and with regard to the judiciary, and giving some ideas on how to solve them are also included in this purpose.

The first study, *"Justice can be Bypassed Sometimes...": Judges and Prosecutors in the Democratization Process*, is built on "in-depth interviews" conducted with judges and prosecutors within the framework of a specific methodology. These interviews have provided a wealth of data that allow gaining information and developing ideas on how judges and prosecutors approach the judicial activity and various social-political issues; the studies present these specifically assorted data to the reader. Having data that can form the basis of a sound conception on the perception and mentality structures prevailing in the judiciary not only facilitates more objective discussions related to the judiciary, but also encourages creating the groundwork required for public supervision of the judiciary.

The objective of the second part of the compilation, *"Just at Times, Unjust in Others...": Society's Perception of the Judiciary in the Democratization Process*, highlights the outlines of society's view of the judiciary. In this respect, it can be said that the first two studies complement each other like the two sides of a coin. When these two studies are read together, it can be seen that the judges and prosecutors interviewed share similar views with the general public on major issues related to the judiciary.

The third part of the compilation is dedicated to *"Everyone Have Their Own Judiciary...": Press' Perception of the Judiciary in the Democratization Process*, which discusses the press' influence and perspective on the judiciary based on cases which have widely stirred the public and found detailed coverage in various media organs.

The studies encompassed in this compilation are included under the general framework of the sociology of law and the specific compartment of sociology of

jurisprudence. The sociology of law, which perceives law as an order of social life, studies the movement and development patterns of law, and its relation to other systems of the order as well as culture and the exclusive areas of life. On the other hand, empirical studies focusing on social processes affecting the operation of the judicial mechanism and the actors involved in the decision-making system in the judiciary are often the subject of a special discipline called "sociology of jurisprudence". Sociology of jurisprudence was developed as a response to the need to be aware of the direct connection between court decisions and the personal characteristics of judges, or in other words, the need to be aware of whether the social backgrounds and individual and political preferences of judges play a determinant role in the decision process.

Empirical studies on judiciary have a long history and a rich literature in the Western academic world. Unfortunately, it is not possible to say the same for Turkey. In Turkey, sociology of jurisprudence is treated as the stepchild of law and sociology, so to say. To date, experts of both fields have generally contented themselves with taking a superficial look at the other discipline from the edge of their own disciplines. These conditions automatically explain the impossibility of development for "sociology of jurisprudence", which is a specific discipline of sociology of law. Some of the judges and prosecutors we interviewed also pointed at and complained about this shortcoming. The lack of any sociological studies on judiciary makes it difficult to easily and efficiently discuss the issues related to this subject. As such, the general and professional public opinion becomes dominated by a castrating and polarizing rhetoric rife with "treason charges" and "conspiracy theories".

In fact, public discussion on the judiciary and the contribution to this discussion by judicial circles is an extremely beneficial development in terms of establishment of democratic procedures and improvement of the democracy culture. On the other hand, the most effective way of tackling arbitration lies in democratic supervision of the judiciary. And democratic supervision can only be possible through uninterrupted discussion. However, a discussion run with shallow arguments and limited materials on the subject and universe can neither serve democratic supervision nor yield results that can build the problem-solving capacities of the society and the political system. The common objective of the studies forming this compilation is to contribute to Turkey's democratization process by helping to make visible the internal world of the judiciary and diagnose the interactions between this world and the outer universe. It is also hoped and desired that they will encourage and enable development of sociology of jurisprudence in Turkey.

**Mithat Sancar**
Professor of Law,
Ankara University

# “Justice can be Bypassed Sometimes…”: Judges and Prosecutors in the Democratization Process

We owe our thanks to each and every judge and prosecutor who gave us their valuable time despite their gigantic workloads at the courthouses we visited.

**Mithat Sancar - Eylem Ümit Atılgan**

# Introduction

This first study, which aims to get information and give ideas about the approaches of judges and prosecutors on judicial activities and various social-political issues, and which therefore aims to do a survey on the perceptions and mentalities prevailing in the judiciary, was constructed on the basis of "in-depth interviews" conducted with judges and prosecutors within the framework of a specific methodology. The purpose of this study is to contribute to the debates revolving around the judiciary, which have recently grown quite intense in Turkey and which are closely related to all aspects of social life and foremost to political developments, by shedding a light on the matter via data collected from the field. Included in this is also the purpose to identify what sorts of problems are encountered in the realm of the judiciary and with regard to the judiciary, and to give some ideas on how to solve them.

## METHODOLOGY AND SCOPE

This study is based on the acceptance that arriving at an understanding on the perceptions and mentalities prevailing in the judiciary can only be possible through collecting data and information from the field. In Turkey, the findings from studies following a positivist methodology and focusing on issues such as the problems of the judicial organization or the physical conditions of courtrooms etc. have obvious contributions to the wealth of information in the area; however, the lack of a study oriented to understand the mentalities and perceptions prevailing in the judiciary is an important shortcoming. Surveys endeavouring to understand the interaction process from the perspective of the actors involved in that process are indeed rare in our country.

### DATA COLLECTION – DATA CREATION

The methodology we preferred for this study was to administer interview forms that used qualitative and quantitative survey designs concurrently, on judges and prosecutors, and to record the interviews via an audio recorder. In line with this purpose, we prepared interview forms consisting of open-ended and closed-ended questions. We used demographic data such as age, place of birth etc. and measurement patterns to enable systematic interpretations and analyses through better familiarization with the research area rather than to arrive at generalizations or principles.

We designed the forms in two sections. In the first section, we included questions on socio-demographic characteristics, living standards, social relationship dynamics and socialization areas. We dedicated the second section to "in-depth interview", with question groups oriented to identify the perception on the meaning of the profession and identity of a judge (externally and internally coded); understand the approach on the function of the activity of judging/adjudicating and the mentalities factoring in the execution of that activity; determine how the actors of the activity of adjudication are viewed; reveal the preferences on norms and values in the activity of adjudicating; and diagnose political and ideological tendencies.

The field work that started on 5 February 2007 at the Courthouse of Ankara was completed on 22 June 2007 with the final interviews held at the Courthouse of Trabzon. While interviews were made at numerous different courthouses in Istanbul, such as Sultanahmet, Şişli, Beşiktaş (the former State Security Court/DGM), Gülhâne etc, the interviews in the other cities were limited to the magistrates/courts located at central courthouses. We took special care to ensure that almost all workdays were spent among judges and prosecutors at courthouses throughout the total duration of the field work, which was approximately five months.

## IDENTIFYING THE RESEARCH AREA

The aim of the study guided us in determining the research area. When going into the field, we thought it would be the correct thing to focus our research on the members of the judiciary who determine the legal life of the country with their decisions and practices. Therefore, we limited the interviews to court presidents and the prosecutors working at courthouses. In the interviews, instead of interviewing an equal number of judges and prosecutors from each courthouse, we took care to achieve a distribution and grouping that would help reaching sufficient data to highlight the differing and similar points in the general picture of the judiciary. We collected the data through the technique of "in-depth interview", which is included in the qualitative research tradition. In line with the "pursuit of multiplicity and diversity"[1], which is one of the most evident characteristics of the qualitative research tradition, we kept the research field broad, ranging from judges and prosecutors serving at the former State Security Courts (DGM) to judges and prosecutors serving at Juvenile Courts.

1 Yıldırım and Şimşek, *Sosyal Bilimlerde Nitel Araştırma Yöntemleri*, p. 58.

# Perception Patterns Regarding the Judge/Prosecutor Identity

Judicial professions (judge and prosecutor) have the highest prestige in the society. It is even frequently stressed that it would be more accurate to call them "roles" instead of mere "professions".[2] So, "who" are the carriers of this role? Drawing the picture of the judge/prosecutor identity is important in terms of recognizing the factors affecting the operation of judicial processes. Such a recognition requires taking the photo from at least three different angles: Doctrine and system (theoretical and ideological perception), the world of the judiciary (self-perception), and society (external perception).

We asked the judges and prosecutors we interviewed to share what they think about the "ideal picture". We established that in most of the responses, the interviewees used similar definition codes at first. These are concepts that to a large extent coincide with the codes introduced by the doctrine and the system, such as "being just and fair", "being impartial", "doing one's job well", "having good command of your area" and so on.

## THE IDEAL JUDGE-PROSECUTOR

Under this heading, we will cite some passages from the somewhat mainstream descriptions given by some of our interviewees on "good judge-ideal judge":

> Now, the judge bench is a sacrosanct post, and the person who will sit on that bench also has to be a sacrosanct person. In other words, he/she has to demonstrate a personality that is in harmony with that seat, that bench. Those who fail at this unfortunately bring harm to the feeling of justice; they injure it. (Interview 23)
>
> Listen courteously, think cautiously, then speak wisely and decide impartially. I think these are of the most important principles of being a judge ... (Interview 6)
>
> First of all, the judge must have a very decent character to ensure a decent judging activity. It is called impartiality, but the judge is not actually impartial; he is on the side of the rightful party. Because he represents what is right and what is just. Of course he will be unbiased when judging. He will be

2 **Rüdiger Lautmann, *Soziologie vor den Türen der Jurisprudenz*, p. 44 and subsequent.**

> hardworking, constantly following up the case laws and the new practices. He will study the case file well. (Interview 5)
>
> I think it is not enough to just have knowledge of the law in order to be a good judge or prosecutor. You have to have an economic and social formation conforming to that post; you have to have a rich accumulation of knowledge. In short, you have to have a personality that can really fill that seat, so to stay. (Interview 44)
>
> Firstly, he has to be just; secondly, he has to be impartial; thirdly, he has to know the laws very well, be a good listener and be unprejudiced. (Interview 28)

As a result of the developments in the sociology of jurisprudence in the West, the discussions around the "judge's portrait" also gained some new dimensions. As the members of the professions also joined in the discussions, it became apparent that the traditional uniform image of the "ideal judge" did not fit very well with reality. Whereas on the one hand the "clichés" that defined judges only in terms of their association with the law started to lose their meaning and credibility, on the other hand formulas on the "judge portrait" highlighting the political and social context of the juridical activity were introduced.[3] Descriptions from both inside and the outside that defined the judge as a "democrat", "social engineer", "human rights protector", "civil servant" and ascribed similar attributes became common.

It is possible to see the reflections of this development in our country too, albeit in a narrower scope. In particular, we are able to see the growing pluralisation in the "judge type" as we read the views of our interviewees on various subjects. However, we also witnessed varying approaches in descriptions of the "judge portrait". For example, a judge puts emphasis on "sensitivity to human rights" in addition to the general attributes named by the majority:

> A judge who is conscious of his duty should be successful, hardworking, honest, impartial, respectful of human rights, should know and recognize and teach human rights and ensure their execution... we can say that briefly these are the responsibilities of a judge. (Interview 26)

Another interviewee uses the "social engineer" concept to define the ideal role, while radically criticizing the widespread perception concerning the professions, or more accurately, the roles, of judges.

3 **Peter Kauffmann, "Wie man Richterleitbilder wirksam macht – Eine rechtssoziologische Betrachtung".**

## TO WHAT EXTENT IDEAL FITS REALITY

Most of the interviewed judges and prosecutors said that their image and conception of their professions or roles, i.e. the "ideal picture", fit the reality to a larger extent, and that they and their colleagues possessed the attributes forming this picture. Some interviewees were not of the same opinion and emphasized that there was a serious gap between the ideal and the reality. One of the interviewees did not hesitate to openly state that the definitions on the "ideal picture" are nothing but deception:

> When you are on your judge internship, they keep you in Ankara for a total of six months, divided into two terms of 3 months, and the gist of their teachings is oriented to keeping up appearances, such as judges do not eat, drink, stroll around etc. in public places or that judges do not have a lot of friends and so on. So, for three intensive months you are exposed to this heavy propaganda.

An interviewee's comment that they deal with not the content but the mould and not the enclosure but the envelope also comes to the same conclusion:

> Now we are playing the game of law and the jurist... law and justice are like the man and his garments. But the justice that is within a person is meaningful and fulfilling only as long as it is in accord with the law and becomes an object together with the pattern of law that is outside the feeling of justice. Most of the time, there is no longer an object inside, and we busy ourselves with the outer garment, which is bad. (Interview 8)

An interviewee draws attention to the huge gap between the ideal and the reality, and the way the judiciary is perceived in the society, with references to public surveys on the state institutions:

> The public expects too much from the judiciary. The people expect too much. Sometimes they make polls, all reputable institutions; and I see the judiciary placed on the third place in the ranking list of the most trusted institutions; for example currently the President of the Republic is the most trusted institution in the eyes of the public, followed by the Armed Forces; and when judiciary comes behind them in this list, the country loses too much. (Interview 7)

Another interviewee states with impressive words how his/her colleagues do not read and hence fail to develop themselves (Interview 29). We have another interviewee complaining about the low level of reading and the low intellectual level among members of the judiciary (Interview 44). A judge born in 1968 and thinking that this situation is connected to the events surrounding the military coup on 12 September 1980, compares the atmosphere prevailing during his student days to post-September 12 1980:

> The pre-80 youth had it in them for example; the reading rates were very high. We saw the post-80 era as well. Maybe during our student days we studied at the faculty with no cares and worries about the world; we had no problems, but I think we were subtlety manipulated to avoid any involvement in the leftist or rightist causes and in the politics in general. (Interview 44)

The same judge thinks that the research habit is already weak in this professional cluster, and coupled with the low reading levels, this situation creates negative consequences such as conceit and complexes.

And finally, an interviewee says in all frankness that the judiciary cannot be fair in a legal system that is obviously unfair, and admits that this situation has completely ruined his relationship with the profession (Interview 8).

### HOW EXPECTATIONS FROM THE JUDICIARY AFFECT THE IDENTITY PERCEPTION

In the eyes of the citizens, judges and prosecutors represent the entirety of the legal system. Therefore, expectations from them are also extremely high. This situation also affects the self-image of judges and prosecutors. The internal perception on the external perception on the one hand shapes the internal perception itself and on the other hand creates a pressure to shape itself according to the external perception. For example, two interviewees describe how the traditional perception regarding the judge as the "person sitting in the prophet's mantle" is reflected on them:

> We discuss this issue among ourselves sometimes. Yes, by calling it the prophet's mantle, the people want to imply that they see our job, our position, at the same level with the prophet's, who is the highest representative of our religion; hence, people expect perfect justice from us; perfect justice. (Interview 23)

> Now, people call it so, yet a judge is not the prophet. Recently, the citizens have come to realize this. But in the old tradition, judge is seen as the person sitting with the prophet's mantle. Of course the judge is not the prophet. But that is how people prefer to see you. (Interview 26)

An interviewee explains how in reality the society does not see judges as sacrosanct and complains that on the contrary they do not care or respect the profession (Interview 40).

### IDENTITY, SOCIAL ORIGIN, AND MENTALITY RELATIONSHIP

Two thirds of the judges and prosecutors we talked to were from villages and small towns. Based on the observations shared by judges and prosecutors, we can say that this phenomenon also corresponds to a widespread perception in the professional circle.

Some interviewees gave detailed explanations on social origin, while some used expressions reflection their perception on the matter when answering other questions. One interviewee openly describes the judge profession as "the village boy's profession". First let us share the explanations provided by that interviewee:

> It is already a village boy's profession ... No city boy would suffer this stress, this ordeal, this thing; it is a job for the village boy. A rich kid is likely to be many times richer than a judge if he became a lawyer or worked outside the profession. But a village boy is at a deadlock: he has to find a job as soon as possible and it has to be a good income job; plus, it has that state guarantee which all of us seek; you want to have your insurance and retirement guaranteed, and that is the dominant reason you choose this profession. So, you turn towards that option and close the door on all other options. (Interview 8)

A judge saying that the profession selection "is closely related to family circumstances", stresses that the need to secure a good income as soon as possible prevents most law school graduates from seeking a career as lawyer (Interview 16).

An interviewee thinks that "this specific social class of judges and prosecutors is a matter of state policy" and defends this argument as follows:

> In order to be independent, the judiciary must first of all have full pockets and then an independent conscious. His brain must be free. What can you expect from a judge or prosecutor who never reads, who has no urban culture, who has come out of his/her village with a backpack and who suddenly wields this enormous power over people and loses all his being in that power? For once, he does not understand the person standing before him! (Interview 1)

The explanations given by this interviewee as an answer to the question "how do you think it becomes a state policy where a specific social segment, i.e. the children of a specific social class, becomes judges and prosecutors, and to what purpose does it serve?" deserve a serious discussion:

> From all this arises a timid, cowardly type of person who has no trust in tomorrow, who cannot give brave decisions and who is worried about how much the political power will give them as salary. And when this is the case, you get a legal system that never progresses, a justice that is never manifested, and a law that is not only politicized but also turned into an ideology. (...) But you have to keep the judge and the prosecutor on hand. This is what works for the state in terms of both the political power and the bureaucracy. (Interview 1)
>
> Upon a question reminding the "role played by judges and prosecutors in the Operation Clean Hands in Italy", an interviewee says that the system in Turkey prefers a meek judge/prosecutor profile (Interview 22).

In truth, there is not much hesitation that there is a connection between social origin and the attitudes and behaviours; however it is probably not that easy to

determine how this connection affects the decisions in the judicial process. Renowned sociologist Dahrendorf who joined these debates with noteworthy analyses also voices similar concerns. In his opinion, it is extremely difficult to arrive at persuasive information on the effect of social background on behaviours and attitudes. Because, the decision-making process runs as a product of many interacting factors; and it is virtually impossible to determine which factor had what share in the decision resulting from that process.[4]

## HOW SOCIALIZATION IN THE PROFESSION AFFECTS PERCEPTION AND MENTALITY

Our interviews revealed that the relations in the professional lives of judges and prosecutors are a factor playing a major role in the formation of their self-perception. The data we obtained from the interviews show that the professional socialization experiences of judges and prosecutors are associated with how specific mentality patterns take shape when we consider the conditions prevailing in Turkey.

Almost all of the judges and prosecutors we talked to said that they are exposed to a huge pressure from the local public especially in small towns, and that this pressure affects them. Here are some examples:

> It is difficult to work in a small area or town, because the people's eyes are always on you. You are forced to kill your inner self and you are never allowed to take off your judge/prosecutor identity. You have to carry it at all times. For example, here in Istanbul, when I go out of this courtroom, no one will recognize me. After we came to Istanbul, we started to take walks hand in hand with my wife at age 46. (Interview 24)

> In small towns, life may be easier, but your lifestyle is always on stage; from the way you dress to the way you behave, everything about you is under constant watch. At least let me put it this way: in small places, whether it is a small town/district or even a small province, I have never been able to walk down the street eating a *simit* (a type of Turkish bagel). But here, I can tear a piece of *simit* with my hands and very comfortably eat it. I can eat ice-cream on the street. Why? Because no one knows me here. In small towns, I have to set an example with my behaviours, actions, speech, clothes and just about anything I do and have. I have to do everything to prevent people from thinking that "the decision rendered by this judge cannot be trusted". (Interview 32)

The system applied in appointment and assignment of judges and prosecutors leads most of them to spend around 10 years of their professional lives in a very restricted social environment. Let us hear from our interviewees who essentially make up this environment:

4 **Ralf Dahrendorf, "Zur Soziologie der juristischen Berufe in Deutschland", p. 216.**

> Their social relations are mostly with the other civil servants working in that small town! They establish social relations only with the governor, the commander of the gendarmerie, the police chief, etc., or in other words, only with high ranking bureaucrats... So, in small places the judge is forced to retreat into his shell. (Interview 42)

An interviewee describes the psychological state experienced by judges and prosecutors in small towns with the term "social phobia":

> We had this social phobia that some harm would come to the profession. But it originates purely from being in this profession. (Interview 29)

Most of our interviewees state, both implicitly and explicitly, that the source of this "phobia" is the distrust felt towards the "public". For example, a judge says that unless they put a distance between themselves and the "local people", they [the people] will clearly "sell them out" (Interview 11). Another interviewee uses more cautious and polite words when saying that in small towns, people are "a bit puritanical" and their relationships are mostly motivated by "interest" (Interview 36).

One of the judges does not hesitate to generalize his experiences and claim that the "interest" dimension will always be there to interfere in all close relationships built with people other than the professional or bureaucracy circles, be it with the "local people" or the "lawyers" (Interview 16).

The region-based procedure used in determining the posts of judges and prosecutors forces new recruits to live in "small towns" for a long time. For a period that can be considered sufficient for the socialization process, these fresh judges and prosecutors generally find themselves in a social relationship with the "bureaucrats" or the "high ranking officials of the state" in that small area. This situation causes judges and prosecutors to become the "representatives of the state" both in the inner (internal) perception and the outer (external) perception. The road leading from this to the mentality of "the civil servant of the state" is indeed very straight and short.

The fact that judges and prosecutors perceive themselves as "civil servants" is one of the major sources of the "statist attitude" commonly seen in the judiciary, as shown below. The relationship between the civil servant and the state is mostly patriarchal. This patriarchal nature considerably curbs the civil servant's potential to object to the state. From the angle of judges and prosecutors, this perception leads to a well-established reflex to "front for the state". Hence, most of the time, judges and prosecutors see themselves as servants of the state who gives content and validity to the "will of the state" in concrete events.

# Perception Patterns on Judicial Independence and Security of Tenure of Judges

## JUDICIAL INDEPENDENCE

Judicial independence, in its simplest sense, means judges "being free when giving their decisions, without being under any external pressure or influence". "Just as actual pressure, the possibility of pressure also undermines the independence of judges."[5] Regardless of how the circumstances may be in today's political system and practice, it is almost indisputably agreed by all countries at principal and verbal level that the judiciary must be independent. In fact, the United Nations has also declared it the duty of member states to recognize the principle of judicial independence.

This point is made clear in the "UN Basic Principles on the Independence of the Judiciary" of 1985, which is the foremost fundamental international instrument on judicial independence[6]. According to the "Main Principles", it is the duty of every Member State to provide adequate resources to enable the judiciary to properly perform its functions. In this framework, "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary".

### HISTORICAL AND ESSENTIAL MEANING OF JUDICIAL INDEPENDENCE

Independence is a concept, a principle that refers to the judge's relationships with others and in particular with the executive, and the guarantees or objective conditions of his/her status rather than the behaviour or circumstances taking place at the time of the de facto performance of the judicial duty. Hence, in order to ensure independence, first of all the structural guarantees that will protect the judge from external influences must be provided.[7]

5 Nurullah Kunter and Feridun Yenisey, *Muhakeme Dalı Olarak Ceza Muhakemesi Hukuku*, p. 315.

6 For a detailed study on this subject, please see Sibel İnceoğlu, *Yargı Bağımsızlığı ve Yargıya Güven Ekseninde Yargıcın Davranış İlkeleri*.

7 Sibel İnceoğlu, p. 17.

Based on the relevant international instruments, the minimum requirements for judicial independence can be listed as follows: Guarantees related to appointment and careers of judges, guarantees related to period and conditions of duty, financial guarantees, principles concerning the internal operation of the judiciary, independence from colleagues and independent image and appearance of the courts.[8]

In essence, independence of the judiciary implies that the judiciary is not dependent on or subordinate to the legislature or the executive, that these other powers of the state cannot instruct or advice the judiciary. The security of tenure of judges is one and the most important of the institutions serving to protect the independence of the judiciary.[9]

Independence of the judiciary as an organ of the state is possible only by ensuring a guaranteed status for judges who perform the judiciary's function. In other words, independence of the judiciary becomes meaningful only when judges are able to perform their jobs in total freedom, without facing any pressure or threat.[10] Therefore, independence of the judiciary requires equipping the judges with individual guarantees that enable them to do their jobs without endangering their own professions or entities and free from any kind of fear or worry.[11]

## CONSTITUTIONAL FRAMEWORK OF JUDICIAL INDEPENDENCE

The Constitution of Turkey contains detailed provisions on both judicial independence and security of tenure of judges. Including the provision that "judicial power shall be exercised by independent courts on behalf of the Turkish Nation", the Constitution regulates the substance of judicial independence in Article 138 "Independence of the Courts". According to the article:

> Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law.
>
> No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.
>
> No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.

8 For details, see Sibel İnceoğlu, p. 18 and subsq.
9 Baki Kuru, *Hâkim ve Savcıların Bağımsızlığı ve Teminatı*, p. 6
10 See: Ergun Özbudun, *Türk Anayasa Hukuku*, p. 337.
11 Şeref Ünal, *Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hâkimlik Teminatı*, p. 27.

> Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

The Constitution regulates the major elements of the security of tenure of judges directly and in a way also encompassing the prosecutors, and leaves the other elements thereof to laws. Let us take a look at the relevant provisions of these articles.

Article 139:

> Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post.
>
> Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill-health, and those determined as unsuitable to remain in the profession, are reserved.

Article 140:

> The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.
>
> Judges and public prosecutors shall exercise their duties until they reach the age of sixty-five; promotion according to age and the retirement of military judges shall be prescribed by law.

These matters specified in the Constitution are regulated via Law no 2802 on Judges and Public Prosecutors.

Another subject directly related to the fate of the security of tenure of judges is the question of what type of a body or committee shall execute the matters related to the personnel status of judges and prosecutors, such as appointments, promotions, transfers, inspections and disciplinary actions.[12] The Constitution

12 **Özbudun, p. 338.**

identifies the High Council of Judges and Public Prosecutors as this body and provides for related provisions in Article 159.

## SYSTEM AND REALITY IN THE EYES OF JUDGES AND PROSECUTORS

A common opinion in the debates continuing since the coming into force of the Constitution is that there are major problems with regard to independence of the judiciary. From the news and commentaries appearing in various media organs, the emphasises made by presidents and members of high judicial bodies especially in the speeches they delivered at beginning of each judicial year, and the statements given by representatives of various circles during this period, which comes close to thirty years, we can conclude that there is a wide consensus that judicial independence does not exist.

We also saw that a big majority of judges and prosecutors we interviewed shared this same common opinion.

### *Those Regarding Judicial Independence as a System-Based Problem*

Some interviewees, after stressing the importance of judicial independence, state that the system is in general inadequate in this regard. Among them, some defined the "system" with a more integrated approach, while some understood it more specifically as "the judicial order".

Another interviewee thinks that the judiciary in Turkey is deprived of rule of law as a mentality and this makes judicial independence impossible (Interview 44).

A prosecutor says that there are no problems with independence of the judiciary on a norm basis, yet the situation in reality is quite different, and the conflict between norm and reality lies first of all in mentalities; he/she codes this mentality as "lack of an understanding of respect to rule of law in the society" (Interview 47).

### *Those Thinking that Problems Originate From Practice*

Some interviewees distinguished between principle and practice, and norm and reality, and said that there is discordance between these two, and that the problem originates from the practice rather than the norm.

One issue most expressed and complained about by our interviewees is that independence of the judiciary exists in the sense that no organ or body can order or instruct them, yet this principle is violated or put under shadow due to various reasons. For example, an interviewee says that independence works in essence, although some problems are experienced due to the desire to pressurize or influence the judiciary (Interview 26).

Another point underlined by the same interviewee is that the judiciary is not strong enough, or is actually weak, when considered from the frame of separation of powers in the constitutional system:

> As the third power of the state, it is weak, and they want to keep it under pressure all the time, taking advantage of that weakness. (Interview 26)

### *Those Seeing the Source of the Problems in Members of the Judiciary*

An interviewee, after stating that the system is problematic in terms of judicial independence, said that the judiciary is able to maintain its independence despite this, and that this is achieved through "quality". This interviewee, who stressed "quality" in every matter addressed, asserts that the main reason of the problems in the judiciary is "lack of quality" (Interview 2).

Another interviewee who defined "quality" from another angle says that "lack of quality" is an important factor, if not the only reason or root cause of the problems in judicial independence. Right after saying that, s/he brings the subject to security of tenure, by giving as example the investigation initiated against the Judge of Kazan, Kemal Şahin for his articles. We have to state here that this same interviewee thinks that this is caused by "fear" and the "fear politics". Underlining the lack of any reactions from the judicial community against the investigation of Kemal Şahin and the statements given by Altay Tokat[13], our interviewee points at the harm this situation did in terms of independence of the judiciary (Interview 30).

Still another interviewee who addresses the issue of judicial independence in terms of the individual characteristics and responsibilities of judges thinks that having judges with strong self-confidence is the basis of independence of the judiciary. The same interviewee, after stating that the judiciary is weak against the executive, emphasizes that this pinch can be overcome with self-confidence and awareness of one's own power (Interview 6).

### *Those Claiming that There Are No Problems with Judicial Independence*

There were also interviewees who argued that there are no serious problems with the independence of the judiciary in Turkey. For example, a judge stated that as long as independence and arbitrariness are distinguished, there are no problems in terms of independence (Interview 37).

13 **Retired lieutenant general Altay Tokat, in his interview in *Yeni Aktüel* magazine, said he had ordered a few bombs to be placed at a few critical empty locations so that the civil servants coming from the West, the judges in particular, could understand the seriousness of their jobs (27 July 2006).**

An interviewee says that the judiciary in Turkey is independent, and then, referring to Decision 367 of the Constitutional Court[14], states that the inability to do anything against such "partial" decisions stems from the independence of the judiciary. According to our interviewee, the judiciary should not be this independent:

> ... Now the current situation we are in is all because of judicial independence; the chaos we are currently experiencing is all due to independence of the judiciary. Since the judiciary is independent, no interference has been possible. No one has been able to interfere. Then, what decision I make IS the decision. And there is not a way out of this mess. Right? (Interview 51)

Another interviewee also takes his cue from his own experiences and says that both judicial independence and security of tenure of judges exist in Turkey. But when we asked him concretely "what he thought of the structure of the High Council of Judges and Prosecutors", we saw that his confident manner regarding independence and security changed immediately.

> I think it surely cannot be counted as independent. In a way, it is a body that has been made subordinate to the Ministry of Justice. In other words, it has to have its own secretariat, and it has to be fully separated from the ministry. It should have its own secretariat to deal with its own transactions, and ministerial members, I mean the minister and the undersecretary, must be removed from the Council. I think the High Council before the 12 September 1980 Military Coup was a more accurate security for judges. (Interview 28)

### *Evaluations regarding the HSYK*

Although what this interviewee says may look contradictory, it is important in that it points at a fundamental problem. When considered together with the feedback from other interviewees sharing a similar approach, we can come to the conclusion that even the judges and prosecutors who think that there are no big problems with independence and security of tenure see the structure of HSYK as a potential source of problem.

We also had an interviewee who expressed that although he has never encountered an independence problem in the sense of "taking orders and instructions" because of HSYK's structure and specifically the inclusion of the Justice Minister and the Undersecretary in the Council, this very structure and

14 **On May 1st, 2007, the Constitutional Court of Turkey issued a ruling overturning the parliamentary process of presidential elections based on a distorted interpretation of the procedural rule laid out in Articles of 102 and 96 of the Constitution. The Court interpreted the minimum quorum of 367 votes laid out in the constitution as a requirement of minimum 367 parliamentary votes in favor of the presidential candidate. The ruling was issued after the main opposition party challenged the constitutionality of the election of the government's presidential candidate Abdullah Gül by the parliament.**

the inclusion of these ministerial members create the possibility of such problems and leads to any rumour thereof being taken seriously (Interview 23).

The same opinion was voiced by other interviewees who said that the structure of the system enables the executive to put pressure on the judiciary and the existence of this possibility alone violates the principle of independence of the judiciary. An interviewee went further and said that the inclusion of the Minister and the Undersecretary in the Council casts a shadow over the independence of the judiciary even if these members act altogether "non-politically" (Interview 6).

These evaluations point at an extremely important perception pattern shared by almost all of the interviewees: The main source of the problems experienced with regard to independence of the judiciary is the structure of HSYK.

Since 12 September 1980 coup, HSYK's structure has become a classicized discussion. Looking at these discussions without digging too deep, it can be seen that the perception or even the belief that HSYK's structure does not agree with independence of the judiciary is quite widespread, not only among the judges and prosecutors we have interviewed, but also in the public as a whole.

Discussions revolving around the HSYK are related to the essence, the core of the principle of judicial independence. As stated before, the essence of judicial independence lies in protecting the judiciary from political authority's pressures or attempts to influence. This system, which gives the executive an opportunity to interfere in the judiciary's domain, contradicts with the principle of independence of the judiciary. That the executive will not hesitate to use this power when the opportunity arises is a historical experience, not an abstract possibility or a theoretical assumption. The validity and dimensions of this experience in the Turkish system were evaluated from different angles by the judges and prosecutors interviewed. We determined that the issues receiving the most complaints from our interviewees were the security of tenure of judges and the inspection institution. Now, starting from these two problem areas, we will address the explanations given by the interviewees about the effects of the executive on the judiciary.

## SECURITY OF TENURE OF JUDGES (AND PROSECUTORS)

An indispensible requisite of judicial independence is to ensure that judges areable to perform their jobs free from all kinds of material or psychological pressure. To this end, it is necessary to provide some guarantees for judges, as independence of the judiciary would become meaningless if a judge could be dismissed or relocated or assigned to another post because of a decision s/he rendered.[15]

15 **Şeref Ünal, *Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hâkimlik Teminatı*, p. 27.**

## CONSTITUTIONAL FRAMEWORK

Article 139 of the Constitution, which was cited above, lists the elements of the security of tenure of judges as follows, including also the prosecutors in its scope, in paragraph 1:

- Judges and prosecutors shall not be dismissed,
- They shall not be retired before the age prescribed by the Constitution unless they so desire,
- They shall not be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post.

The exceptions to these guarantees are specified in paragraph 2 of the same article. According to this paragraph, "exceptions indicated in the law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill-health, and those determined as unsuitable to remain in the profession, are reserved."

The Constitution does not directly grant "geographical security", which is accepted as one of the most important elements of the security of tenure of judges. According to the principle of "geographical security", which is also called "security of location" or "location-based security", "a judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto."[16]

The European Charter on the Statute for Judges states that exception to this principle is permitted only:

- in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction,
- in the case of a lawful alteration of the court system, and
- in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute.[17]

Our Constitution provides that "temporary or permanent changes in the duties and posts" of judges and prosecutors shall be regulated by law and in accordance with the principles of the "independence of the courts and the security of tenure of judges".

Hence, the Constitution has transferred the issue to the law-maker, and the law-maker has passed the ball to the regulation, without going into details, with Law no. 2802 on Judges and Public Prosecutors. According to paragraph 1 of Article 35

16 **Baki Kuru, p. 40.**
17 **Sibel İnceoğlu, p. 21.**

"Appointment by Change of Location of Post", "judges and prosecutors shall be appointed to equal or higher posts at the same or another location by way of transfer with their earned rights, salaries and cadre degrees, in accordance with the Regulation on Transfers and Appointments prepared by the High Council of Judges and Prosecutors".

Article 35 does not only make reference to said regulation but also provides a basis for the geographical framework applicable for the appointment system. According to the article, "places with judicial and administrative justice organizations established shall be separated into regions in consideration of their geographical and economic conditions, social, healthcare and cultural facilities, degrees of deprivation, transportation conditions and other relevant conditions, and the duration of office shall be determined separately for each such region".

In paragraph 5 of the same Article, the reasons for appointment are identified with general and ambiguous concepts, rendering "geographical security of tenure" practically impossible. According to the paragraph, "those established with documents to be unsuccessful and discordant with the requirements of the post in their regions can be transferred to another region where their services can be used or to another location equal in level to the current region of their offices, regardless of whether they have completed their term in that region and irrespective of their professional seniority".

The regulation that is currently in force is the "Regulation on Appointments and Transfers for Judges and Public Prosecutors", issued in 1988 by the Ministry of Justice and changed numerous times since.

## THE NIGHTMARE OF JUDGES AND PROSECUTORS: TRANSFER OR RELOCATION

During the field work, we observed there were serious problems regarding the functioning of the "geographical security of tenure". A large majority of the judges and prosecutors we interviewed expressed that the practices related to change of location or post are not in harmony with the principle of independence of the judiciary, and made them feel uncomfortable and uneasy.

A judge says that although he has never had any bad experiences, the possibility of pressure always exists in the current system and this existence is enough to undermine judicial independence:

> [...]for example, when a decision is cast that is not welcomed by the administration or the political structure, one can easily develop a fear of being transferred or send off to another location. Today, provinces such as Şanlıurfa, Diyarbakır, Elazığ etc are also included among 'region 1'. So, for example if

> they transfer you from here to Urfa, you go from a Region 1 province to another Region 1 province (...) In appearance, or on paper, there is no problem, but it is perceived as something like being sent to exile. So, such occurrences, which are elements of pressure, can happen any day, though not so frequently. (Interview 23)

Among the judges and prosecutors we interviewed, the number of those who had personally experienced the materialization of this possibility was not low by any count.

The majority of the interviewees agree that practices related to "change of location of post" undermine the principle of independence of the judiciary. The conclusion we derived from the interviews is that there is a widespread perception among judges and prosecutors that change of post location is a practice determined by punishment or rewarding for political reasons or personal relations (favouritism and string pulling), rather than objective criteria such as competence and service requirements. Yet it should be noted that the degrees and sources of this perception varied between the interviewees. The different approaches to this issue can be summarized under three categories:

- Some of the judges and prosecutors openly disclosed that they arrived at this belief as a result of their personal experiences.
- Some interviewees said that although they had never been directly exposed to such practices, they have strong suspicions that relocations are not based on objective criteria, with the influence of the examples they themselves have witnessed or heard from colleagues.
- Some interviewees were of the opinion that the current system almost encourages acting on political reasons or personal relationships, independent from the examples seen in practice.

As a conclusion, almost all of the judges and prosecutors we interviewed see the arrangements that enable the political authority to influence the judiciary as a threat and are disturbed by these arrangements.

### INSPECTION AND THE INSPECTION BOARD

At the source of the unease felt with regard to appointments and transfers lies the workings of the institution known as "inspection". In essence, the fate of all the elements merging to create the security of tenure of judges (and prosecutors) depends on the structure of the supervision system, which is based on inspections.

Likewise, the Constitution of the Republic of Turkey also regulates this matter under Article 144 "Supervision of Judges and Public Prosecutors". According to the Article, "Supervision of judges and public prosecutors with regard to the

performance of their duties in accordance with laws, regulations, by-laws and circulars (administrative circulars, in the case of judges), investigation into whether they have committed offences in connection with, or in the course of their duties, whether their behaviour and attitude are in conformity with their status and duties and if necessary, inquiry and investigations concerning them shall be made by judiciary inspectors with the permission of the Ministry of Justice. The Minister of Justice may request the investigation or inquiry to be conducted by a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated."

We see the same approach also in the Law on Judges and Public Prosecutors (HSK). Chapter Eight "Supervision" of the Law on Judges and Public Prosecutors, which consists of three articles, is dedicated solely to "inspection".

## BLACK HUMOUR STORIES

The fact that the supervision system, which is so closely related to the professional guarantees and personnel rights of judges and prosecutors, works under the Ministry of Justice has been criticized in view of the principle of independence of the judiciary and has even been regarded as the most important situation that undermines independence. We found that this same judgement was shared by almost all the judges and prosecutors we interviewed. It is possible to read what interviewees relate with regard to the operation of the inspection system, as "black humour stories".

During our interviews, we observed a widespread perception that the inspection system worked based on subjective factors rather then objective criteria. We listened to how the individual characteristics of the inspectors and the relationships they developed with the judges being inspected affected inspections and determined the outcomes of inspections.

The matters queried and reference materials etc. used during the inspections take a good share of the complaints. The interviewees not only thought that the parameters of the inspection system were unfair and undue, they also pointed out that this system creates a pressure on judges and prosecutors. There were also some interviewees who likened this pressure to a feeling of being under constant watch.

In the interviews, it was also expressed that executive's opportunities to influence the judiciary are not limited to appointments and inspections only, and that there are other practices that render the judiciary dependent and subordinate to the executive. It was specifically highlighted that the fact that courts do not have their own budges makes them dependent on the executive, which does not fit the principle of independence of the judiciary.

## SUGGESTED SOLUTIONS TO ISSUES OF INDEPENDENCE AND SECURITY OF TENURE

In the interviews, we asked our judges and prosecutors "how independence of the judiciary could be ensured". Most of the responses focused on similar suggestions and mainly on changing the structure of the HSYK; but it should be noted that the ideas differed in the details. Moreover, there were some interviewees who emphasized the various dimensions of independence and accordingly suggested differing solutions.

### "WHAT EVERYONE SAYS": MINISTER AND UNDERSECRETARY SHOULD LEAVE THE COUNCIL!

An interviewee says that in order to ensure independence of the judiciary, it is necessary to begin with what has been said "for years", i.e. terminate the Council membership of the Minister and the Undersecretary:

> The same thing is being said for years, and what has to be done is certainly clear, but somehow it is not done. Removing the Justice Minister and Undersecretary from the Council, and attaching the Inspection Board to the High Council of Judges and Prosecutors; these have all been established under the scope of a Project and are there for all to see. But they are not done, somehow cannot be put into practice. Every new political party rising to power promises they will be the one to do it. Yet they never do. They never do; somehow they cannot do it. (Interview 43)

It is possible to derive from some of the expressions used that it is a widespread perception among our interviewees that the most important obstacle before independence of the justice is the structure of the HSYK, and that any solution requires first of all a change in this structure. For example, a judge, when divulging his ideas on this subject, starts by saying "I agree with some of what everybody says" (Interview 42).

### THE ISSUE OF AN INDEPENDENT ORGANIZATION AND SECRETARIAT

The fact that HSYK does not have a separate organization and an independent secretariat of its own is considered as one of the most important obstacles before independence of the judiciary, both by the judicial public opinion and by the majority of our interviewees. The need for "an independent secretariat" was one of the issues most expressed by the interviewees when suggesting solutions for the issue of independence of the judiciary.

A judge who is of the opinion that the Justice Minister and Secretary should be removed from the Council states that having the Inspection Board working under

the Ministry of Justice creates an even bigger threat for independence of the judiciary and the principle of separation of powers (Interview 12).

Another interviewee, highlighting the importance of having an independent secretariat, specifically emphasizes that the Inspection Board must be detached from the Ministry of Justice and attached to the High Council (Interview 41).

Another interviewee pointing at the importance and necessity of inspection also thinks that the Inspection Board should be detached from the Ministry of Justice (Interview 38).

### ELECTION OF HSYK MEMBERS

Some interviewees hold that election of members of the High Council by judges and prosecutors would be a more appropriate method in terms of independence of the judiciary.

### OPINIONS SEEING THE SOLUTION IN MEMBERS OF THE JUDICIARY

Some of the judges and prosecutors we talked to advocated the idea that the members of the judiciary were the address for solving the issue of independence of the judiciary. In this context, some interviewees highlighted "quality", while some stressed concepts such as "self-confidence" and "conviction".

# Perception Patterns on Impartiality of the Judiciary

It is always said that the raison d'être of the judiciary is to distribute justice. This discourse is so widespread that the concepts of justice and judiciary are usually used interchangeably or as synonyms. The fact that the buildings where courts are located are called "justice palaces" in Turkey is regarded as an expression and indication of this identicalness. Though an abstract concept, when it comes to judicial function, justice is defined and embodied first of all with the criteria of impartiality and equality.[18]

## MEANING AND DIMENSIONS OF IMPARTIALITY

In this context, justice tells that the judicial organs are required to judge and decide in accordance with impartiality and equality. Regardless of the content of the applicable law, in essence it is considered enough for administration of justice in this sense that the norms forming the law are applied equally for everyone. The importance of an impartial judicial practice loyal to formal equality is measured rather by the harm its non-existence would cause; in other words, it is based on a negative criterion. It would be a really blatant and unbearable injustice if judicial organs implemented the applicable rules arbitrarily, with no concern for equality.[19]

## IMPARTIALITY TOWARDS THE STATE

The relations of the judiciary and its members with the state were put under the scope in the initial periods when demand for independence of the judiciary was on the rise. In that period, a just judge was defined as a judge who did not mix the interests of the state with the requirements of justice, and justice was seen as the reality which judges should shout out in the face of the sovereign. According to this philosophy, the judge received his legitimacy by observing the justice, and not by paying homage to the political rule or the "mind of the state".[20] Therefore, it was emphasized that any structure, organization or arrangement that put the judge in the status of a simple "servant of the state" would cast suspicion on the

18 Mithat Sancar, "Yargının Bağımsızlığı ve Tarafsızlığı", p. 187.
19 Mithat Sancar, "Ağır Adaletsizlik Halleri", *Evrensel*, 7 September 2003.
20 Eberhard Schmidt, "Richtertum, Justiz und Staat", *Juristenzeitung* içinde, p. 321-322.

legitimacy of the judiciary right from the start; and that a judge acting with the mentality of "a servant of the state" would at once render his own legitimacy dubious.

The issue of impartiality in relations with the state manifests itself in different ways in different branches of the judiciary. For example, in the constitutional judiciary and the administrative judiciary, which is directly identified with the function of supervising political organs and preventing political excesses, this problem is reified at a principal level, as a specific notion of state and freedom.[21] Whereas in criminal judiciary, the concrete judicial approach to two crime groups become crystallized. These are the "offenses against the state" and the offenses committed by state officials during the follow-up and investigation of these offenses (such as torture, extrajudicial killings, -"summary execution"- etc.).[22]

However, there is no doubt that the issue of the general prepossession of the judiciary, or in other words its impartiality in terms of ideological influences, cannot be limited to its approach to the state. It is also possible for the judiciary to take up the role of an actor in the political struggles taking place in the state under certain conditions, or to become a party to social conflict lines. This and similar situations, which are called politicization of the judiciary, are addressed under the term "political judiciary", which is a broad topic.

## POLITICAL JUDICIARY

The term political judiciary may at first glance be perceived as a phrase aiming to describe the general character of the judiciary. In fact, starting off from a broad and general definition of politics, it can be said that law cannot be regarded as merely a function of social life, and is at the same time an important instrument of shaping the society; and since the judiciary reifies this function, it can be said that it carries a political character. The fundamental purpose of law is to bring an order to social relations and hence to reinforce or change social situations. The judiciary, as an organ bringing norms to life, validates the values behind these norms and gives legitimacy to the will that has created them; and this is another reason why it has a political character.[23]

Based on the thesis that there is an inherent relationship between politics and political power, it is concluded that the judiciary has a political character in terms of structure and function, form and content. According to this, we can talk about politics anywhere where a decision is made binding on all the diverse interests,

21 For a study on the concrete manifestations of the issue of impartiality in these two judicial branches, see: Ali Rıza Çoban, "Kuvvetler Ayrılığı İlkesi Bağlamında Yargıcın Tarafsızlığı Sorunu".

22 Mithat Sancar, "Yargının Bağımsızlığı ve Tarafsızlığı", p. 188.

23 Rudolf Wassermann, *Der politische Richter*, p. 17-18.

conflicting demands, and the entirety of a group or society, and where these decisions are enforced with force when required.[24] There is no doubt that in this sense, the judiciary executes political power.[25]

Similarly, when it is stated that the judicial power constitutes one of the main elements of the political domain in all forms of state, and therefore is already a power with a "political" character,[26] this concept becomes applicable.

However, the established and commonly used meaning of "political judiciary" as a concept is different from the above. In a specific sense, the concept of political judiciary reflects not a neutral but a completely negative perception and is generally defined as politically motivated arbitrariness brought into action under cover of the judiciary.[27]

The most marked and common objective of politicization of the judiciary in favour of the state is to silence or neutralize the opposition. Here, judiciary is used as an instrument of political pressure and purging. Yet it should be added right away that in such situations, it is not necessary for the courts to act blatantly in line with the orders of the political authority in order to talk about "political judiciary". If a court takes as its reference the ruling or official ideology or the "mind of the state" instead of law and justice when deciding, then there is certainly a situation that can be called "political judiciary".[28]

## IMPARTIALITY OF THE JUDICIARY IN THE EYES OF JUDGES AND PROSECUTORS

All of the judges and prosecutors we interviewed said they perceived impartiality as an inherent quality of the judiciary. The words cited below come as the typical reflection of this perception pattern:

> A judge must be completely independent and impartial, isolated from any concerns or emotional influences. He may have a different social view, yet he must base his decision completely on the evidence found in the file in front of him. He should not be influenced by anything other than those evidences. (Interview 49)

24 Wolf-Dieter Narr, "Zum Verständnis der Dritten Gewalt in der pluralistischen Gesellschaft", *Politische Richter und Staatsanwälte – auf dem Wege zu einer polarisierten Justiz?* featuring Dietmar Albrecht & Ingo Hurlin, *Neue Folge*, issue 16, p.10

25 Adolf Arndt, *Das Bild des Richters*, p. 9.

26 See Karl Dietrich Bracher, "Einleitung", *Politische Justiz 1918–1933*, featuring Heinrich Hannover & Elisabeth Hannover-Drück, p. 10.

27 Gerhard Wolf, "Politische Justiz? - Rechtsstaatliche Gerichtsbarkeit oder Willkürjustiz!", p. 1.

28 Mithat Sancar, "Yargının Bağımsızlığı ve Tarafsızlığı", p. 190.

Another example for this perception:

> As a strict rule, the judge must be impartial. He should be impartial towards the parties of the case and he must also be impartial in terms of his own beliefs and thoughts. In the end, a judge is also a member of the society and is furthermore an individual who has had the opportunity to finish a university in this country. So, of course a judge will have his own value judgements regarding social events; but he should never bring them forward in the domain of his work. (Interview 3)

Yet, we have to emphasize that this approach is rather an expression of a wish at a general, abstract place. When we go from abstract to concrete, we find that the idea that there is more or less a distance between wishes and reality with regard to impartiality of the judiciary is pretty common among the interviewees.

### THOSE THINKING THAT THE JUDICIARY IS IMPARTIAL AND ANY DEVIATIONS ARE ISOLATED EVENTS

Some interviewees said partial behaviours can be seen in the judiciary, but that these are singular, isolated cases.

### THOSE THINKING THAT THE JUDICIARY IS NOT IMPARTIAL

On the other hand, quite a few interviewees argue that deviations from impartiality in the judiciary are not isolated cases and are quite common. An interviewee thinks that the political antagonism in the society are reflected onto the judiciary, that there is an interaction in this sense between the judiciary and the society, and that this situation results in consequences that disrupt impartiality, eventually leading to collapse (Interview 2).

### THE ISSUE OF STATISM IN THE JUDICIARY

In order to further clarify the perceptions of the interviewees on the impartiality of the judiciary and obtain more data on elements of mentality, we asked questions directly related to the issue of "political judiciary". We formulated this question, which, in a narrow sense, aimed to highlight the picture regarding the perception of political judiciary, as follows: "There are particular criticisms that the judiciary demonstrates a varying approach towards crimes committed by officials of the state (state employees) and crimes committed against the state. What do you say about these criticisms? Is there really such a differing tendency in the judiciary?"

In order to get a bit closer to the perceptions of the interviewees, we opened the main question as follows, in line with the flow of the dialogue: "For example,

how should be the approach to the concept of democracy in a situation where you think the security of the state is endangered? Can democracy and the security of the state come against each other? Can human rights be considered to threaten concepts such as national security or interests of the state? Then how should we interpret democracy? How would such situations affect the judiciary, in your opinion?"

In the dialogues developing around these questions, we came across significant comments that may shed light on the ongoing public debates. We did not witness virtually any of the interviewees advocating without hesitation that the judiciary is impartial in its approach to the state. Some of the interviewees pointing at the existence of the tendency to favour the state in the judiciary defended that it was necessary and legitimate, while some stated that it was an unacceptable situation. Various evaluations on the existence of this tendency were put forward along with various rationales for the approaches against it; interesting comments were made when discussing the reasons of the problem and how to solve it.

### *Judiciary is also impartial to the state (so to say)*

One of the judges who was in the opinion that state and identity-based discrimination in the judiciary did not exist barring some isolated cases said that when such events take place, the necessary intervention is made, for example investigation is launched and punishments are given. However, the example he gave for interventions made for the sake of ensuring impartiality were interesting: the case of Ferhat Sarıkaya, who was permanently removed from the profession for including witness statements incriminating some high ranking commanders in the indictment he prepared for the Şemdinli case. So, while trying to defend that the judiciary was impartial, our interviewee actually admitted to the deviations from the impartialy (Interview 7).

### *Statism is prevalent in the judiciary, but it shouldn't be*

A portion of the interviewees accepted that there were violations of impartiality based on political tendencies in the judiciary, and emphasized that it should not be so.

A public prosecutor uses the concept of politicization of the judiciary to point at the existence of an attitude of deviating from impartiality when it comes to the state:

> Justice, individual rights, social peace, state, democracy, national unity and solidarity; these values should never be placed against each other. It is not right to put them against each other. But they are sometimes placed against each other. Some people do this. And what do we call the outcome? We try to explain them with expressions such as politicization of the judiciary or intervention of politics into judiciary. (Interview 13)

A judge, after stating that such tendencies show themselves "from time to time" in the judiciary although it is something that should never take place, argues that this is an attitude that is seen rather in members of the judiciary who have expectations from the political power and who therefore want to ingratiate himself to that political power (Interview 14).

Another judge first emphasized that impartiality is as important as independence, and then went on to explain that there is a failure to ensure impartiality, and that there are deviations from impartiality in the judiciary either due to political or personal reasons or motivated by ideology and interest. Rejecting the thesis that there can be a conflict, a tension between "security and democracy", this interviewee said that in his opinion, security can only be ensured by virtue of democracy and human rights, with a human-centred approach (Interview 44).

Another judge, defending the same approach with similar words, says human rights must come before everything else in the judicial activity:

> Protecting the state and maintaining national unity are not the sole duties of the judiciary. The judiciary has other duties. Foremost is human rights. Because, you are the last authority that everyone can apply to. I mean, you can protect the state also with the police, with the military, and with all the public employees; but of course beyond this, it is also the duty of justice to protect the state. But you cannot put protecting the state in the first place [...] Human rights ensure that the state acts in accordance with the law, which is the state's characteristic of being a state... (Interview 43)

Advocating that law and justice can only be realized at the individual level and by taking the individual as the basis, another judge states that social peace can only be achieved through this approach. Calling the perception of the individual as a threat to the state as nothing but a "disease", the interviewee says that what lies at the root of this approach is the "fear" factor, and that we have to "confront ourselves" in order to get rid of this fear. Adding that he does not recognize a concept such as "national interest" and that he prefers to talk about "social interest" instead, the interviewee thinks that "national interest" cannot be used as a criterion in judicial activity.

The same judge claims that the judiciary's "tendency to protect the state's interest" in Turkey is widespread. To support this claim, he refers to the statement recently made by one of his colleagues during a conversation: "If my country is at stake, if my homeland or nation is at stake, I do not care about law!" (Interview 1)

### *Judiciary fronts for the state and it should do so in any case*

There were also judges and prosecutors who directly or indirectly revealed that they represented the perception and mentality patterns illustrated by the interviewees above. Some of them admitted that the state was favoured in trials, yet also advocated that this was necessary. Whereas, some said they found these criticisms to be unfair, while revealing that they themselves adopt the same attitude described in these criticisms.

A judge describes himself openly as a "statist jurist" and says that this attitude of favouring the state is not specific to us but is seen even "in the most democratic countries", hence demonstrating that he regards this attitude as "normal". The same judge answers the question "can human rights be a threat to the state's national security and national interests?" positively, giving "Turkey's specific condition" as his reason (Interview 22).

Another judge, advocating that national interests should be prioritized in the activity of judging, explains how he holds the state more important than freedoms, as follows:

> My state; first comes my state! This may be criticized by some writers or some thinkers; but if I do not have a state, my individual freedoms would mean nothing. My individual freedom must never conflict with my state ... (Interview 5)

Despite these ideas he advocates, the same judge says he finds the "arguments on the impartiality of the judiciary" very unfair, and is even able to say that he does not accept any of the criticisms made in this regard.

Another interviewee stressing the importance and priority of the state also gives the "specific conditions of Turkey" as his rationale when defending that it is normal to have a practice that is different to that of developed countries. According to this interviewee, it is necessary to act stricter towards those offending for personal interests, while showing tolerance to those "acting for the sake of the state and the nation"; according to him, it is also among the obligations of the judiciary to take into consideration the special situation of the police and the conditions in which they serve (Interview 8).

A prosecutor, defending that the state comes above and before everything else, does not see being a "public prosecutor", i.e. prosecutor of the republic, as enough, and ascribes himself the title of "prosecutor of the regime":

> Now, if there is no state, then there can't be democracy. ..So, which one has more priority: the state or the democracy? We have not encountered many situations in this regard till now, but as the Public Prosecutor of course I have to protect the state and the regime. I am the regime's prosecutor. (Interview 34)

### *Sources of statism in the judiciary*

Interviewees who thought "statist mentality" was widespread in the judiciary but who did not approve it also gave some statements on the reasons of the attitudes that are based on this mentality. An experienced judge who drew our attention with his detailed analyses on various subjects says that the attitude that favours the state and therefore violates the principle of impartiality in the judiciary is a reflection of the "statist mentality" that is widespread in Turkey, that this mentality takes root in the education system and is fed with an "enemy perception". According to this judge, this is the reason why Turkey is not "a fair state" and rather a "security-oriented state" (Interview 1).

Another senior judge states that the problem of impartiality stemming from the way judiciary regards the state can be explained with various reasons, and emphasizes that among these reasons, "the statist traditions" have a special place. This interviewee thinks that the "fear of losing the reins of the state" plays a decisive role in the judiciary, as it does in other domains (Interview 12).

Some interviewees associate the situation of "impunity" frequently seen in crimes committed by state officials with how the investigation phase works, rather than the attitude of judges. According to this interviewee, during the investigation phase, state officials are protected or favoured one way or another; for example, the investigation may be impeded, allowed to drag out, evidence may be ignored or obscured etc.

An interviewee, reminding that the investigations are carried out by the law enforcement, explains with examples how protective law enforcement officers act in investigations related to their own colleagues. This interviewee points out that "judicial law enforcement", which does not exist in Turkey's judicial system, could only be established after eighty years of debates, yet the new arrangement is far from being able to meet the demand. He says that the circumstance surrounding the prosecutors also prevent them from acting independent and free in such cases, which directly affects trial processes (Interview 43).

### *Testing statism in the judiciary*

In Turkey, you can find some studies aiming to demonstrate how politically partial or impartial the courts and judges are, although they are rare and usually narrow in scope. Meryem Erdal's book, dedicated to torture investigations, is an important example in this regard. In said research, which is based on rich case studies, the role of investigation and trial process in the impunity of torture is

revealed in a striking way.[29] We should note that the results of that research confirm the picture presented by our interviews.

In another study based on an analysis of some decisions of the Constitutional Court and the Supreme Court of Appeals, it is concluded that "judicial authorities act with a statist reflex in a considerable portion of the decisions they cast particularly in cases with political content, and that efforts such as 'protecting the state' and 'observing the interests of the state' exist".[30]

In addition, the statements given by members of the judiciary, especially the members and chairs of high courts, on various occasions, can also be examined systematically and used as a sort of testing material to test the results of our study. For example, a statement coming from the judicial world and which is not the only example of its kind may help in evaluating the data we collected from the field with regard to the statist trends and sources in the judiciary. The speech given by former president of the Supreme Court of Appeals Osman Arslan on 1 November 2007 at the opening ceremony of the 2007-2008 academic year of the Turkish Justice Academy should give us an idea on the prevalence of the patterns of perception and mentality revealed in our study:

> The main element of being a judge is to be impartial. But in some of your decisions, you will become a party to protecting and keeping alive the Republic of Turkey. If we are here today, it is thanks to the attainments of the Republic. You should know, you must know that republic is the most appropriate regime for human honour and dignity. You are party to protecting the democratic, laic state governed by rule of law; you will be party to protecting the flag of moon and crescent and to raise that flag even higher. In these, you do not have the luxury of remaining impartial.

We can understand the meaning of these words better when we consider the statements given by the judges and prosecutors we interviewed. Kemal Şahin, who is one of the "writing judges", thinks that this mentality, which is pronounced in the speech given by Osman Arslan and which is also openly advocated by some of our interviewees, "places the judiciary under the clutches of the mind of the state" and that this is where the biggest threat to impartiality comes from.[31]

29 Meryem Erdal, *Soruşturma ve Dava Örnekleriyle İşkencenin Cezasızlığı Sorunu.2006, İnsan Hakları Derneği*

30 Fazıl Hüsnü Erdem, "Türkiye'de 'İdeolojik Devlet' Gölgesinde Yargı Bağımsızlığı Sorunu", *Demokrasi Platformu*, issue 2, p. 53 and subsq.

31 Kemal Şahin, "Yargıcın Tarafsızlığı", *Radikal İki*, 18 November 2007.

# Perception Patterns Regarding the EU Process

Turkey is going through a "reform process" since late 1999, when its candidacy for full membership to the European Union was approved. The most prominent characteristic of this process is the extensive changes made in many areas of the legal system. In order to meet the "Copenhagen Criteria" which were the prerequisites for starting the accession negotiations with the EU, an intense legislative activity was started following the announcement of the first National Program in March 2001. In this process, the first product was the Constitutional amendments introduced in October 2001; and to date, numerous "harmonization packages" were introduced that made changes in many laws and added new provisions to some. Apart from these packages, the legislation making amendments in ten articles of the Constitution came into force on 22 May 2004.[32]

Particularly during the initial phase of the EU harmonization process, democracy and human rights issues were at the centre of the debates and the target of the legislative activity. Whether the arrangements introduced in these areas were indeed put into practice or how they were going to be put into practice was one of the unchanging topics of the agenda. In particular, the manner in which the legal arrangements were interpreted and embodied by the judicial organs was heavily criticized; and it was even claimed that the judiciary was turning the reforms into failure. These discussions and criticisms are doubtlessly not limited to only that subject or only that phase, and continue today on the basis of some other grounds.

One of our objectives in this study was to obtain data on patterns of perception and mentality aspects determining the judiciary's approach to the "EU harmonization process" and the "reforms" made during that process. To this end, we asked questions oriented to reveal how "critical arrangements" having the potential of determining the fate of the reforms were perceived, in addition to and more than the questions oriented to identify the general view of the interviewees on EU membership.

32 **For more detailed information on the content and Dynamics of this process, see Mithat Sancar, "AB Uyum Süreci ya da Bir İhtimal Olarak Demokratikleşme",** ***Birikim*****, issue 184-185, p. 39 and subsq.**

## CONFUSED MINDS REGARDING THE EU HARMONIZATION PROCESS

From the answers given to our questions on the legal arrangements and amendments done during the EU harmonization process, we found out that most of our interviewees had hesitations on this matter. Some interviewees said that the process developed too rapidly and hence that the changes could not be digested properly. Some interviewees said they found the changes positive, but that there are problems in harmonizing these new legal arrangements with our social structure. We also observed that there were different perceptions on how the problems could be surmounted. A group of interviewees were outright against the EU, while some stated that they found the process and the membership goal entirely positive.

### THOSE THINKING THE PROCESS RUNS TOO FAST

Among our interviewees, a considerably large number believe that the change process is running too fast. For example, a judge says that the changes are being rushed, which causes problems in implementation:

> I personally witness the helter-skelter manner in which they are produced and structured, and of course this causes us to have some problems in implementation. But this mentality was introduced, the mentality that everything should be fast, that we should not lag behind and that any problem arising should be solved within the process. And everything was done and changed according to this mentality. In the end it has been done; I have very different ideas on this subject and it is not something I really approve of. (Interview 6)

We should emphasize that the same judge finds the harmonization process positive in terms of improvement of human rights and democracy:

> Of course, we have to make an effort to achieve the universal values, be it with our own dynamics or with the dynamics of others. Although I am not a big fan of things imported from outside, I am okay with it if it is democracy, freedom and human rights we are importing. (Interview 6)

Another judge, saying that he finds the arrangements made in democracy and human rights through adjustment laws positive, also complains about the fast speed of this process. According to him, this speed indicates a problem of sincerity with regard to democratization (Interview 2).

### THOSE THINKING THERE IS ADJUSTMENT PROBLEM BETWEEN CHANGES AND SOCIAL STRUCTURE

A part of the interviewees stated that although they find the changes made during the harmonization process positive in essence, they think that problems will occur in implementation and internalization of these arrangements due to the "unique structure of Turkey".

The following statement of an interviewee can be regarded as a typical expression of this perception:

> I think they are positive. But here is the problem: the conditions of our country are different than the conditions of the EU. It may create problems to adopt their laws directly. Otherwise, the adoption of the EU laws is pertinent in terms of rights and freedoms, which we call the human values, yet their pertinence in economic, social and cultural aspects is open to discussion. (Interview 28)

A prosecutor sharing a similar perception says that the EU system "is really good", but the specific characteristics and infrastructure of our country are not yet at a level that can successfully carry this system:

> Now, the EU's system is really good. It is very easy to implement this system in Switzerland; the place we call Switzerland is as small as our province of Konya. The farthest point you can go takes three or maximum five hours by bus. Now we took their system and brought it here. A very simple example: currently we have "road arrest" procedure in our penal system. So you will apprehend the guy and bring him before the competent judge within 24 hours ... In other words, my dress will not fit you, it will hang loose. (Interview 24)

According to this prosecutor, the solution lies in adjusting the arrangements in consideration of our actual and physical shortcomings.

### THOSE THINKING GAINS ARE IMPORTANT AND PROBLEMS SURMOUNTABLE

A judge insisting that Turkey has gained a lot through the EU harmonization process is extremely optimistic about overcoming the problems:

> Turkey has gained a lot. Of course one's heart desires that these did not happen with the pressure from Europe etc. But this is how it has happened in every country, you know that. This is the way it was done in all countries, in all EU members states; the trials in Italy used to last for 25-30 years. The Italian example is very important, very serious in this regard. The problems we are experiencing today were also experienced Italy in 90s. They suffered a lot of hardships. (Interview 43)

There were also interviewees who made detailed analyses on the EU. For example, a judge thinking that the EU process is a positive development in all aspects for Turkey says that the concerns voiced by some specific circles are irrelevant, and that thanks to this process we are now able to solve the problems in democratization, which we could not have solved on our own before (Interview 14).

### THOSE FINDING THE EU AND THE HARMONIZATION PROCESS HARMFUL

The views of a judge looking at the EU from an opposite angle represent a certain perception that is found in the judiciary as well as the society, and give an idea about the sources of the resistance pointed out by the abovementioned judge:

> The real purpose of establishing the European Union was to protect the Christian capital against the Jewish capital. It was to ensure the economic power and hence the security and safety of Christian societies. So they established an organization based on the notion of Holy Rome, and they did it; they succeeded. ...I mean they are hypocritical in their understanding of human. They do not accept those other than their own people as humans. Would they take us in? They would. How? When and if they need our power. Which power? Our fighting power. If they need it, they will take us in. (Interview 2)

The judge describing himself as a "statist jurist" and having a similar perception of the EU thinks that the harmonization process has created negative consequences for Turkey:

> I think it created unfavourable results for Turkey and will harm the social order. From my remarks you may think that I have fascist thoughts, but in the end I love my country and this is what I think. (Interview 22)

The interviewee describing himself as the "prosecutor of the regime" also thinks that the EU process is inflicting great harms on our independence:

> I do not adopt it. I mean I miss the independence of Ataturk's Republic, the independence of those days in which the Turkish Republic of Ataturk was still maintained. Today, all those capitulations we read in our history books would be as nothing, because they now have more economic and political power over us. (Interview 34)

Another interviewee says s/he prefers "we had not entered the EU process", because s/he thinks we will draw away from our culture (Interview 51).

## PRECISION TESTING THE APPROACHES TO THE HARMONIZATION PROCESS: ARTICLE 90 OF THE CONSTITUTION

The amendment made in Article 90 of the Constitution is considered to be one of the most important products of the EU harmonisation process in terms of democratization and human rights. The sentence added to the last paragraph of this article, "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail", is of a nature that can smoothly open a large portal for international human rights standards to enter domestic law. The judiciary is the main organ that can carry these human rights standards inside, using this portal, into the domestic law so that they can have a direct effect on our daily lives. Hence, it bears great importance to recognize the existing perception and mentality patterns in the judiciary regarding these amendments and international human rights law, so that they can be opened for debate and influenced through democratic means.

### THOSE FINDING THE AMENDMENT IRRELEVANT

In our interviews, we found out that there are only a few who directly oppose to the concept of human rights and the international standards set in this area, whereas those with mentality elements going as far as denying the results in this regard reach a number that cannot be overlooked.

A judge states briefly why he does not find the amendment of Article 90 relevant, based on the "classic sovereignty concept":

> In my opinion, it is wrong. Why wrong? Because I think the Republic of Turkey disregarded the sovereignty of the Turkish Assembly when granting this power. What does it mean that the Parliament cannot issue laws against international conventions? Then where does this leave our sovereignty! In this regard, I think it is one of the points where we lost our sovereignty. Wrong! (Interview 14)

The interviewee seems to have forgotten that international agreements can only come into force after they are ratified by the Parliament, and hence that in the end the procedure that transfers them to domestic law is also done by the parliament's hand and therefore the "national sovereignty" is also determinative here.

However, it should be noted that a large portion of the interviewees raising objections to this arrangement do not give credit to this sort of rationales that contain legal resonances or that point at democracy even if forced; on the contrary, they approach the issue with statist/secularist-nationalistic (*ulusalcı*) , and even isolationist or racist mentality patterns.

For example, a prosecutor insistently emphasizing that he is "universalist" –and also defining himself as the "prosecutor of the Republic"- refuses the binding nature of international human rights norms in our domestic law, with a reflex that is almost statist/secularist-nationalistic (*ulusalcı*) (Interview 24).

One judge adopts a completely "isolationist" approach to international law. In all his radicalism, he does not even hesitate to list arguments which even the most ultranationalist persons would avoid defending since the emergence of the modern states system:

> I do not find pertinent or appropriate any of the signatures put under any convention that is binding on Turkey. I think they are not adequately examined. Not adequately; I mean the officials going there are definitely the best, selected among the best, but I think they are individuals who do not know our culture or our history. They are individuals who have forgotten the treatment the Turkish nation received before. If they remembered, if they knew what happened in the War of Independence, they could not put that signature there so easily, they could not so easily make Turkey dependent (Interview 32)

The approach of one interviewee who started from the amendment of Article 90 and went as far as to questioning the universality of human rights is also interesting. The interviewee begins by saying he is not against human rights as a principle. Then he advocates his thesis that human rights are always used for political calculations and interests in international relations, and are brought on the agenda with ulterior motives especially against Turkey (Interview 23).

When it comes to international law, it can be understood in general that "rational evaluation" is turned off, as evidenced by the fact that "information" which can best be called "urban (or internet) legends" are easily listed as arguments.

One of the judges overdoes the "conspiracy theory" logic and bases his belief that ECtHR applies "double standard" against Turkey and gives prejudiced decisions, on the following rationale:

> The double standard by the European Court of Human Rights, that is the reason I say; I mean, we are a strong country, and a bold country, so they do not want us to stop being a country dependent on them... (Interview 35)

Another judge thinks that ECtHR is "sometimes prejudiced" against Turkey; he implies that the applicants to this court are always from the "known circles", and regards taking this path as "impertinence" (Interview 8).

### THOSE REGARDING OPENING UP TO INTERNATIONAL LAW AS A RICHNESS

Among the interviewees, we should state that a large number approached the "outside" with suspicion and distrust, and there is "a general tendency", "a widespread perception", and "strong mentality patterns" in this regard. We must also emphasize that some of these interviewees stated ideas on this matter that can be classified as liberal and universalist. On the other hand, all of the interviewees remaining out of this general picture demonstrate pro-freedom and universalist approaches in other matters too.

A prosecutor, saying that he always decides for nolle prosequi in investigations opened on Article 301 of the Turkish Penal Code (TPC), adds that he finds the decisions of the ECtHR serious and consistent:

> The decisions of the human rights court? They are not so prejudiced, [...] they are all relevant. Especially the various decisions on failure of prosecutors to conduct effective investigation; they are included in the summaries sent to us by the Ministry. So you read and say, yes the prosecutor should have done a better investigation. (Interview 21)

This prosecutor who states that he takes the decisions of the ECtHR as a basis particularly in issues related to "freedom of expression" also points at an extremely important reason for the differences seen in the implementation of TPC 301:

> Now we generally give priority to the Convention in issues related to freedom of speech. For example, in 2006 we did not file any suits against violation of TPC 301. We all decided not to prosecute in cases involving article 301, while indictments kept coming from Şişli. When deciding not to prosecute, we make use of the convention and the decisions of the Court of Human Rights. (Interview 21)

Another prosecutor also agrees that barring some exceptions, the ECtHR decisions are all accurate and objective:

> I mean I generally find the decisions of the European Court of Human Rights accurate. But this does not show that they sometimes give political decisions. I think some of their decisions are political and partial. For example, they acted partial in the Cyprus case. Again in some political crimes; they find

> Turkey guilty in that type of cases and build their decisions based on those cases, at least that is how it feels to me. (Interview 41)

An interviewee stating having a completely positive approach to ECtHR also evaluates the reasons of the rejectionist and suspicious perception widespread among his colleagues:

> I think the European Court of Human Rights is a very serious institution. A very serious and very guiding institution. Our media and official authorities may have some manipulations or comments on many subjects. For example, [...] gave decisions on that and gave decisions on political parties etc, and you do not have the right to like what coincides with your purposes and dislike what does not serve your interests. (Interview 3)

### IS THE AMENDMENT IMPLEMENTED?

A big majority of the interviewees, regardless of whether they have a positive or negative approach to the amendment of Article 90, stated that the international human rights norms are not taken into account in trials.

An interviewee finding this amendment well-placed conveys his observations as follows:

> Theoretically, it is a well-placed amendment in terms of human rights. ...I do not think it is implemented exactly in practice. I do not remember any case where domestic laws were overruled and international conventions were applied ... I do not think that 90 % of all our judges will look at the conventions and apply them, setting aside the laws. There is no such thing in practice any way. Yet the Constitutional article puts it very clearly. (Interview 41)

Another interviewee underlines that judges and prosecutors do not have the habit to refer to resources other than "laws and case-laws", and comes to the same conclusion (Interview 37).

An interviewee openly says that he does not use international human rights instruments in trials, and adds that he has never witnessed a case where they were used:

> It is not a reference we frequently use. But by its definition in the law, it is a rule that becomes applicable only when there is a conflict or when there is conflict with the legal arrangement. Personally, I have never witnessed it to date. So I have no examples to give. ... But I do not think it is fully practiced. As a result, we sometimes see cases brought before the Human Rights Court, which result in verdicts against our country. This indicates that there is a problem in ensuring compliance, which makes it necessary to refer the case to an arbitrator. And they result in decisions not in favour of Turkey. (Interview 3)

One judge explains that they do not make references to international instruments in their decisions texts, but they certainly take them into consideration when casting the decision (Interview 40).

A judge whose opinions we imparted at length under another context emphasizes that international human rights instruments "do not get even the slightest consideration" during trial processes, especially at the State Security Court where he serves. According to him, the reason is the "effort to protect the state at all costs". When we reminded him that such decisions are likely to convict Turkey at the ECtHR, he said that those serving at those (state security) courts do not care two pence for that (Interview 42).

A prosecutor says that even the intensive seminar program of the Ministry of Justice on human rights and especially on ECtHR does not have much effect in practice, or in other words, that despite all these efforts, judges and prosecutors do not refer to international human rights instruments. According to this prosecutor, the reason for this is the distrust in ECtHR (Interview 47).

One judge we interviewed thinks that the amendment to Article 90 has made fundamental changes in our legal system, but fulfilling the requirements of this amendment requires formulating a new constitution (Interview 12).

# In Place of a Conclusion

It would not be an exaggeration to say that all the major debates and stirrings experienced on the axis of the concept of "change" in the last 10 years in Turkey are connected to the European Union, either directly or indirectly. The most concrete reflection of this situation is the "reforms" realized in the legal system. And in this fast and furious process of "change", "democratization" holds a special place among the most frequently pronounced words.

Another striking characteristic of this period is how the judiciary made its entry into the field of debates, on an unprecedented scale. As the harmonization process progressed, for the first time in history, there grew a clear awareness on the implications of the changes taking place in laws with regard to the judiciary, and hence the immense power of self-determination it held. In particular, the decisions rendered due to the new arrangements made within the framework of the reforms by courts of first instance and the Supreme Court of Appeals in the realm of judicial justice, the attitude demonstrated by the Constitutional Court in party closure cases and Constitutional amendments, and many other examples, caustically brought on the agenda the issue of the political power of the judiciary and the democratic limits of this power. This situation brought with it a more or less visible need to get familiar with and understand the judiciary. And the most important area that can help satisfy this need is sociology of jurisprudence. The great gap existing in this area in Turkey is one of the major reasons making it difficult for the discussions to flow towards more constructive channels.

This study, which aims to contribute to revealing the factors determining the behaviours of judges and prosecutors in the decision-making process, is a product of this need. There is no doubt that this study will not lead to outcomes that can be generalized, as is the case in all research activities based on the in-depth interview technique. However, likewise, it cannot be claimed that the interviews, which were oriented to learning about the mentality elements and perception patterns, will not give an idea about the whole of the structure.

Both the ideas and the impressions of the judges and prosecutors we interviewed within the scope of this study give off important signs about the problems experienced in the domain of the judiciary, which can also be verified using other resources. For example, in the case of impartiality, it is expressed in various different ways by a large segment of the public opinion that it is connected to the

ideological approaches prevailing in the judiciary. Our interviews allowed this public perception to be voiced by none other than the lead actors of the judicial decision-making process. As such, it has been frequently stressed on various occasions that there is a resistance in the judiciary oriented to prevent the legal reforms made under the EU harmonization process from coming to life. The evaluations of the interviewed judges and prosecutors regarding these reforms and in general the EU process have shown that this is not a groundless fear. The majority of the interviewees openly declaring that they do not hold with or implement the Constitutional amendments and especially the amendments to Article 90 give us an important data that will enable us to go to the source of the problem.

Almost all of the judges and prosecutors we talked to stated they were of the opinion that independence of the judiciary is either not ensured at all or not ensured properly or that it does not work in any case. In fact, this situation is not an unknown for anyone. Nevertheless, we can say that the judges and prosecutors do not have a different perception than the traditional approach when it comes to finding a solution to the problem of independence of the judiciary. This approach sees the essence of judicial independence in judicial self-government. This essence, which finds its expression in the texts prepared by institutions such as the United Nations or the Council of Europe, cannot be easily claimed to constitute a problem in itself as a principle. However, there are other mechanisms that are accepted as being complementary to this principle. The most important of these mechanisms are judicial criticism, judicial transparency and public responsibility/accountability of the judiciary. What is missing not only in the interviewed judges and prosecutors but also in the public in general and the specific judicial community is the awareness and belief in the function and importance of these mechanisms.

Just as independence of the judiciary does not mean that the judiciary will be free from any criticism or questioning, it also cannot be seen as a shield of immunity that holds the judiciary exempt from public accountability. If independence was perceived and lived in this manner, there would arise a serious danger of the judiciary transforming into an oligarchic structure and crippling the functioning of the democratic system with the power it would thus wield. Mechanisms providing for judicial criticism and public accountability of the judiciary fulfil an important function such as ensuring that independence of the judiciary serves its intended purpose and balancing any deviations that may arise from independence.

The judiciary does not possess a democratic mechanism that can broker between social interests and demands. The judiciary turning into a power "independent" from social supervision and public accountability leads to weakened democratic

mechanisms. This in turn results in abandoning the guarantee of the principle of impartiality, which is the foundation and source of legitimacy of the judiciary's existence, exclusively in the hands of the judiciary itself. In such an operation, it becomes extremely hard and even impossible to remove the suspicions and doubts arising in the society with regard to impartiality of the judiciary. And a widespread belief that the judiciary is not impartial seriously threatens social peace. This is also why democratic procedures and methods enabling public accountability of the judiciary are so important. The prerequisite for achieving progress on this road is to bring the judiciary to light and stop it from being the "black box". And this is exactly where lies the importance of studies aiming to learn about the mentality and perception patterns prevalent in the judiciary and open them to discussion.

# References


Arndt, Adolf: Das Bild des Richters (Karlsruhe: C. F. Müler Verlag, 1957).

Bracher, Karl Dietrich: "Einleitung", (ed.) Heinrich Hannover, Elisabeth Hannover-Drück, Politische Justiz 1918-1933 containing (Frankfurt am Main: Fischer Verlag, 1966)

Çoban, Ali Rıza: "Kuvvetler Ayrılığı İlkesi Bağlamında Yargıcın Tarafsızlığı Sorunu" http://www.hukukcular.org.tr/hukukdunyasi/2006-2.pdf (accessed on 12 November 2008).

Dahrendorf, Ralf: "Zur Soziologie der juristischen Berufe in Deutschland", *Deutscher Anwaltverlag*, Anwaltsblatt 14, 1964.

Erdal, Meryem: Soruşturma ve Dava Örnekleriyle İşkencenin Cezasızlığı Sorunu (Ankara: İHD Yayını, 2006).

Erdem, Fazıl Hüsnü: "Türkiye'de 'İdeolojik Devlet' Gölgesinde Yargı Bağımsızlığı Sorunu", Demokrasi Platformu Dergisi, Year 1, Issue 2, Spring 2005.

İnceoğlu, Sibel: Yargı Bağımsızlığı ve Yargıya Güven Ekseninde Yargıcın Davranış İlkeleri, (İstanbul: Beta Yayınları, 2008).

Kauffmann, Peter: "Wie man Richterleitbilder wirksam macht – Eine rechtssoziologische Betrachtung"

http://www.nrb-info.de/mitteilungsblatt/2008/Richterleitbilder%20S.%2074.pdf (accesed on 11January 2009).

Kunter, Nurullah ve Yenisey, Feridun: Muhakeme Dalı Olarak Ceza Muhakemesi Hukuku, 10th Edition, (İstanbul: Beta Yayınları, 1998).

Kuru, Baki: *Hâkim ve Savcıların Bağımsızlığı ve Teminatı* (Ankara: AÜ Hukuk Fakültesi Yayını, 1966).

Lautmann, Rüdiger: Soziologie vor den Türen der Jurisprudenz (Stuttgart, Berlin, Köln, Mainz: Kohlhammer W, 1971).

Narr, Wolf-Dieter: "Zum Verständnis der Dritten Gewalt in der pluralistischen Gesellschaft", Albrecht Dietmar; Hurlin, Ingo Politische Richter und Staatsanwälte – auf dem Wege zu einer polarisierten Justiz? Schriftenreihe der Akademie Sankelmark, Neue Folge, Issue 16 (Sankelmark: Akademie Sankelmark, 1985).

Özbudun, Ergun: Türk Anayasa Hukuku (Ankara: Yetkin Yayınları, 1986).

Sancar, Mithat: "Ağır Adaletsizlik Halleri", Evrensel daily newspaper, 7 September 2007.

--------- "AB Uyum Süreci ya da Bir İhtimal Olarak Demokratikleşme", Birikim, August-September, Issue 184-185 (İstanbul: Birikim Yayınları, 2004).

--------- "Yargının Bağımsızlığı ve Tarafsızlığı", "Devlet Aklı" Kıskacında Hukuk Devleti, 4th Edition (İstanbul: İletişim Yayınları, 2008).

Schmidt, Eberhard: "Richtertum, Justiz und Staat", Juristenzeitung (Tübingen: Mohr Siebeck, 1953).

Şahin, Kemal: "Yargıcın Tarafsızlığı", Radikal İki, 18 November 2007.

Ünal, Şeref: Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hakimlik Teminatı (Ankara: TBMM Kültür Sanat Yayınları, Yayın No. 65, 1982).

Yıldırım, Ali ve Şimşek: Sosyal Bilimlerde Nitel Araştırma Yöntemleri (Ankara: Seçkin Yayıncılık, 2004).

Wassermann, Rudolf: Der politische Richter (Münih: Piper Verlag, 1972).

Wolf, Gerhard: "Politische Justiz? - Rechtsstaatliche Gerichtsbarkeit oder Willkürjustiz!"http://viadrina.euv-frankfurt-o.de/~w3lswolf/material/schrifttum/01-schriften_gerhard_wolf/03-verfahrensrecht/politische_justiz/politische_justiz.pdf (accessed on 12 August 2008).

# “Just at Times, Unjust in Others”: Society’s Perception of the Judiciary in the Democratization Process

We extend our gratitude to Bağış Erten, Çağdaş Demren, Abdürrahim Özmen, Handan Üstündağ, Yasemin Çakar, Yalçın Mergen, Çakır Ceyhan Suvari, Jelle Verheij, Turgut Karabulut and Tuğba Atalar for the valuable help they lent us during the study, and our thanks to all interviewees who agreed to interview with us and answered our questions with sincerity.

**Mithat Sancar - Suavi Aydın**

# Introduction

The purpose of this study is to gather data on the perception of various social segments on the judiciary, and thereby identify the reference points that will enable us to understand specific perception patterns regarding the judiciary in Turkey. This study was designed to complement the first book of the Project, *"Justice can be Bypassed Sometimes…": Judges and Prosecutors in the Democratization Process*. These two studies share the same universe in terms of conceptual framework, theoretical foundations and methodology. Therefore, we felt it unnecessary to include conceptual explanations and theoretical information, as these were covered in the first book. With regard to "methodology", we mainly underlined the aspects specific to this study.

Following in the footsteps of the first study, we took care to impart the assessments made by the interviewees and tried to be economic with our own comments. When the two studies are read together, it will be seen that interviewed judges, prosecutors and citizens share similar perceptions on important issues regarding the judiciary. However, in this regard we also avoided a didactic style, and preferred to leave it to the reader to identify the differences and their meanings.

# Methodology

In this study, "in-depth interview" technique was used and a specific framework was built for the questions; nevertheless, the interviews developed in line with the experiences of the interviewees, who were selected randomly. In order to ensure that this randomness gains a specific measure of representation capability, it was preferred to select the interviewees from various regions of the country.

The interviewees were found randomly, independent from age, gender, profession, ethnic origin, social status or ideological or political opinion. However, thanks to the diversity and mobility offered by Turkey, this random selection was able to gain a specific representation capability, as if a specific sampling was created in consideration of these categories. This can be easily seen in the table of interviewees.

The purpose of this study is to get information that will help in understanding the public impressions and perceptions with regard to the judiciary. However, during the study, effort was made to draw a map of these impressions and perceptions rather than reaching statistical results, and it was attempted to demonstrate the ideas prevailing with regard to courts and the justice system. Thus, a cluster of ideas and thoughts emerged from the study. These ideas were then grouped to form a meaningful text.

# Subjectivity of Perceptions

It should be accepted that the ideas and expressions revealed during the interviews are a reflection of the subjective experiences and worldviews of the interviewed persons. The process that creates and structures perceptions does have an entirely subjective quality. The encounters between the interviewees and the courts particularly affect their comments and thoughts.

The most important phenomenon completing subjectivity is the existence of consent and approval. Sometimes, individuals may make "fair" judgements showing that it is possible to look at the phenomenon from an outsider's eye even when the outcomes are not in their favour since the process has a contingency that will seek the person's consent and approval. Cases of absolute subjectivity that will eliminate this contingency may occur in the event of an obvious alienation related to the process. This alienation can have various sources: favouritism taking place when individuals are not treated with impartiality and integrity; mistreatment; the existence of a hierarchy created between the person brought before justice and the person who is to administer the justice, etc. When this alienation becomes a common phenomenon in the society with a snowball effect, these perceptions are stripped from their subjectivities and transform into indicators of a concrete condition.

Furthermore, it was observed that many of the interviewees were reluctant about revealing their ideas openly and with moral courage. An interviewee from Eskisehir explains the reason for this reluctance as follows: "I am afraid to say it; for one thing, we do not have freedom of thought!" While some interviewees tried to rush the process with short answers, some gave the feeling that they were uttering the ideas they thought would be liked by the interviewer. However, later during the interview, especially when it came to talking about specific events and when the interview developed with other questions, it was observed that there were statements contradicting the stereotypes or explanations regarding abstract concepts mentioned at the beginning of the interviews. Our opinion is that the real opinions of the interviewees are their later statements that appear contradictory, since what is concrete always eliminates the ambiguity of the abstract.

The reason for the reserve observed during interviews is clear: The Turkish society still feels under interrogation, and when developing opinions that oppose the

opinions they consider "mainstream" or "official", they are cautious, especially when talking with someone they do not know. Therefore, the reliability of percent-based statistical surveys conducted in Turkey is extremely weak. However, it always yields better results to make long interviews, capture the facts and try to get more information based on the facts revealed.

# Perception of the Judicial Branch: Seeing the State and the Judiciary as One

The way in which the judiciary is perceived as a power and an abstract structure is important, particularly in terms of understanding the functions attributed to the judiciary. An interesting thing we observed in most of the interviewees was that the judicial branch was perceived as a whole with the other powers of the state, especially the units forming the executive. To put it more clearly, the interviewees demonstrated a strong tendency to identify the judiciary with the state. In this context, for example an irregularity or favouritism seen in the police or gendarmerie can be listed among examples of the corrupted functioning of the judiciary. Hence, the judiciary is seen within the entirety of the state, any negative feelings or concerns about the state also extend to include the judiciary, or negative perceptions on the functioning of the judiciary feed the perceptions on the state.

From this, we can conclude that the interviewees did not have any civic awareness on the principle of "separation of powers", or that this principle did not hold any credibility for our interviewees. Words of an interviewee from Kars provide a typical example: "I swear judgement exists in both the police and the gendarmerie of the state, they all have it..." (Kars 1)[33]. Another individual we interviewed in the same province used similar expressions: "Judgement exists also in the police and the gendarmerie" (Kars 11). These expressions actually imply that institutions such as the police and the gendarmerie can put themselves in the place of the judiciary. This perception is also conducive to the interpretation that the judiciary is powerless and ineffective. Similarly, another interviewee from Kars expressed it directly. In his opinion, the military and the police have too loud a voice in Turkey (compared to the judiciary and the government). "Everything they want is done; I think the government does not have much influence. There is something like a military government in Turkey [...]!" (Kars 6)

There were also some interviewees who made connections between the judiciary and the gendarmerie (for example Kars 7; Kars 15; Kars 16; Nusaybin 1). We can say that this image is associated with whether the person lives in a village or city.

33 **In this book, the interviewees are identified according to their place of residence.**

The identification of the gendarmerie with the judiciary by a citizen living in the village stems from the fact that in village life, the gendarmerie is the most direct form of encountering the state.

Urban interviewees tend to make the same equation, replacing the gendarmerie with the police. In this case, a negativity arising from the police is also associated with justice and the judiciary.

# The Image of Courts and Courthouses: "Pray God Make No One Have to Go There"

As an abstract structure, the concrete manifestation of the judiciary is first of all the courts, and then the courthouses. In the interviews, we asked questions oriented to understand what the abstract judiciary perception turns into when it comes to material manifestations. The perception shared by almost all of the interviewees is that courts are not "pleasant" places. Even those who had never had the occasion to visit a court demonstrated a distant position towards courts. A 65 year-old illiterate woman we spoke to in Kars uttered a sentence which neatly summarized the situation although she had never been to a court: "Pray God make no one have to go there!" (Kars 12)

So what is the source of this perception? Based on our interviews, we can say that in the eyes of the public, courts are not a place where "service" is received or public service is produced; they are still the "gates of the state", and the citizens are still in a subordinate position before the "gates of the state".

An interviewee from Trabzon defines the court where he was tried as follows: "When I think of the Heavy Penal Court, I remember sour faced judges and prosecutors" (Trabzon 1).

Courts and courthouses have a "cold" image in general. An interviewee explains this feeling as follows:

> For example, when entering a courthouse, any courthouse, you feel the cold face of the state. There is a cold structure there. No feeling of justice is evoked. It is a very different place. A very cold place and a very cold feeling. It also affects the individual behaviours of people, either negatively or positively. When you do not obey the rules, you can face very harsh behaviours. When you have to go to a court, the reason for your going there is important. I mean, the charges against you are important. When you are on trial for thought crimes, you become more agitated. In political cases, the judiciary also gives political decisions. This is very common in this region. When it is a petty crime, you feel more relaxed (Diyarbakir 4).

The hierarchy built by members of the courthouse from the very beginning prevents people from thinking that they are receiving a service. In addition, the design, soft-furnishings and observed interpersonal relations in courthouses reinforce this perception. An interviewee from Sivas explains this as follows:

> Courtrooms are very cold and daunting. Judges and prosecutors are as cold and unlikeable as the courtroom. I saw them as prigs who look down on people. (Sivas 2)

This perception of courts and judiciaries was repeated in other interviews too. Another interviewee from Sivas says:

> [The courtroom] is a very cold and unlikeable place. Judges, prosecutors and the court staff have a condescending attitude towards people; they speak loudly and in a reproving manner. (Sivas 3)

Another feeling experienced by those finding themselves in a courthouse is "fear". The interviewee from Denizli describes his psychological state as follows:

> When you enter the courthouse, first you feel fear. At least it was like that for me, because it was my first time there. First you experience fear. You have to trust them; you have to do whatever they say, so you have to trust them. (Denizli 1)

The courtroom image of a leftist interviewee from Diyarbakir reveals some interesting modes of perception:

> For years, we have had this courtroom phobia, because there has been many tortures, oppressions etc. Yet back in those days, we were able to reject at court any testimonies we were forced to make under torture; we used to feel more relaxed in the courtroom. An environment much more relaxed than when you are with the police or gendarmerie. [...] But judges are always so loyal to rules, and sometimes they apply the rules even when it is wrong. I find prosecutors more oppressive compared to judges. (Diyarbakir 3)

# Perception of Justice and Law

When we asked interviewees directly what they understood from the concept of "law", we mostly received answers such as "I do not know", "I was not schooled", "We are ignorant", "I do not have much knowledge about it" etc. Hence, we tried to reveal the perception on the concept of "justice" by asking other questions. In this framework, we met some very interesting definitions.

Let us first give some examples where interviewees gave direct definitions for the concept of "justice":

A shepherd from Kars defined justice with these words: "Justice, as Ataturk said, is the foundation of the state, they say. Yet unfortunately we cannot find justice in Turkey" (Kars 16). The interviewee from Trabzon says "justice [...] should be equality, protection of rights" (Trabzon 1). The image of justice for one elderly woman was identical to "being a good person": "Justice means seeing good manners; good persons, good men are called justice" (Erzurum 1). One interviewee understands justice as "a system that also protects the rights of the oppressed" (Diyarbakir 4). Actually, the first mental image of the concept of "justice" is based on the dilemma of "rightness-wrongness" (e.g. Kars 14). For some "justice is rights and laws" (Kars 18).

Some interviewees followed the path of the "negative" instead of the "positive", and instead of defining justice they tried to describe "injustice". For example, one interviewee established a link between "injustice" and "unfairness" and said he did not know what justice is, because he was never able to experience it in this country (Kars 3).

We saw a widespread tendency to materialize the concept of justice with the help of some principles or values, as often seen in academic works or philosophical discussions. The principle most referred to in this context was "equality".

The connection made between the concepts of "justice" and "equality" by a young interviewee of Kurdish descent is a meaningful example of how the perception of this concept is directly related to the subjective position and life experiences of the person: "Justice is enjoyment of all rights equally by all people regardless of religion or race on the territories of a state" (Kars 11).

Some interviewees defined "justice" from the viewpoint of the concept of order. Almost all of the interviewees making a direct connection between "justice" and "order" were educated and high-income individuals, which was found noteworthy.

In these definitions, law is also perceived as a one-way process determined by the state. The idea that law could be a "compact" that needs the will and approval of the nation/citizens was not uttered by any of the interviewees, regardless of how highly educated they were. Similarly, none of the interviewees made references to universal norms when defining law.

We identified that defining law with direct references to the state became more and more highlighted especially among those with an affinity to the "statist-conservative" worldview. For example, according to one of these interviewees, "law protects the state and is valid for the state. Laws on the other hand are applicable for communities and individuals forming the state and must be applied to everyone equally" (Sivas 1).

Only a few number of interviewees used the concept of the rule of law state when defining justice. One of them, a higher education student from Istanbul basing this concept on the concept of "equality before law" gave the following definition:

> Of course, after the concept of rule of law emerges, respect to laws is the first thing that should happen in our system, as in all the other countries like us claiming to be a rule of law state; also, everyone should be subject to the same laws; then there is the principle of equality before the law; of course the unitary state also has a contribution. Ideally, every individual, every citizen should be equal in the laws... yet in practice... (Istanbul 2)

# Image of the Ideal Judge

In this study, we conducted interviews oriented to catch hints of the social perception on the ideal judge image. According to the results gained from the interviews, the general patterns determining the external perception on the ideal judge correspond strongly with the similar elements of the internal perception. We observed that when defining the "ideal judge", the interviewees referred mostly to qualities of "impartiality", "integrity" and "fairness".

The interviewee from Denizli emphasized "integrity" when defining the ideal judge, which he described as applying the law equally for everyone and acting with conscience:

> An ideal judge should execute all the laws; he should administer all laws regardless of the situation or the person in question I think. There should be no favouritism. In other words, he should maintain his integrity in all his decisions. And to be able to do that, he should have a conscience. (Denizli 1)

However, the interviewee emphasized that this expectation of his is not fully met in reality, and that not all judges are like this.

A well-educated interviewee from Samsun emphasized the qualities of "being informed" and "doing one's job well" when describing the ideal judge image in his mind (Samsun 1). The same interviewee also includes the requirement "to be a part of the society" in the image of the ideal judge. The interviewee, who pointed at a challenging issue like "socialization in the profession", which is painful for judges and prosecutors and difficult for the society, gave the following explanation:

> He should be able to have a social life. He should read at least two newspapers so that he can see the social dynamics. This is because laws feel the need for a change in accordance with social dynamics. [...] He should watch at least two main news bulletins every day. He should take fifteen days of vacation every year. He should spend more time among people, isolate himself from his judge/prosecutor identity and be one of them [people]. [...] A profession that is so involved with the society should be able to take the pulse everywhere in the society and come up with a synthesis. Hence, he has to have a strong intellect. (Samsun 1)

One of the interviewees pointed out that the most important factor making it difficult for courts to meet the expectations is their heavy work load, and provided a "citizen's view" on this perception, which is widespread and strong among the judicial circles (Istanbul 1).

# Expectations from Courts

One of the conclusions derived from the interviews was that the expectations of the society from courts are in concordance with the image of the ideal judge. Virtually all interviewees said that first and foremost they "expected justice" from the courts. Most of them based their definition of *justice* on three concepts: "Integrity", "impartiality" and "fairness".

The concepts of impartiality and fairness are also defined with the help of other principles and values when it comes to expectations from courts. The most frequently referenced principle in this context is again equality. What is expected from the court is that they "treat everyone equally". The following words from an interviewee in Erzurum emphasize this point: "We expect courts to treat everyone equally, that is, we expect real justice" (Erzurum 2). The statement by an interviewee from Kars can also be placed in the same framework: "I expect courts to give equal rights to everyone, treat everyone equally, and not decide based on favouritism or string-pulling" (Kars 11). We heard the same concepts from other mouths in the form of "expectation of justice, equality and rights" (Sivas 1). Some interviewees associated the concept of "fairness" with "fair trial".

"Receiving a better welcome at courts" and "having judges that listen to them" were also among the projections of the ideal judge image on the expectations from courts.

A scholar we interviewed expressed the expectation of fair treatment to everyone by courts, and referred to the example of how witnesses are addressed differently depending on their identities, which he had observed during hearings:

> I was a witness at a court case. We went to the court. Before hearing me, the judge heard the grocery's apprentice who was also a witness. He addressed him informally, using the second person singular "you", and even scolded him by reminding him the evidence he had given at the police. Then it was my turn. He addressed me formally, using the polite "You", and even his tone of voice was different. (Ankara 1)

We can see that similar expectations also encompass the treatments at prosecutor's offices, as clearly indicated in the following account:

> When I go in there, I should be able to contact the prosecutor directly. When I have a problem or grievance, I should not be made to wait there for two or three hours. Even if direct interaction with the prosecutor is not possible, I should be able to establish a dialogue with one of the several clerks who work for the prosecutor. I should be able to explain my problem to them. (Antalya 1)

# Belief in Realization of Expectations from Courts

It is possible to say that there was widespread a disbelief among interviewees with regard to the reflection of those three concepts mentioned above into practice, when it comes to fulfilment of the expectations from courts. The response given by one interviewee can be read as a general expression of this disbelief:

> From courts, we expect [...] integrity, that is, not to allow anyone's rights to be violated or confiscated by others, and we expect [...] justice, though it already includes justice within it [...] we expect them to distinguish between the wronged and the wrongdoer, [...] alas, these do not happen in our country. (Kars 1)

The interviewees perceived that courts did not examine the files with due meticulousness before deciding on the case, and even decided on wrong files when they sometimes mix up the case files, a situation which is even seen in the appeal process. An interviewee explaining his impressions at a court emphasized the impression of perfunctory attitude, saying "they do not dwell long on anything" (Kars 8). There were a lot of complaints that in cases where the files are sent for expert witness evaluation, judges usually conclude the case based solely on the report from the expert witness.

The interviewee from Gölcük complained about the length of cases, underlying irresponsibility and negligence as the main reasons prolonging the cases. An interviewee, who had lost his child in the earthquake and filed a suit for his discovery, explained how he could not get any results despite having deposited the fee asked from him. The same interviewee made a comparison between the Western law and the legal practices in Turkey, and said "no value is placed on humans" in this country, and therefore he did not believe that courts would act fairly (Kocaeli 1).

# Confidence in Fairness of Courts

An important conclusion derived from the accounts given by the interviewees is that one of the strongest sources of the disbelief in the realization of expectation from courts is the lack of confidence in the fairness of courts. Indeed, we detected a lack of confidence that courts would administer justice among the generality of the persons we interviewed. In other words, we observed that among the interviewees, distrust in the courts was a common perception.

This perception has become an almost permanent opinion especially among those who have been victims to some extent and who thought the court decision did not repair the unjust treatment they had suffered or that a person harming them or someone close to them did not get the necessary punishment from the courts. The statement by an interviewee whose brother was shot is like a typical depiction of this perception:

> Justice has never taken its deserved place; they always skip it, they hit and break anyone before them, and then they release them, let them go. That is, they do nothing to avenge him; [...] is free. They give you no justice, no justice at all! [...] (Kars 5)

An interviewee who said he was not guilty but still was put on trial and penalized also had the same frame of mind:

> I went there, I was tried [...] remained under arrest for two months, even though I had not committed any crime, I have never even violated a red light in traffic in my entire life, but they found false witnesses and put me in this debacle. (Trabzon 1)

According to an interviewee, "the judiciary is in disgrace" and the manifestation of justice at court is "something that is pure luck": "Justice is manifested perhaps once in every hundred cases, and that is based purely on luck." Another interviewee, despite having had no such experiences, shows the same perception with the same expressions. The question "Do you think justice is manifested in courts?" is answered as follows: "To a large extent, no! Sometimes, due to luck, one or two rightful decisions come from the court, yet they are exceptions" (Kars 6).

Of course, this distrust in the justice system is not a perception that originates solely from victimization. There were interviewees from different circles who shared the same approach but put it forward with different arguments. For

example, an interviewee states that he "does not trust the state" in general, and says he does not trust the justice, which he sees as a part of the state, either (Antalya 1).

According to an interviewee from Samsun, justice is the main mechanism that is supposed to ensure equality, yet in reality it is "the complete opposite" (Samsun 2). The statements of this interviewee reflect a perception that is common in the films which he made references to, in the news and commentaries in the mass media, and more significantly, in the "daily language":

> Although there is a lot of evidence that one can trust in the courts, there is also a lot of evidence that you cannot trust them. For example, people can change a court's decision, say, with money; you can buy the judge; there are films on it, you now, we buy the judge, arrange the lawyer and find a false witness... I think it is from the existence of such usages in our language that we can understand how unreliable courts are. (Samsun 2)

Among the large number of interviewees sharing the perception that courts are not fair (e.g. Trabzon 1, Kars 15, Kars 17, Kars 18, Erzurum 2, Nusaybin 1), the short dialogue we had with an interviewee who started out hesitantly but finished the interview with a clean-cut opinion is interesting. According to this interviewee, courts are "not fair enough" (Kars 8). However, in the next question, the same interviewee changed this "not fair enough" to "not fair at all".

From some interviewees, we received direct responses that courts are fair. Some of these responses had elaborate foundations. For example, the educated interviewee from Samsun thinks courts are fair, possible mistakes stem from the nature of the job, but there are remedies that can correct these errors within the system. This interviewee stresses the human factor, but believes that any error made will surely turn back from one of the judicial levels during the process, and that the judicial mechanism is equipped with such safety valves. (Samsun 1).

Some positive responses are either short cut or lack explanation (For example Kars 2, Kars 7, Kars 13: "Fair"!). However, most of those who gave such responses used expressions during the later stages of the interview that indicated they had no clear-cut beliefs regarding the fairness of courts. For example, an interviewee gives the following response when asked, "Do you think justice is manifested at courts?"

> As I said, whatever that place is, it gets all the rights [...] who ever gives some bribes or finds favour, he gets all the justice and the other remains victimized. (Kars 2)

# Perception Patterns on the Functioning of the Justice System

The weakened belief that courts will bring justice and the distrust in courts is related to a large extent to the problems encountered in the functioning of the justice system. Similarly, it is seen that the above accounts by interviewees, though mentioning some abstract and general reasons, are mainly based on examples related to the material operation of the justice system. During the flow of conversation, when these issues came up, it became clearer that these perceptions are fed from negative experiences, testimonies and information. Based on the views expressed with regard to the operation of the justice system, we can group the problems and complaints indicated by these perceptions under several headings.

## FAVOURITISM AND POWER RELATIONS IN THE JUSTICE SYSTEM

With regard to the problems experienced in the operation of the justice system, we can say that the most common complaint is "favouritism". In almost all the individuals we interviewed, we found a strong perception that favouritism at courts is a common occurrence and that power relations are a major factor influencing court decisions. Favouritism is expressed with concepts such as "having money", "having an influential acquaintance or insider", or "sitting in a catbird seat".

A well-educated interviewee describes the mode of operation at courts as "accommodation of requests of friends". According to him, when he filed a suit against his employer, the employer was "influential" in various ways prior to and during the court process (Antalya 1). Another retired worker who was put out of his job as a result of a conflict with the employer said that the court decided in favour of the capital at the end of the process (Eskişehir 1).

During the interviews, we also came across statements claiming that some things in the judiciary are carried out through "bribes" as a special form of favouritism. It is interesting that people have this well-established perception even if they have never personally witnessed such an occurrence.

According to one interviewee, the low salaries of the members of the judiciary are the most important factor that enables bribes. Hence, this interviewer says

"bribe exists for sure; that is, I cannot say it does not exist". On the other hand, he also adds: "though I have not witnessed any bribing" (Istanbul 2).

One interviewee states that favouritism is a common attitude, but stresses that it is a cultural characteristics:

> To give an example from my own professional field, for example paying your taxes is a matter of honour for Europeans; yet here, the amount of tax you can manage to evade determines how good an accountant you are. Things like that. For me, this is a clear definition. This is the way of it. Or, if you have a very good lawyer, he can pull you out of the worst circumstances and elevate your status. You can find false witnesses, fake reports and whatnot. People can even get fake health reports. The concept of "acquaintance" will never end in Turkey. In its simplest form, we are fellow townsmen, and if you are a townsman, you protect your townsmen; it is your duty to adopt and protect them. We have this culture, and I do not believe it can be erased; because regardless of how cosmopolitan you become, how modern you become, this culture will remain with you. (Samsun 2)

Some interviewees stated that they believed judges favour and decide in favour of the segments that provide certain advantages to them. An interviewee who thinks he was in the right but who received a court decision against him blames it on the judge who was "bought" by the other party (Kayseri 2).

In addition to favouritism towards powerful and influential people, there are those who believe that the "mafia" creates a power field in the justice system, and that the "mafia" has become a strong pressure group in the justice system.

There were also interviewees who did not share this perception and who described courts as "the institution that has remained the cleanest".

### ARBITRARINESS AND PERSONALITY IN THE TRIAL PROCESS

Some interviewees complain that the actors serving in the trial process, particularly the judges who have the power to decide and prosecutors who have the power to influence the process, act according to their own personal preferences and tendencies when assessing a case, instead of the general principles of law and the governing provisions of the existing legislation.

An interviewee from Istanbul assesses the arbitrariness seen in practice and the resultant lack of trust as a general problem of the society that is also reflected in the law:

> Maybe we can say that practice is the main problem... For example, they say it is prohibited to park here, so no one should park there, yet when it comes to practice [...] you go and park there every day. (Istanbul 1)

Another interviewee from Istanbul says judges use their own personal assessments "with ease" when interpreting the laws, which results in differing judgements ruled for similar cases:

> For example, any judge can easily interpret the law according to his own ideas and give completely opposite decisions in cases that are essentially the same. Maybe this sort of thing happens everywhere but... (Istanbul 3)

### LONG DURATION OF CASES

The long duration of cases has all along been identified as the biggest obstacle before the manifestation of justice in the public opinion. Hence it was not surprising to hear observations on this matter. Here is an example:

> The time factor erodes the case, it eats through everything. You go to court for a small matter and it is settled in ten days; the other guy goes to court and his suit takes five years, so I do not think justice is manifested; there is no justice... (Kars 4)

The interviewee who expressed having a 50% belief in the fairness of courts thinks that the long duration required for settling the cases makes it too cumbersome for justice to manifest, even on the winner's side:

> To put it in percentages, I think justice is manifested only 50-60% of the time, but I think it brings an extra load on people because the trial process is too long. (Kars 10)

An educated interviewee emphasized that the main factor prolonging the cases is the heavy work load, which is caused by the inadequate number of judges and prosecutors (Samsun 1). An interviewee from Antalya explains how he was victimized when he filed for damages against his employer, won the case, but by the time the decision was ruled the damages he was paid had become eroded to almost nothing by inflation, due to the case taking too long (Antalya 1). The interviewee from Eskişehir talks of a similar experience where the severance payment decided by the court melted away under inflation due to the prolonged duration of the case (Eskişehir 1).

An interviewee said the party in the wrong can turn the case in their favour by taking advantage of the prolonged duration of the cases. In his opinion, parties that have the power take advantage of this weakness of the courts by deliberately causing the prolongation of the case (Samsun 2). Another interviewee also implied that prolonging the case is a deliberate tactic used by parties in certain cases. Bringing the topic to statute of limitation, the interviewee says this tactic is used particularly in cases involving "offences committed by government officials" or "crimes committed in the name of the state", as is the case in his example (Diyarbakır 3).

### HEAVY WORKLOAD OF COURTS

Another issue frequently voiced in the public is the heavy workload of courts, which bears down on it and which prevents justice from being substantiated. This situation is constantly being brought on the agenda by judicial circles as a major problem and a serious source of complaint. Even those who have no court experience stress the heavy workload of courts and similar perceptions about the prolongation of suits.

### SEEKING YOUR RIGHTS IS EXPENSIVE

We observed that most of the individuals we interviewed established a direct relationship between "seeking one's rights" and "having money". The point which is particularly emphasized by interviewees is that in order to seek justice, they will have to hire lawyers and hence will need money. According to an interviewee from Kars, the actual point in going to court is to defend yourself; yet since you cannot defend himself, you have to hire a lawyer. Yet since one does not have money, one will not be able to do that, and hence will not be able to seek your rights (Kars 13). The same emphasis can be seen in the following words:

> Rich people hire lawyers, while those who are poor cannot do anything and thus they become the party in the wrong while they are in fact the party wronged... You see the rightful party [...] the aggrieved person being punished, while the guilty party is set free to roam the streets. (Kars 14)

According to some interviewees, "seeking justice" is expensive work. If one does not have wealth or power, one cannot possibly access justice. The interviewee from Gölcük explains the financial difficulties he found himself in right from the very beginning of the process in his legal struggle to have his child located in the aftermath of the earthquake:

> The court gave me ten days to deposit the fee. I had just come out of an earthquake, from under the ruins, with nothing left to my name; I had been staying at the hospital. So it was not easy for me to find seven and a half billion Liras in ten days... Of course, if you have absolutely no money, you cannot file a suit, not a chance. You know they say they will provide lawyers from the Bar Association etc, but there are no lawyers there so how can they assign you one? I mean there are no lawyers willing to come from the Bar Association, so they cannot appoint one. So, in my opinion, lack of money is a total hindrance against justice. (Kocaeli 1)

According to him, the reason he lost the case was that he applied to the court without a lawyer, since he did not have the economic means to hire one. An interviewee from Kayseri thinks when you hire a cheap lawyer, that lawyer will not pay enough attention to your case. This interviewee thinks lawyers make a

bargain among themselves and manipulate the court according to that bargain (Kayseri 4).

Lawyers are seen as actors that arrange self-interest relations and that can use their own connections and skills in favour of the guilty party, rather than indispensable elements playing a role in instituting justice. An interviewee from Denizli who had been divorced from his wife and was experiencing child visit problems blames the lawyer for his inability to visit his child (Denizli 1).

### SEEKING JUSTICE OUTSIDE JUDICIAL PROCESSES

Most of the interviewees admit they have no other authority they can apply to when they have a dispute, regardless of how little they trust the courts and the judicial process: "Justice is justice, regardless of how weak or unfair it might be. I go to court to settle my problems." (Kars 6; Kars 7; Kars 15; Kars 18; Samsun 1; Samsun 2). An interviewee who was tried and sentenced also points at the courts as the address to settle disputes:

> The mafia-style seems to be the norm today; yet I have never had any dealings with the mafia and will never have. If I tried to judge the culprits myself, I would feel all my education was wasted. So I would apply to a court in any case, yet with lowered expectations. (Trabzon 1)

In the eyes of most interviewees, from the most illiterate to graduates of higher education, courts are still a place of "remedy". There are no categorical differences in this regard between the perception of an illiterate elderly woman from Erzurum "I petition the court, settle the matter; I seek out the citizen and never give up my rights" (Erzurum 1) and the perception given above of the higher education graduate.

What we observed among the generality of our interviewees is that they have the tendency to believe in the supremacy of the duty of "ensuring justice" entrusted to the state, compared to an individual pursuit of solution. From this observation, we can draw the conclusion that fair and effective operation of the judiciary is of utmost importance for the Turkish society. Here are some of the responses given to the question "What would you do to ensure justice?" all of which support this perception:

> No, it must be by way of court; you cannot settle things with an eye for an eye approach; you can only settle it through courts, by the way of the state; yet around here they draw blood for blood. (Kars 1)
>
> To ensure justice, you have to go to court; if everyone tried to settle their disputes themselves, there would not be any justice in the country. (Kars 8)
>
> I would first petition the court. (Erzurum 2)

> Of course, the court. I would trust in the court. I mean, I may know that I will never be able to get a satisfactory result. But I know it is the right thing to do; if I tried to settle it myself, I would be no different than other people at that point. (Samsun 2)

The words of some interviewees show that they accept courts as a remedy not because they trust them, but rather because they are "desperate". For example, an interviewee from Diyarbakir stresses that he must go to court in any case even if he has no hopes of justice prevailing:

> There are no other remedies that can offer a solution. It will be either a vendetta, or a court. We do not have that power that comes from the law of the jungle so that we can overpower someone. And we do not have the power of the mafia. We petition the court, but still we cannot get what is rightfully our due and we always end up the suffering party. So, unfortunately some groups always become the victim under all circumstances. (Diyarbakir 3)

However, the uncertainties and doubts about the fairness and impartiality of courts do not have the same effect on everyone. For example, some interviewees gave vague and ambiguous replies indicating they saw trying illegal ways as a valid option due to not trusting fully in courts:

> If justice will be fair, then of course I would like the justice to solve my problems; I would not take it upon myself to personally settle the matter, neither would I go to the mafia; what I mean is, the state should treat the offenders as they deserve in relation to their offenses, and to the innocent as they deserve for their innocence. (Kars 3)
>
> I would actually go to court. Where the court cannot provide a solution, I would settle the matter myself. Sometimes the court cannot give you the solution. (Kars 4)

Some interviewees say they do not want to apply to the judiciary for settlement of any dispute they may have, because of the various problems they see in the functioning of the justice system, and that they would prefer to seek other remedies.

The statement by the interviewee from Hakkâri and the "examples" he gives with regard to seeking remedies other than judicial processes are the most explicit expression of this perception:

> I would not go to court. Because that process, I mean that legal process... We have never experienced a judicial process ourselves, but we hear the accounts given by those who have, and they all say the process gets inundated with ebbs and flows. So I would prefer more practical ways; if I am in the Eastern region, I go the leader of the clan, or to the elders of that community, and my

> problem is solved within a matter of hours, or a day, or a week at the most... Since the legal process is too wearying, people even give up their claims on huge amounts that can literally revive most people's families or businesses. But here I state it clearly: people give up their rights only so as to avoid having to crawl through that process. (Hakkâri 1)

An interviewee from Kars shares the same perception as evident from his following words:

> To tell you the truth, in the current system, it is better if you solve it yourself. I do not think courts can be the solution; I think courts would rather cause people to have to do a lot of unnecessary work and come back only to find themselves showered with new chores. (Kars 10)

According to an interviewee, the perception of bureaucracy which is based on the abundance and complexity of transactions is an important factor that deters people from applying to courts. The interviewee says this situation is wearying on people and hence discourages them from seeking justice through "legal procedures" and encourages seeking "illegal" remedies; he also points at an important truth: the unfairness of the judicial system undermines the concept of "rule of law" with regard to the state and its institutions. (Istanbul 2). Some of the interviewees sharing this perception think that a multi-phased plan of action for solution is the best way. For example, an interviewee from Kars says he would first use his own means, and apply to the court only as a last resort. (Kars 16).

From the interviews conducted in Eastern and South-eastern Anatolia, it is seen that the current judicial system fails in substituting for the clan (*aşiret*) system; the judicial mechanisms of the modern state are not trusted as much as the traditional system; traditional mechanisms are sought for solving problems and in this context people resort to traditional justice mechanisms to solve their problems.

# Perception Patterns on the Independence of the Judiciary

In our interviews, we found that there is a widespread view that the judiciary is not independent. A lot of interviewees, instead of giving subtle responses, expressed their views on this issue with short-cut expressions. For example, first interviewee from Kars said: "The judiciary is not independent, is it? It isn't independent... And that's that." The third and the sixth interviewee from Kars said: "It gives the appearance of being independent, but in my opinion it is not." The sixteenth interviewee from Kars said: "No it isn't; it looks independent, but it isn't!" The first interviewee from Nusaybin : "It is not independent, absolutely not!"

The perception of the interviewee from Trabzon that the judiciary is not independent was so clear and point-blank that he found this question funny: "This question is indeed ironic; everyone sees that the judiciary is certainly not independent" (Trabzon 1).

Although there are various approaches on the definition and criteria of independence, we can say that this issue is for the most part considered in connection with the relationship between the judicial branch and executive, and particularly with the government. A large portion of the comments given in this framework are based on material experiences and learned examples, rather than on a concept like rule of law or a principle like separation of powers. On the other hand, there were also interviewees who defined judicial independence based on this principle and concept. It should be noted that all of these interviewees are from the educated segment. At the core of the perceptions of most interviewees on judicial independence lies the role played by the government in judicial processes. It is also seen that there is a widespread view that first of all governments should not interfere with the judiciary.

As opposed to those saying that the intervention of the current government in the judiciary prejudices independence, there are also those who think that there are other forces controlling the judiciary despite the government. An interviewee from Diyarbakir thinks the judiciary is not independent, and the reason behind the relations damaging this independence is the military domination:

> In my opinion, the judiciary is not independent. It is completely under the pressure of the state and the governments, and these governments are usually under the influence of other powers. Here is my impression. [...] Especially the Constitutional Court has become too politicized in the recent years and at least 70-80% of its decisions are political. I mean, all they care about is protecting the Republic in whatever way they can. But it is not the Republic of the people that they want to protect; it is the Republic of the military. So, most members of this court give their decisions under pressure. This may not be a direct pressure, but rather through political and emotional pressure. For example, they influence the outcome of the decision by saying " if you do not decide like this and that, then these events will take place and the country will be lost and the sin will be yours." Pressures like this are more effective than other actual pressures. (Diyarbakir 3)

An interviewee used exactly the following words: "The judiciary is not independent; it is under the state's pressure, whether willingly or unwillingly!" (Kars 11). This interviewee sees the state as powers transcending the state, and thinks that like other things, these powers also pressurize or influence the judiciary.

Some interviewees said that the government should have the power to interfere with the judiciary and should use this power when necessary. One of the interviewees from Kars expressed this same thought in a very direct manner: "The government should do it, of course, based on some laws. The government should have some powers; in the end, it is the government." (Kars 3).

# Perception Patterns on the Impartiality of the Judiciary

Responses to questions on the impartiality of the judiciary draw a picture that matches the data we obtained with regard to public trust in the judiciary. The result obtained from the interviews as a whole is that the belief in the impartiality of the judiciary is weak. Diversity is observed in perceptions regarding the reasons of deviation from impartiality, in concordance with the nature of the matter.

Although some of the interviewees shared the perception that courts act partial, they refrained from making a generalization on this matter. Some of these interviewees said "courts are sometimes partial" without giving a tangible justification for this view. (e.g. Erzurum 2). Some interviewees talked in more concrete terms; they said there are certain factors disrupting the impartiality of courts and that deviations are seen from impartiality when these factors join the equation.

Some interviewees talked hesitantly, but in the end they expressed doubts indicating that the judiciary is partial:

> Since I do not have any court experiences I am not very informed about this topic, but it can be partial, why not[..] In Turkey we doubt everything. (Kars 6)
>
> I am not sure; I do not fully trust courts, so I cannot say that the justice is not partial one way or another[...] (Van 1)

Some interviewees have a clear opinion that courts are "partial" (for example Kars 16; Kars 17; Kars 18; Nusaybin 1; Van 1; Van 2; Van 3; Diyarbakir 3). There are also those who have no doubts: "They are partial; absolutely!" (Kars 11).

Among the factors affecting the impartiality of courts, the factor most emphasized can be summarized as "matters concerning the state". This issue requires a closer look under a separate heading.

# Statism in the Judiciary

A significant portion of the interviewees think that "courts are not impartial when it comes to matters concerning the state". Hence, it is seen that the perception that "the judiciary is statist", which we had already established in the first book *"Justice can be Bypassed Sometimes...": Judges and Prosecutors in the Democratization Process*, is also shared by the citizens we interviewed in this study.

Some of the interviewees expressed with brief but clear words the perception that courts decide in favour of the state when the citizen and the state contend in a case. According to an interviewee from Kars, "the more you are on the state's side, the more protection you receive from the court; no need to say anything else on the matter". (Kars 4) Another interviewee replaces the state with "system": "It is partial; it defends those who are pro-system [...] in a crystal clear way" (Nusaybin 1).

Despite these views, some interviewees provided a more detailed assessment and gave different examples on partiality. For example, an interviewee from Diyarbakir defined the statism of the judiciary as an ancient and universal phenomenon, by emphasizing that in essence the role of the law is to protect the state (Diyarbakir 3).

According to an interviewee, the reason why the judiciary is not impartial is the "pressure on the law/judiciary":

> First of all, there is a huge pressure on the law, a great pressure on the judiciary. In terms of ensuring that justice prevails, it is not always close to ideal. There are a lot of reasons for this pressure. For example, there can be political reasons, economic reasons etc. (Istanbul 2)

According to the interviewee, the low salaries of judges and prosecutors play a role in rendering these pressures effective:

> Put yourself in the judge's shoes. With your minimal salary, to what extent can you afford to be impartial in cases where one of the parties is the state, for example in public suits? (Istanbul 2)

Due to these reasons, this interviewee says "I would not like to be even the rightful party against the state; I mean I would not want to become involved in a suit against the state. Because I know it would cause endless troubles. And I would have to consider the long phase which will surely force me to go to the European Court of Human Rights (Istanbul 2).

An educated interviewee from Samsun said that when the citizen and the state come against each other in a suit, the citizen is at a disadvantage, which is the reason behind the increased number of applications to the ECtHR (Samsun 1).

There were also interviewees who provided a class-based view on the issue of impartiality. The interviewee from Antalya blames the influence of employers on the legal system for the difference in the interest applicable at the beginning of the process and the interest applicable at the end of the process with regard to damages (Antalya 1).

Some interviewees implied that the ideological views and political preferences of judges and prosecutors affect their decisions and attitudes, and emphasized that this situation creates distrust towards the judiciary.

An interviewee from Sivas complains about "politicization of the judiciary", putting emphasis on the democracy: "There should be nothing that breeches the democracy in a state governed by rule of law and managed with a constitution". (Sivas 1)

An interviewee from Denizli thinks that with the AKP rule, the probability that the judiciary will be influenced by the government has increased in connection with the "lifestyle" issue in particular:

> I don't think that courts are under the influence of the political ruling party, but I still think there can be favouritism in this regard. In other words, if the lawyer or judge at the court is a member of such a party, the rights of a drunkard will most likely be...
>
> However, a judge cannot be a member of a party since he is a civil servant!
>
> Still, if his political view is in that direction, if he has adopted that party, I mean, a religious person would decide in favour of another religious person I think. The response to this question is already a depiction of what currently happens in the country[...] (Denizli 1)

The interviewee from Antalya also made similar comments. According to this interviewee, the statements given by the Minister of Justice concerning the suit filed to close down AKP aimed to exert pressure on the judiciary:

> Politicization is visible, especially considering the recent suit filed to close down AKP. The Minister of Justice can interfere or give an opinion. He can influence judges and prosecutors from the outside.
>
> Do you think the government has an influence on the judiciary?
>
> I do. (Antalya 1)

The number of interviewees thinking that the judiciary is not on the government's side and that, to the contrary, it is against the government and the values it represents is not few. For example, when asked whether the judiciary is politicized or not, the interviewees from Van recall the decision of the Constitutional Court regarding the headscarf:

> If you mean the decision of the Constitutional Court, I say it is completely partial; but it is my opinion only, not the public's. It is definitely a political decision... if they are saying that everyone is equal in a democracy, then we say our mothers, sisters etc. should be able to go to university and get education there; this is our opinion. If you ask whether it is a just decision, I say it is not, not for me. It is not a just decision. (Van 2).

The same interviewees give the following opinions when asked about what the AKP closure case means in terms of the politicization of the judiciary:

> We can say that because of that closure case, we have lost the little faith we had in the judiciary. (Van 1)
>
> We do not trust the independent judiciary, yes... What is there to trust? (Van 2)

The same interviewees give the following explanation when asked "whether the 367 decision is also like that":

> Yes, it was the same too. Because there were no such problems when selecting the 10 or 11 Presidents that came before him. But when it came to him, these problems arose; so, they can manipulate the law whenever they want. (Van 1)
>
> They can turn whatever they want to their advantage or disadvantage; I don't know, till now... (Van 2)

Another interviewee also stresses that the Constitutional Court demonstrated a political attitude towards AKP in particular and has compromised its impartiality:

> For example, the Constitutional Court generally acts political. As in the AKP closure case. (Diyarbakir 4)

An educated interviewee from Istanbul makes reference to the 367 decision in particular and says that the unfairness of the law has once again confirmed itself (Istanbul 2).

The individual we interviewed in Hakkâri also thinks that the judiciary "has become politicized, at least in the recent period". Our interviewee thinks that the military plays a role in the politicization of the judiciary, especially with regard to practices in the region, and that on some matters the judiciary is under pressure. Our interviewee thinks that the position and role of the military within the system are the main reasons of this chaos, which renders the judiciary dysfunctional; yet he still retains his belief that the rule of law will become established in Turkey (Hakkâri 1).

# Discrimination at Courts

The instances of discrimination seen at courts should also be evaluated within the context of judicial impartiality. Some interviewees mentioned some practices which can be considered to constitute discrimination, while some related the examples they experienced. Among these examples, the majority are related to "language", i.e. Kurdish.

An interviewee explains that the judges and prosecutors used to react strongly when a language other than Turkish was used in the courtroom, but that the situation is gradually improving:

> At one time, there was a strong reaction when you spoke in a language other than Turkish at the court. Now the reactions have decreased; they are not as strong as before (Diyarbakir 2)

The same interviewee also says that sometimes clothing style can also become a problem at courts:

> Fashion of clothing becomes a problem at the court. Especially religious garments... But I do not think garments have much effect on the outcome of the process. (Diyarbakir 2)

Another interviewee from Diyarbakir makes a distinction when explaining that Kurdish is a ground for discrimination:

> In the past, there were a lot of problems with regard to language. Yet recently, the attitude at courts has changed quite a bit. When for political reasons you present your defence in Kurdish although you know Turkish, you can get some negative reaction. But if you really do not know Turkish, they find you a translator. (Diyarbakir 4)

Another interviewee from Diyarbakir makes a connection between discrimination and the language practices at courts:

> Yes, some people receive different treatment. For example, they treat Kurds differently. The fact that Kurds cannot defend themselves in Kurdish is an example. (Diyarbakir 3)

The same interviewee believes that there is discrimination based on political and religious reasons, in addition to favouritism based on power, money, prestige, kinship etc.:

> I think more than bribery, there is political favouritism. Political and religious favouritism happens a lot. They are rightist and conservative. There is only one truth I know: the left is never able to benefit from justice and the left never receives fair treatment. (Diyarbakir 3)

According to this interviewee, for example while mafia leaders are released for "good behaviour" or get penalty discounts, the same attitude is not shown to political defendants:

> When mafia leaders appear at court with their suits, their penalty is abated. Such privileges are not made available for those arrested for political reasons. This has an effect, but in my opinion it is wrong. (Diyarbakir 3)

Another interviewee from Diyarbakir believes that being a Kurd, especially if you are being tried for a political offence, is treated as a serious criteria for discrimination (Diyarbakir 4).

The same interviewee says that the courts adopt a patriarchal attitude in cases concerning women, which can be clearly seen in cases concerning "honour killings":

> Differing decisions can be ruled with regard to honour killings and violence towards women. Sometimes this causes indignation. The judiciary should be able to secure the rights of women and give them justice. (Diyarbakir 4)

# Evaluations on Special Courts

The past experiences of special courts were mentioned by some interviewees as examples of deviation from impartiality or misuse of the judiciary for political purposes. In particular, the impact created in the memories of these interviewees by the Yassıada Trials[34], Court Martial and State Security Courts was expressed as a reaction to such practices. Barring a few exceptions, in general our interviewees have doubts about the legitimacy of the existence of special courts.

For example, an interviewee in Kars explains the risks of martial law in the context of Court Martial:

> No, it shouldn't be! If we are a people, there should not be martial law. There should be no martial law, our people should be free, should live freely, should get on well with each other; so in my opinion such things [court martial] should not exist. (Kars 1)

An interviewee who regards special courts as "a misinterpretation of the principle of rule of law", says:

> Of course these are misinterpretations of the principle of rule of law, in my opinion. State Security Courts, Independence Courts[35] etc., they make the operation of the state, the executive easier, in law and in judiciary, and they are courts that do not go any further than legitimizing and legalizing certain illegal practices of the state (Istanbul 2).

Another interviewee shows Independence Courts as an example and thinks these types of courts are essentially illegal yet "unfortunately useful" in the prevailing conditions of those days. The same interviewee says courts in the same type as State Security Courts can exist provided that their mode of operation and trial procedures are soundly set in the law. (Istanbul 3).

Of course, another debate about the implementation of the principle of natural competent judge is based on the existence of Military Courts. Although people are quite confused on this matter, they have a feeling that this situation is not in conformity with the principle of natural competent judge, and the closed structure of the military system violates the principle of public hearings.

34 **It is the name given to the special court established by the military junta which staged the coup d'etat of May 27th, 1960 to try the members of the overthrown Democratic Party (Demokrat Parti) government. The trial resulted in the execution of the Prime Minister Adnan Menderes and two ministers.**

35 **These were special courts established during the Turkish War of Independence (1919-1923) to prosecute the individuals who were involved in the anti-government movement.**

# Awareness Levels Regarding the Legal System

During our interviews, we found a prevailing atmosphere of general ignorance about the legal system. A wide legal domain, starting from abstract and theoretical topics such as the principle of separation of powers and extending to jurisdiction areas of courts, the hierarchy of legal texts and the order of application to judicial bodies, does not occupy a place in the knowledge store of citizens.

One of the citizens we talked to in Van emphasized that the "ignorance" of citizens constitutes an important hindrance in the manifestation of justice, and gave the following example:

> If he could only have explained himself better, said he did not know how to read etc... when you are illiterate, you do not know what a lawyer is and you would probably never be in this fix if only you knew enough to understand why that land title was transferred by the cadastre/land registry office without any payment. (Van 2)

Similarly, the interviewee from Denizli does not hesitate to say "he knows nothing" about law and the judiciary:

> You learn things by asking them... You need them. You even pay them some money, in return they write petitions for you. You have to ask, because you do not know it yourself. Actually there is a place in courts where you can consult, but they are not as knowledgeable as you need. (Denizli 1)

All interviewees acknowledge that ignorance is an important shortcoming in seeking your rights and for manifestation of justice. It is also understood that the education system has no effect in eliminating this ignorance.

There are several exceptions to this general state of ignorance. The exceptions who are not ignorant on law-related matters can be grouped as follows: 1) Those working in fields close to the law domain 2) Educated individuals 3) Those who have been to court before and have learned by experience.

In general, those who have gone to the court before for divorce, death or similar matters know the duties and competencies of that relevant court. (for example

Kayseri 5; Yozgat 1). The same individuals also expressed the difficulties experienced in accessing justice. For example, the interviewee from Hakkâri complains about the "language of laws and regulations". In his opinion, it is necessary to carry a dictionary with you in order to understand the judicial process. (Hakkâri 1). Another interviewee complains about the need to use a lawyer or a petition-writer in order to ensure that you apply to the court using the correct procedure. He thinks such challenges exist even for the simplest matter. (Kayseri 4). Among interviewees, the number of those with knowledge on the changes in the legal system is too few. And these handful of people are from the educated segment.

# In Place of a Conclusion

In modern societies, the main function of the judiciary is to settle conflicts between individuals and between individuals and the state through an *impartial procedure and process* and hence maintain social peace. The ability of the judiciary to fulfil this function depends to a large extent on its ability to maintain the public's trust. And maintaining this trust requires the existence of a strong and widespread belief in the fairness of the judiciary in the society. The words of one of the judges we talked to for *"Justice can be Bypassed Sometimes..." : Judges and Prosecutors in the Democratization Process,* the first book of this compilation, provides a striking summary of this situation: "The public enmity towards the judiciary is not important. For me, what is important is the public distrust in the judiciary. If there is distrust, then the real catastrophe has already started."

Researching the existence and degree of public trust in the judiciary occupies an important place in the sociology of law and in the sociology of jurisprudence, which is a lower branch under it. It is seen that various types of surveys are used in the West for this purpose. The reliability of questionnaire-based surveys and numerical measurements are questioned with justified reasons. The most frequently voiced thesis in these debates is that the closed-ended questions which are required to be answered through specific options given in the questionnaire method are not productive in terms of getting a full picture on the perception regarding trust. To rectify this shortcoming, the "in-depth interview" technique is used so as to ensure that perception patterns regarding the judiciary are identified. Undoubtedly, this method also has some limitations, the foremost of which arises with regard to identifying the survey scale and universe. Creating a sampling that can represent the whole of the society contradicts with the nature of the in-depth interview. Therefore, in studies carried out using this method, the claim to reach results that can be generalized is abandoned from the very beginning. For the same reason, it is also difficult to write a conclusion for such studies, or the conclusion you write cannot go beyond being essentially a summary of the data extracted from interviews.

Nevertheless, it would not be right to think that such a summary would be meaningless. Even in a narrow universe of interviewees, the perception patterns identified can be evaluated as examples of approvals or criticisms regarding the judiciary. In particular, since negative perceptions serve as warnings that remind the judiciary of its responsibility towards the society, it is accepted that these

perceptions support the quest for public supervision and democratic accountability of the judiciary. Hence, the findings of our study should also be evaluated in this framework. Among the "outcomes" of this study, those we consider worthy of particular emphasis can be briefly summarized as follows:

The judicial branch is perceived by most of the interviewees with a holistic state concept rather than an awareness of the principle of separation of powers. This perception regarding the judiciary is based on some reasons which can be considered universal and which find their best depiction in the novels *The Castle* and *The Trial* by Franz Kafka, such as the rituals and tasks that serve as constant reminders of authority etc. However, in societies that have an advanced awareness of a democratic state governed by rule of law, these characteristics do not cause the judiciary to be perceived as a venue for direct representation of the state's rule or as its direct reflection; or this perception does not reach the lengths we identified in our interviewees. Hence, it seems reasonable to accept that this perception, which we called the identicalness of the judiciary and the state, has reasons specific to the Turkish society. It can be said that the effect of the mentality that regards the judiciary as an external power or structure aiming to control and discipline the society rather than an organization that provides service to citizens plays an important role. Essentially, the perception of courts as cold and scary authorities/places can also be viewed as an interpretation of the outlook on the state in this specific area. The perception of "statism in the judiciary" exhibited by the majority of the interviewees can also be placed in this context. Let us remind you that there is a wide and strong perception that the courts will always more or less side with the state in court cases where the state or its officials are a party.

The fact that most of the ideas stated by the interviewees on this matter coincide with the evaluations of a large segment of the judges and prosecutors interviewed within the scope of our previous study *"Justice can be Bypassed Sometimes...": Judges and Prosecutors in the Democratization Process* is an important finding that requires serious attention, in our opinion.

In the various manifestations of the perception that the judiciary is not independent, the effects of the perception that the strong imposes its will can be clearly seen. The interviewees stating that the biggest threat for judicial independence comes from the government believe that AKP has conquered the social power fields and influences the judiciary from these power fields. On the other hand, those who think that other various power groups, such as the army, manipulate the judiciary against the government take as their starting point the argument that "AKP" does not have "the real ruler power".

The weakness of the trust in the judiciary is another finding of our study. This feeling is based on the belief that favouritism and power relations affect the trial process. Here we can also say that the perception that the 'powerful, whether the state or private parties, usually comes out the rightful' is determinative. The following words by an interviewee can be read as a simplistic yet striking expression of this perception: "The poor always looses..." The meaning of this expression is that the structure and relations of the ruling government, which are embodied in the state concept in Turkey, prevent the idea of equality in the application of laws from gaining believability. The fact that courts are, despite all these, seen as a remedy can also be interpreted as an admission of "desperation", i.e. lack of any other means of remedy.

As a result, in the light of the picture revealed through the interviews, we would like to emphasize that the problems regarding the judiciary cannot be regarded as limited only to the organizational structure and operation of the justice system, and should be addressed in general within the framework of the dominant management mentality and the well-established state-citizen relationship model.

# “Everyone Have Their Own Judiciary…”: Press’ Perception of the Judiciary in the Democratization Process

This book, which is the product of a challenging and intensive study, came into being with the devoted efforts of a great number of people. The contribution of my dear friend, who helped me tackle a great hurdle by compiling and classifying thousands of pages of documents, was unforgettable. I extend my endless thanks to the TESEV Democratization Program staff, and foremost to Koray Özdil and Özge Genç, who alleviated my burden with their valuable support throughout the study, and to Mithat Sancar who guided me with his suggestions and enabled me to carry out this intensive work.

**Meryem Erdal**

# Introduction

This study focuses on the one hand on the "judiciary", which ensures social cohesion by settling the disputes arising between individuals or from public acts and actions, and on the other hand on the "media", which is capable of reducing or totally eliminating the distance between individuals and society and the institutions forming the State within the scope of the right to information of the public. The judiciary has an important place among the institutions the activities of which are monitored by the media on behalf of the society and in accordance with the criteria of reality, objectivity, impartiality and independence. Media's criticisms, commentaries and reviews regarding the judiciary are gaining an increasing importance in shaping the public perception of the judiciary.

Another point indicating the increasing role of the media with regard to judicial processes is the way the media promotes transparency and democratization in judicial processes by conveying its findings and observations to the public. It is obvious that as an effective democratic monitoring instrument, the media, which has become an inseparable part of the democratic system, will contribute to developing and strengthening the democracy as well as rights and freedoms.

This study attempts to show, using critical cases as samples, how the media fulfils this function and to what extent it contributes to democratization of the society and the judiciary. In the study, endeavour is made to impart the media reflections of contentions among institutions arising during critical cases and the effects of these reflections to the process. By doing so, it is also aimed to discover whether the line adopted by the media with regard to news, commentaries and reviews on the cases sharpen or smooth social and political divisions. Instead of focusing solely on columnists and commentators who are identified with the identities of their newspapers, the study pays special importance to the views of columnists and commentators who draw attention with their unique attitudes and approaches and who do not necessarily reflect the publication policy or general position of their newspapers. In general, the evaluations given by writers and commentators who address events independently from the separation and contention existing in the media were seen to act like path-clearers in terms of reminding the media of its democratic monitoring function.

To achieve the purpose of the study, six critical judicial cases each of which resulted in major political, legal and social consequences and left their marks in

their specific areas, and five newspapers reflecting the various trends and separations in the media were selected. The selected cases are the Susurluk, Şemdinli and Ergenekon cases within the context of the "deep state", the Hrant Dink case in view of freedom of expression including the process that led to his murder, and the closure cases of the Democracy Party (*Demokrasi Partisi*, DEP) and Welfare Party (*Refah Partisi*, RP) within the context of freedom of association and expression. In order to find out the media's perception of the judiciary, five newspapers were selected in consideration of the different social segments they represent and the different publishing policies they adopt. *Hürriyet* was chosen to represent the mainstream media; *Zaman* was chosen for its high circulation rate and because it represents the views of the religious-conservative segment; *Ortadoğu* was chosen as the representative of the nationalistic segment; *Taraf* was chosen since it informed the public with a unique style and perspective during ongoing critical cases, and *Radikal* was chosen for the period prior to start of the publishing life of *Taraf*.

Before proceeding with an overview of the media, a summary of these six critical cases may help a better understanding of the issue.

### THE SUSURLUK CASE

On 3 November 1996, the traffic accident taking place in the Susurluk District of Balıkesir, coincidentally, was the first critical threshold giving hints of the politics-mafia-police foot of the deep and extensive network of relationships. Found in the Mercedes car that crashed were the True Path Party (*Doğru Yol Partisi*, DYP) Şanlıurfa MP Sedat Edip Bucak, the Istanbul Chief of Police Hüseyin Kocadağ, and Abdullah Çatlı who was one of the accused perpetrators of a nationalistic massacre and sought with red notice and who carried a fake ID under the alias Mehmet Özbay, and lastly a woman named Gonca Us. In the accident which Sedat Edip Bucak survived with injuries, the other three lost their lives. After the accident, a lot of weapons and documents were confiscated in the automobile belonging to Bucak. On the date of the accident, the Minister of Interior was Mehmet Ağar. Trying to explain why Çatlı and the chief of police Hüseyin Kocadağ was in the same automobile saying "They were escorting him to deliver to security forces", Ağar, upon severe reactions, resigned from his post 5 days after the accident. In many of the charges emerging after the accident, Ağar's name was included. Some of these charges included the lost weapons and the issuing of fake green passports to the Turkish National Intelligence Organization (*Milli İstihbarat Teşkilatı*, MİT) informant Tarık Ümit and drug trafficker Yaşar Öz.

The Susurluk report was prepared by Kutlu Savaş, the Head of the Prime Ministry Inspection Board, upon a letter of appointment dated 13 August 1997 from Mesut Yılmaz, the Prime Minister of the 55th Government, with the intention of

enlightening the state-politics-mafia relationship revealed with the accident taking place on 3 November 1993 in Susurluk, Balıkesir. Prime Minister Mesut Yılmaz disclosed some of the information included in the report, in a television program on which he appeared on 22 January 1998. Following this disclosure, the media demanded that the full report be made public. However, the full report was never made public due to its classification as a state secret. Although not officially disclosed, the matters contained in a 12-page section of the confidential report were somehow leaked to the media. The confidential sections of the report were not even sent or disclosed to the court hearing the Susurluk case. Yet, the confidential parts of the report were later found during the Ergenekon operations in the searches done at the homes and workplaces of the suspects, and took their place in the annexure of the Ergenekon indictment.

## THE ŞEMDİNLİ CASE

After the Susurluk scandal, Turkey came face to face with a new "deep state" debate on 9 November 2005. A Bookshop called Umut was allegedly bombed by two non-commissioned officers (NCO) who were members of the Gendarmerie Intelligence Organization (*Jandarma İstihbarat Birimi,* JİT) along with a PKK informant who were apprehended by passers-by immediately after the event. It was revealed that before this bombing, there had been 17 bombings in the region since 15 July 2005, 12 of which remained unsolved, and in which 7 soldiers were killed and 44 people were wounded.

The fact that the apprehended suspects were Gendarmerie's Intelligence and Counter-Terrorism Service's (*Jandarma İstihbarat ve Terörle Mücadele,* JİTEM) members and that a lot of name lists, blueprints, weapons and similar materials were found in the automobiles used by the gendarmerie officers drew all attentions to this bombing.[36] The fact that gendarmerie ID cards were found on the apprehended perpetrators turned all eyes to the General Command of the Gendarmerie. The General Commander of the Gendarmerie, Fevzi Türkeri, described the bombing as a local incident. The Land Forces (*Kara Kuvvetleri Komutanlığı,* KKK) Commander Yaşar Büyükanıt also said that one of the accused officers was not someone able to commit crime.

Ferhat Sarıkaya, the Public Prosecutor of Van carrying out the Şemdinli investigation included in his indictment some witness testimonies incriminating some commanders including Yaşar Büyükanıt, the Commander of the Land Forces, and evaluated Büyükanıt's statement for NCO Ali Kaya, one of the accused officers in the case,-"I know him, he is a good guy"- as an "attempt to influence the judiciary".

36 **Mesut Değer, *Şemdinli mi?*, March 2007, p.12**

Inspectors of the Ministry of Justice launched an investigation against Sarıkaya. In the days of this investigation, the Turkish General Staff published a press release. In this press release dated 20 March 2006, it was said with regard to the indictment and the prosecutor that "the personnel has been exposed to charges that have no relevancy with the truth". In their reports, the inspectors stated that the prosecutor had "included matters that should not be included in an indictment" and had "overstepped his authority" and therefore should be given disciplinary punishment.[37] The HSYK (High Council of Judges and Prosecutors), approximately one month after the statement by the General Staff, announced its decision to "disbar" Sarıkaya.

Another striking development was that the HSYK's decision to disbar the Şemdinli Prosecutor Ferhat Sarıkaya was taken despite the counter-vote of the Undersecretary of the Justice Minister who has criticized this decision for undermining the independence of the Board. This development brought it to the media's agenda that the problem of judicial independence is not only independence from political rule but also from other ruling powers.

## THE ERGENEKON CASE

The Ergenekon investigation, launched after tracing the bombs seized in a squatter house in a suburb of Istanbul, Ümraniye on 12 June 2007, was expanded to include incidents such as the attack on the Council of State, the bombing of the Istanbul Office of the Cumhuriyet newspaper and coup attempts against the government. Currently, the case is continuing at the Istanbul Heavy Penal Court No.13 and is continuing to expand with every new development added to its scope. It is possible to define Ergenekon briefly as an illegal organization including under its umbrella some prominent names from the army, the non-governmental organization (NGOs), the academia and the media, and plotting assassinations for the purpose of creating an atmosphere of chaos in Turkey and laying the background for a military coup.

The Ergenekon investigation witnessed some specific differences and firsts with the scope of the charges, the widespread nature of the organization and the memberships of retired and active members and high-ranking commanders of the Turkish Armed Forces (*Türk Silahlı Kuvvetleri,* TAF). However, the developments occurring during the course of the investigation found immediate reactions in the public and in the media and at the political platform with every new round of detentions. Dissolutions and polarizations increased with every new development.

37 ***Hürriyet*, 2006, 'The inspectors claimed for a disciplinary punishment' '*Müfettişler disiplin cezası istediler*', 29 March**

## THE HRANT DINK CASE

Hrant Dink, editor-in-chief of *AGOS* (bilingual Turkish-Armenian newspaper) was killed on 19 January 2007 in a shooting attack in front of the newspaper's office. Dink's trials arising from Article 301 of the Turkish Penal Code and the lynching campaigns and threats led by Retired Brigadier General Veli Küçük's group, the alleged members of Ergenekon organization and its supporters had already made the assassination something expected. The information revealed after the murder showed that the murder preparations were already known firsthand by the security units of the state and watched step-by-step, without any interventions until the end of the incident.

The media became an important part of the process which turned Dink into a target. It can be said that the media's role started when the article "Sabiha Gökçen's 80-year Secret" exposing that Sabiha Gökçen, the first female combat pilot of Turkey and one of the adopted daughters of Atatürk was of Armenian descent. This was initially published in *AGOS* on 6 February 2004 with Hrant Dink's signature and was published two weeks later in *Hürriyet* on 21 February 2004 with the headline "Sabiha Gökçen or Hatun Sebilciyan?". *Hürriyet* based the news on the article published in *AGOS*, yet used in its headline a title oriented to create question marks independent from the content. On the next day, in its statement dated 22 February, the Turkish General Staff described the news about Gökçen as "abuse of national sentiments and values". Two days after this statement, Dink was summoned to the Governor's Office of Istanbul and was threatened there. Following this incident of threatening, the radical rightist media published articles and news stories that showed Dink as a target. On 26 February, in front of the *AGOS* office, a demonstration took place accompanied by slogans containing threats. Meanwhile, the press, picking out the sentence "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia. As long as we have the awareness of its existence.[38]" in isolation from the context in which it was published on 13 February 2004 as a part of Dink's 8-part series on the Armenian identity, used this sentence as an excuse for new attacks. In the ensuing days, based on this sentence, a suit was filed against Dink for violation of Article 301 of the Turkish Penal Code (TPC). Although the expert witness did not find any element of crime in the sentence, the No:2 Penal Court of First Instance of Şişli sentenced Dink to 6 months of imprisonment on 7 October 2005. The decision to convict was approved and finalized by the 9th Penal Chamber of the Supreme Court of Appeals. The objections raised against this approval decision by the Public Prosecutor's Office of the Supreme Court of Appeals were refused by the Penal General Assembly and hence failed to get any results. On 9 October 2004, *Yeniçağ* showed Dink as

38 **In this article Hrant Dink discusses the perception of 'the Turk' by some Armenians in diaspora and how their hatred for Turks shapes their identity.**

a target with its headline "Look at That Armenian". Due to this news, the newspaper was given a penalty of warning by the Press Council. The process triggered against Dink under the pincers of the press and the judiciary did not stop there. Dink's statements regarding the decision were also brought before the court. This time, the suit was filed on charges of "attempting to influence the trial". During this case, the threats and attacks happened right before the eyes of the media and the judiciary. At the first hearing, Dink and his lawyers were exposed to insults, curses and threats from a group that said they wanted to become a party to the case. Dink and his lawyers could only enter and exit the courthouse under police protection.

### DEMOCRACY PARTY CLOSURE CASE

In Turkey, parties centred on a democratic solution to the Kurdish issue, namely People's Labour Party (*Halkın Emek Partisi*, HEP), DEP, People's Democracy Party (*Halkın Demokrasi Partisi*, HADEP), Democratic People's Party ( *Demokratik Halk Partisi*, DEHAP) and finally Democratic Society Party (*Demokratik Toplum Partisi*, DTP), were closed down on the grounds of committing separatism.

DEP was established on 7 May 1993, while the closure case of HEP was still underway. A short while later, the party's leader Yaşar Kaya and seven executives were arrested. Kurdish deputies joining the political arena under Social Democratic People's Party (*Sosyaldemokrat Halk Partisi*, SHP) but later removed from the party also joined DEP after a while.

On 2 March 1994, exactly three months after the filing of the closure case on 2 December 1993, the immunities of DEP MPs Leyla Zana, Hatip Dicle, Orhan Doğan, Sırrı Sakık, Ahmet Türk and Mahmut Alınak were lifted as a result of the voting held at the General Assembly of the Parliament. The remaining deputies of the party, namely Selim Sadak and Sedat Yurttaş, lost their immunities upon the closure of DEP on 17 June 1994 by the Constitutional Court. Following this closure decision, which coincided with the period when the Speaker of the Parliament, Hüsamettin Cindoruk, was in the United States for treatment purposes, the police laid siege to the Parliament building in order to take the MPs into custody upon the instructions of Nusret Demiral, Chief Public Prosecutor of the State Security Court (*Devlet Güvenlik Mahkemesi*, DGM) of Ankara. The MPs, refusing to leave the building after hearing about the decision, were nevertheless forcibly detained on the next day at the gates of the Parliament. These developments led to an unprecedented atmosphere and various reactions, mainly from abroad, within the context of "human rights" and "freedom of expression".

Following the arrest of six MPs, the closure decision ruled against DEP by the Constitutional Court on 15 June 1994 brought to the agenda a second arrest of the

MPs on Parliament premises. However, this time, Speaker Cindoruk did not allow any detentions to take place at the Parliament without a duly issued decision accompanied by a rationale.

A very different picture was revealed when the attitude demonstrated during the "lifting" of the immunities of DEP deputies was compared to the protective attitude adopted so as "not to lift" the immunities of the political actors of the Susurluk process. In this picture, the harmony and consensus demonstrated by the army, the political parties, the judiciary and the media played a big part.

### WELFARE PARTY CLOSURE CASE

The process, escalating with the march of tanks in Sincan following a pro-jihad play staged at the Al-Quds (Jerusalem) Night organized by the Municipality of Sincan on 30 January 1997, led to historical developments that went as far as a change of government with the decision taken on 28 February at the National Security Council (MGK). The MGK decisions, popularly dubbed as the military memorandum of 28 February and as a post-modern coup, included raising compulsory education to eight years, supervision of schools operated by religious sects and their inclusion under the umbrella of the Ministry of National Education, exerting control over the media which showed the army as an enemy of religion by harping on former military members discharged from the army on grounds of religious reactionism (*irtica*; seeking to return to the old Islamic way of life and government), punishing acts committed against Ataturk, and ensuring adherence to the dress law. The Turkish General Staff prepared a document classifying writers and journalists as pro or against the army based on their stance on the army's interference in politics. Following these decisions, on 21 May, a suit was filed at the Constitutional Court against the ruling Welfare Party on claims of its being "a focus of anti-laicist activities". On 10 June, the Turkish General Staff gave a briefing to high ranking members of the judiciary on Islamic reactionism. On 18 June, Prime Minister Necmettin Erbakan resigned from his post. Erbakan handed over the Prime Ministry seat to his Deputy, Tansu Çiller, who was the leader of the government partner DYP; this move by Erbakan aimed to ensure continuation of the Welfare-True Path coalition, yet the President of the Republic, Süleyman Demirel, appointed Mesut Yılmaz, the leader of the Motherland Party (*Anavatan Partisi,* ANAP), to set up the government instead of the Leader of the DYP which held the majority in the Parliament. Yılmaz established the ANASOL-D government (the 55th government) together with the Democratic Left Party (*Demokratik Sol Parti,* DSP) and the Democratic Turkey Party (*Demokrat Türkiye Partisi,* DTP).

In the following pages, we will take a look at the media's perception of the judiciary within the framework of the deep state, judicial independence, guarantees available for judges and prosecutors, fair trial, and immunity and impunity, based on these six critical judicial cases briefly explained above.

# The Deep State and Depth-Handicapped Trial

Many reviews and commentaries have been penned in the media regarding the origins of the deep state, the way it is organized in Turkey and the course it follows. Investigations and judicial cases connected to the deep state and unsolved murders and incidents constantly revived the issue of the deep state and re-started the debates on the matter. In these debates focusing on the use of "illegal" methods through clandestine organizations set up within the Turkish State, references were made to Gladio-type organizations set up under the NATO against the threat of communism during the cold war era.

The Susurluk and Şemdinli incidents, the Hrant Dink murder, and the Ergenekon investigations and trials became the critical milestones of the deep state phenomenon and debates due to the network of relationships revealed by apprehended individuals or unearthed information, as well as due to the flagrante delicto nature of the apprehensions. Each of these cases represented the first of their genres within themselves at various points. And this was the sign of changes happening in the organization of the deep state. This change also indicated that the power of the deep state had increased. Every operation conducted and every information and network unearthed led to comments that the new deep state was deeper and more extensive than before. For example, the Şemdinli and Ergenekon processes were described as being deeper and more comprehensive then the Susurluk scandal by the public and the media supporting the investigations.

The most striking aspect of the whole process was the resistance shown by the state's institutions regarding the dissolution of the deep state. The support given to this institutional resistance by political actors, the judiciary and the media was an important factor ensuring the continuation of the deep state. Hence, any chance of illuminating the incidents was prevented, and the legal processes were blocked, preventing an effective judicial process. Therefore, these critical investigation and prosecution processes created an effect that further sharpened the existing political divisions and tightened the ranks instead of offering an opportunity to demonstrate a common resolve and agreement on dissolution and punishment of the deep state.

## TURKEY'S DEEP STATE

The Ergenekon investigation brought to the foreground a huge body of comments, opinions and analyses in the media on the origins of the "deep state" organization and its course. It was emphasized that this organization, re-established several times under various names since 1948, the year it was first founded, until the 1990s, had committed numerous acts and had been involved in numerous incidents, all of which remain unsolved.

*Hürriyet* mostly advocated the idea that a state could engage in illegalities and form clandestine organizations when required for its interests. *Ortadoğu* also stressed that a deep state is necessary based on the concept of "sacred state". The newspaper saw the deep state as a legitimate self-defence instrument of the state.

### THE DEEP STATE DECLARATION OF THE GENERAL STAFF

As it is its habit in critical judicial processes, the General Staff joined the debates on "deep state" again through statements and declarations. Hence, the General Staff defended the institutions described as deep state, saying that they operate under the General Staff in accordance with the legal framework and within the chain of command, and on the other hand strongly reacted to associating these institutions to the deep state. However, this reaction could not prevent the debates and the association of some institutions operating under the General Staff, such as the Special Warfare Department (*Özel Harekât Dairesi*, ÖHD), with the deep state.

### DEEP STATE FROM THE EYES OF THE JUDICIARY

The "Deep State" concept was also reflected in court decisions within the context of "illegal organization of the state". Among the critical cases addressed here, the first and only case completing its legal process has been the Susurluk case. However, the relationships revealed with the Susurluk scandal were not evaluated within the scope of a "terror crime" either by the prosecutor or by the court hearing the case. The major reason behind the consideration of the case as a petty gang crime[39] was the "anti-terror" sensitivity.

39 **In Article 313 of the Turkish Penal Code (TPC) No. 765 and Article 220 of the TPC No. 5237 coming into effect on 1 June, the offence of "establishing an organization for the purpose of committing crime" is arranged as a crime against the public order and outside the scope of organized crimes against the state and the scope of the Anti-Terror Law; moreover, it is classified as a petty crime. Hence, the maximum punishment envisaged for this crime is 6 years in TPC No. 765 and 5 years in the new TPC No. 5237, while for organized crimes included under the scope of crimes against the state, which include heavier sanctions, the laws provide for imprisonment for maximum durations and particularly imprisonment for life.**

Although its legal process has not yet been finalized, the Şemdinli investigation and case maintained its place among critical cases with new developments at every phase. Şemdinli showed an important difference with regard to the judiciary's approach to claims of deep state. While the initial trial process starting with Susurluk considered the acts of the defendants within the scope of gang crimes, in the Şemdinli case the acts of the accused persons were for the first time considered outside the scope of judicial gang crimes. The accused NCOs were arrested on the grounds of having committed the crime of "disrupting the unity of the state and the integrity of the country". The reason of the arrest decision created disturbances in many segments, and mostly in the Turkish Armed Forces (TAF). The media reminded that Abdullah Öcalan, the leader of PKK and PKK members have also been tried for the same crime. Nationalist writers reacted to the arrest of the NCOs under the scope of crimes against the state, and to the rationale used to justify these arrests.

The reactions to the court's decision to convict was replaced with "joy" after the defendants were released at the first hearing held at the military court, where the case was transferred to following the reversal of the decision by the Supreme Court of Appeals. This development in the judicial process, which had been subject to all kinds of protections since the beginning of the investigation, was welcomed with joy by the military authorities in Şemdinli. *Radikal* gave the news under the heading "They celebrated the Şemdinli decision touring around the town with tanks", announcing that according to the statements given by officials of the Democratic Society Party, high ranking military officers celebrated by taking tours with tanks in the district following the court's decision to release.[40]

The attitude of the judiciary with regard to the tolerance shown to the defendants in critical cases and with regard to assessment of the charges within the scope of petty gang crimes was criticized as "double standard" in the case of the murder of Hrant Dink. The fact that the judiciary assessed the crimes committed by the defendants as a petty gang crime rather than a "terrorism" crime following the briefing by security units was described as "double standard" by some writers who compared this with other defendants on trial for organized crimes.

## DEEP STATE DEBATES IN THE SUSURLUK PROCESS

For a long time, the public and the media maintained their expectation to see the responsible persons revealed and punished. Turkey never got the chance to use the opportunity of facing and reckoning with its own deep state, mainly due to attentions being pulled elsewhere with the 28 February process, the fact that the

40 *Radikal*, 2007, 'They celebrated the Semdinli decision touring around the town with tanks' (*'Şemdinli kararını tanklarla tur atarak kutladılar'*), 16 December

politicians involved in the scandal were included in the government of the period, and the fact that the succeeding governments failed to make true their assertive outbursts. The expectations that remained unfulfilled in the political arena caused all attentions to turn toward the trial process. However, this process also ended to a large extent with immunity and impunity despite the media and public support. The state's institutions and the defendants refused to give the courts the information and documents available to them, with excuses that they were "state secrets" and that their disclosure would harm "the best interests of the state", and by doing so they prevented the trial from going any deeper. In the gang suit, the process ended with the conviction of the limited number of accuseds which could be identified, and new dark activities and relationships continued to occupy the nation's agenda.

This panorama also pointed at a formation so widespread and so expansive that the idea that the deep state was indeed the "state itself" began to take root. Güntay Şimşek explained this situation by quoting the words uttered by Hanefi Avcı, the Head of Intelligence Department of the Turkish National Police (Directorate General of Security), who had drawn the attentions with his statements following the Susurluk accidents and who had played a role in enlightening many aspects of the incident: "deep state was the real state."[41]

The common characteristics of the comments made after the Susurluk accident was the acceptance of a clandestine structure within the state.

## DEEP STATE DEBATES IN THE ŞEMDİNLİ PROCESS

The attack in which a bookshop was bombed and 2 were killed was announced by *Hürriyet* under the headline "Dark Incident: Gendarmerie in the vehicle"; the newspaper evaluated the incidents as provocation.[42]

*Zaman,* right from the start, addressed the Şemdinli incidents by pointing out their similarities with Susurluk. With the headline "Suspicions of Susurluk in Şemdinli: Şemdinli is an illumination, not an obscuration", the newspaper made reference to how the Susurluk incident was obscured. The news described the incident as the "Second Susurluk" based on the items found in the motor vehicles of apprehended soldiers, such as weapons, marked name lists, maps and so on, and stated that the provocateurs desiring to stage a new tension scenario got caught this time.[43]

41 Şimşek, Güntay, 1998, 'In reply to the Susurluk report'(*'Susurluk raporuna nazire'*), *Zaman*, 9 February

42 *Hürriyet*, 2005, 'Dark Incident: Gendarmerie in the Vehicle' (*Karanlık olay: Araçtakiler jandarmaymış'*)-headline, 11 November

43 *Zaman*, 2005, 'Susurluk suspicions in Şemdinli: Şemdinli is not an obscuration but an illumination' (*'Şemdinli'de Susurluk şüphesi: Şemdinli karatma değil, aydınlatma'*)-headline, 11 November

The opinion that Şemdinli was the second deep state incident was also reflected in the comments penned by columnists. In their articles stressing the intersections between the Susurluk and Şemdinli incidents, columnists based their opinions on concrete findings derived from the incidents.

The "Second Susurluk" analogy received strong reactions from *Ortadoğu*, which advocated engagement of the state in illegal activities to protect its interests, because of its reference to the deep state. The newspaper refused the claims of deep state and, concluding that the incident was a "PKK set up", blamed the media for coming up with the analogy, and the government due to its approach to the incident, for eroding the state.

### DEEP STATE DEBATES IN THE HRANT DINK MURDER

It was revealed that the security units of the state had knowledge of the murder preparations but did not intervene. However, as in all incidents and trials involving the deep state, the defendants in this case were again limited only to those who were exposed. The police, gendarmerie and intelligence officers and officials who knew months ahead that the murder was going to be committed were all protected with the shield of immunity. It even required long efforts to include some of them in the lawsuit on "neglect of duty", which was carried out independent from the murder case, despite their gross faults which enabled the violation of Dink's right to life. Against these developments, it became impossible to enlighten the murder.

Article 301 of the Turkish Penal Code (TPC) regulating the offence of "denigrating Turkishness, the Republic and the institutions and organs of the State" was revealed as a major problem area within the context of freedom of thought and expression due to trial of many intellectuals and writers, including Hrant Dink, for its violation. This problem was carried to a new dimension with the planned interventions and attacks of some individuals and organizations included among the suspects of the Ergenekon case.

The environment of pressure and threat created by these actors in the 301 trials and in other suits filed in connection to these cases put its mark on the assessments made in the aftermath of Dink's assassination. A large segment in the media emphasized, in absolute terms, the role played in the murder by the case in which Dink was tried for infringing Article 301 and by the decision given at the end of that case. The reactions all agreed that the murder was not only the act of the person pulling the trigger, and that the murder had a lot of stakeholders from the legislature to executive, the judiciary to media, and from the security forces to the relevant provincial governorate, in reference to 301 trials and the atmosphere created by opportunist groups that took advantage of these trials.

Describing Dink's killing as a "premeditated murder blatantly progressing to fruition", Murat Belge said that the actors of the trial process launched their attacks under the guise of a legal struggle, and directed his criticisms to the government for failing to prevent these attacks, for failing to clamp down on the mentality behind the attacks and failing to abolish Article 301, which has been turned into an instrument of psychological lynching.[44]

Pointing at racist speeches, Mithat Sancar also said that the mentality that convicted Dink's 'language', a language free of feelings of rancour and revenge, had also convicted his life; Sancar stressed that these speeches emerging at every lynching attempt and throughout the trial process were legitimized by the authorities and by the mainstream media.[45]

İsmet Berkan included the Turkish Armed Forces, the government and the media in his definition of those who were responsible for and creators of the murder atmosphere that connived with the culprit pulling the trigger.[46]

*Zaman*' columnist İhsan Dağı pointed out the contribution of political actors in instigating the chauvinistic nationalism that turned Dink into a target. Dağı also stated that the judges convicting Dink had indeed sacrificed Dink with superfluous and meaningless fears and ideological obsessions.[47]

In the criticisms directed to the government, Justice Minister Cemil Çiçek's name came to fore due to various reasons. Reactions concerning Çiçek continued in the first anniversary of the murder. *Taraf* announced Çiçek's statement of "Abolishment of Article 301 is no one's concern", under the headline "Tell it to Rakel's face". In the news story, Çiçek's attitude during the Armenian Conference[48] was also recalled.[49]

Comments made based on Article 301 met with reactions from the writers of *Ortadoğu* and *Hürriyet*. Ertuğrul Özkök reacted to inclusion of advocates of Article

44 Belge, Murat, 2007, 'Living like a scared pigeon' (*'Ürkek güvercin misali yaşamak'*), *Radikal*, 28 January

45 Sancar, Mithat, 2007, 'Pigeon butchers' (*'Güvercin kasapları'*), *Radikal*, 28 January

46 Berkan, İsmet, 2007, 'A child of 17?' (*'17 yaşında bir çocuk mu?'*), *Radikal*, 22 January

47 Dağı, İhsan, 2007, 'Rethinking on nationalism' (*'Milliyetçiliği yeniden düşünmek'*), *Zaman*, 21 January

48 The Armenian Conference was the first scientific forum in Turkey, which aimed to open the topic "Armenians in the period of collapse of the Ottoman Empire" to discussion. In the days when the Armenian Conference was being planned but later aborted, Cemil Çiçek, in his speech at the TGNA session on the Armenian Conference, held on 24 May 2005, described the Conference as backstabbing the Turkish Nation, irresponsibility, lack of seriousness and blasphemy on the nation, and reminded the Assembly to execute Article 301 of the TPC, saying "We call on autonomous organizations [referring to Council of Higher Education] to do their duties. If we had any powers in the matter as the Government, we would do what was necessary. I wish I had not transferred my power to file a suit as the Minister of Justice".

49 *Taraf*, 2008, 'Tell it to Rakel's face' (*'Bunu Rakel'in yüzüne söyle'*)-headline, 11 January

301 in the definitions of Dink's murderers, and to linking of the murder with Article 301 trials.[50]

*Ortadoğu's* columnists based their commentaries on a defence of Article 301. Orhan Karataş criticized the approach that "the real perpetrators are the advocates of Article 301" on the grounds that abolishing the article might create new monsters, and that those who have no problems with their countries and nations have no trouble with the article.[51]

## WORK OF AN ORGANIZATION OR "NEIGHBOURHOOD PSYCHOLOGY"?

Newspapers and columnists refusing the role of 301 trials also rejected the speculations that the murder was the work of an organized power. Refusing to associate the murder with the deep state, they interpreted the incident as an act perpetrated by slum youths driven either by the provocations of foreign intelligence organizations or by the social-economic-political conditions/climate they live in. In his initial comment on the incident, Ertuğrul Özkök stressed that the social and political climate turning people into sleazy murderers was effective in the murder:

This murder is a huge blow to Turkey's defence in the wake of its grand intellectual war against the so-called genocide claims. This murder is one of the gravest assassinations in the history of the Republic of Turkey ... Whoever gave that weapon into the hands of that man; let us get hold of him. But first of all, let us take a look at who is or are creating this social and political climate that turns the people of our country into sleazy murderers [...] Rest assured, there will be two parties that will rejoice in this murder: Racist Turks and racist Armenians.[52]

In another article, Özkök analyzed the assassination as a murder committed by a youngster "whose psychology I can read so well, who has no grip on reality and who has risen to the bait dangled by an 'elder brother'.[53]

It was not long before reactions started to rain from the media against this approach by Özkök. Yasemin Çongar said that those who identified the malefactors as "slum psychopaths" when the names of the suspects have only just been learned wanted no one to look for deep powers behind the murder. [54]

50 Özkök, Ertuğrul, 2007, 'The Madimak Syndrome' ('*Madımak sendromu*'), Hürriyet, 24 January

51 Karataş, Orhan, 2007, '301 & Hrant Dink' ('*301 ve Hrant Dink*'), *Ortadoğu*, 24 January

52 Özkök, Ertuğrul, 2007, 'I did not call Ali Kemal a traitor' ('*Ali Kemal'e vatan haini dememiştim*'), *Hürriyet*, 20 January

53 Özkök, Ertuğrul, 2007, 'Why do you think he did not throw away the gun' ('*Sizce o silahı niye atmadı*'), *Hürriyet*, 23 January

54 Çongar, Yasemin, 2008, 'One murder, two coup plans and the virtue of intellectual pursuit' ('*Bir cinayet, iki darbe planı ve fikri takibin erdemi*'), *Taraf*, 15 April

Those opposing the approach that the Dink murder was committed by the deep state pointed at the timing of the murder and saw it as a provocation by foreign intelligence organizations so as to put Turkey in a difficult position at home and abroad. This view, mostly advocated by the writers of *Ortadoğu*, was also expressed by some writers in *Hürriyet* and *Radikal*.[55] *Hürriyet* columnist Tufan Türenç stressed the timing of the murder and wrote that it destroyed Turkey's power to fight against the genocide slander and hence made it all easier for the Armenian Diaspora.[56] Writers of the *Ortadoğu* newspaper which addressed the incident outside the deep state context called it "provocation", parallel to their general attitude. Some writers reacted to blaming the state and the nationalists for the murder.

## DEEP STATE DEBATES IN THE ERGENEKON INVESTIGATION

In the Ergenekon investigation, the printed and visual media determined their attitude against the investigation and the detention operations in line with their general publishing policies and attitudes towards the government. Therefore, they did not demonstrate a consensus supporting the judicial process with regard to disbanding the deep state. Every new development occurring during the investigation and trial phases carried the already existing debate further ahead.

The division in the media made itself visible for the first time when it came to naming the investigation. *Hürriyet* and *Ortadoğu* diligently avoided using the term "terrorist organization" when referring to the investigation and operations, while the media supporting the investigation and accused of being on the side of the ruling party took special care to emphasize it as a "terrorist organization". *Hürriyet* and *Ortadoğu* preferred to call it the "Ergenekon investigation" or "Ergenekon case", while *Zaman*, *Taraf* and *Radikal* used the expression "Ergenekon terrorist organization".

Mainstream media claimed that the investigation, and hence the judiciary, was being used to intimidate those opposing the AKP (Justice and Development Party) rule and to create a fear society, on the basis of the government's political interests. Newspapers supporting the investigation called the investigation and the case "the most important case in the republic's history", "the case of the century", a "historic opportunity" and the "cleansing of the bowels of the state".

55 Güzel, Hasan Celal, 2007, 'Who killed Hrant Dink?' (*'Hrant Dink'i kim öldürdü'*), *Radikal*, 21 January

56 Türenç, Tufan, 2007, 'Bullets targeted both Hrant and Turkey' (*'Kurşunlar hem Hrant'a hem Türkiye'ye sıkıldı'*), *Hürryet*, 20 January

## MEDIA'S ERGENEKON DEFINITION

Newspapers and writers attributed various definitions to Ergenekon. Similarly, the emphasis put on the significance of the investigation also varied. In these definitions and emphasises, the judiciary came out as an important element. Judges and prosecutors working in the investigation process became the target of critiques with their decisions and dispositions.

Yasemin Çongar, in her article where she summarized *Taraf*'s approach, defined the Ergenekon investigation as "the effort to unearth a gang suspected of attempting to change the political course and lay the foundation for a coup by using violence and creating instability, and also of planning and conducting many assassinations and attacks to date for this purpose, which is conjectured to have extensions in civil-military bureaucracy, policy, business and media circles". Çongar also stated that clamping down on this structure, which she called the deep state, depended on the determination of the judiciary and the political will:

> On the other hand, clamping down on a deep state formation which is said to include among its members some retired and active military officers, journalists, bureaucrats who have served in the highest orders and politicians requires not only a determined judge but also, without a doubt, a determined political will that will not hold the hands of that judge.[57]

*Zaman* columnist Mümtaz Er Türköne based the importance of the Ergenekon case on its quality of revealing the need for political control on authorities providing security services, in addition to disbanding the crime organizations existing within the state.[58]

*Hürriyet's* perspective on the Ergenekon investigation and case developed mostly around critisizm directed at the purpose and style of the investigation. In this framework, the newspaper put forward many justifications to its criticisms. First of these was that the investigation was being used for the purpose of intimidating and threatening those against the Justice and Development Party.[59]

Upon the filing of a closure case against the Justice and Development Party at the Constitutional Court, new operations and detentions carried out under the scope of the investigation were described as "revenge against AKP closure case" by *Hürriyet*. *Hürriyet*, in its news titled "Why was the detention order kept pending

57 **Çongar, Yasemin, 2008, 'Symmetry going blind, the closure case and Ergenekon' (*'Körleşen simetri, kapatma davası ve Ergenekon'*), *Taraf*, 25 March**

58 **Türköne, Mümtaz Er, 2008, 'An uncontrolled security force turns into a criminal organization' (*'Denetimsiz güvenlik gücü, suç örgütüne dönüşür'*), *Zaman*, 28 November**

59 **Yılmaz, Mehmet Y., 2009, 'Our business is with facts, not rumours' (*'Bizim işimiz gerçeklerle dedikodularla değil'*), *Hürriyet*, 15 January**

for 2 days?" claimed that the 6th wave of operations under the Ergenekon investigation was intentionally coincided with the day of the oral statement of the Chief Public Prosecutor of the Supreme Court in the closure case.[60]

The "revenge" comment received reactions from newspapers and writers supporting the investigation. *Zaman* commented on the relationship between the closure case and the investigation, describing it as "an attempt to create pressure on the investigation" and "influence the judiciary". It criticized the opponents of the investigation by comparing their attitude to the attitude they adopted in the AKP closure case. In his article titled "revenge", Mümtaz Er Türköne wrote that linking the investigation and the closure was "irrational", and that such a claim prejudiced both cases.[61]

Another objection raised by the groups criticizing the investigation was directed to the involvement of the persons, whom they claimed were in no way involved, in the investigation. Claiming that the investigation "mixed the wheat and the chaff", writers of *Hürriyet* stated that this method caused diversion from the purpose of revealing and punishing the deep state and hence that the investigation had lost its credibility.[62]

Rahmi Turan wrote that although the investigation is not altogether hollow, it is highly unlikely that there is a clandestine organization resembling "Noah's pudding" with members from all walks of life such as retired generals, professors and even the president of the Council of Higher Education (*Yükseköğretim Kurulu*, YÖK), and therefore that the investigation's credibility is diminished and even serious claims are treated as casual.[63]

## DISTINCTION BETWEEN MILITARY JUDICIARY – CIVILIAN JUDICIARY

Trials of military personnel and bureaucrats suspected of being involved in the network of "deep" relations or organizations within the state have always become a problem. Although the Gendarmerie has been the focus of criticisms for various reasons since the Susurluk incident, there has been a constant attempt to keep it out of trial processes. This situation continued until the start of the judicial process regarding the bombing incident in Şemdinli. In the Şemdinli case, at the end of a controversial trial process, unfortunately the trials of the military perpetrators, which had started in the civilian court, could not be finalized.

60 *Hürriyet*, 2008, 'Why the detention warrant was left pending for 2 days' ('*Gözaltı emri niye iki gün bekletildi*)', 2 July

61 Türköne, Mümtaz Er, 2008, 'Revenge' ('*Rövanş*'), *Zaman*, 8 July

62 Berberoğlu, Enis, 2008, 'The part ignored by the AKP media' ('*AKP medyasının görmezden geldiği bölüm*'), *Hürriyet*, 16 August

63 Turan, Rahmi, 2009, 'God has justice' ('*Allahın adaleti var*'), *Hürriyet*, 18 January

The Şemdinli case no doubt found a place in the judicial history of Turkey with the traumas it created with regard to judicial independence and impartiality, the cost of suing military personnel, and guarantees of judges (and prosecutors).

The debate's dimensions were enlarged with the statements of retired Chief Public Prosecutor of the Supreme Court, Sabih Kanadoğlu, who said that the retired full generals should be tried at the General Staff's Military Court since they had committed the coup attempts when they were still in office. The media supporting the Ergenekon investigation took care to give coverage to news stories and commentaries focusing on views opposing this approach. Likewise, *Zaman* announced the views claiming that the coup attempts fall under the jurisdiction of the civilian judiciary with the headline "Coup attempts are tried by civilian courts, not military courts", and afterwards kept the matter on the agenda for a long time.[64]

In the axis of this ongoing debate regarding the Ergenekon investigation, *Taraf* continued to reflect the views that the jurisdiction fell under the jurisdiction of civilian judiciary:

Currently, the investigation is being carried out in accordance with the Turkish Penal Code, not the Military Penal Code. Hence, these acts are not military. Therefore, if connected to illegal structures, even active generals can be directly investigated and detained by civilian prosecutors in the axis of this investigation.[65]

## ROLE OF THE TWO-HEADED JUDICIARY IN MILITARY IMMUNITY

Cases related to the deep state such as Şemdinli and Ergenekon showed that when it came to charges against members of the army, the separation of military judiciary and civilian judiciary constituted an important obstacle with regard to the issue of impunity and immunity. The media addressed this issue again in line with its adopted position regarding the investigation. Those holding a critical approach to army immunity put forward arguments supporting that the cases and investigations should be administered by the civilian judiciary. On the other hand, those who considered trying of army members, particularly the high ranking commanders, as an act aimed to erode the army and undermine its will to fight, took a more sensitive and critical approach to the dispositions of the civilian judiciary. This sensitivity turned into an even harder attitude with the concept of "absolute immunity" when it came to the command echelon.

64 *Zaman*, 2008, 'Coup attempt cases are administered by the civil court, not the military' (*'Darbe girişimine askeri değil sivil mahkeme bakar'*)-headline, 13 July

65 Avcı, Gültekin, 2008, 'Ergenekon is not only a 'terrorist organization' (*'Ergenekon sadece 'terör örgütü' değildir'*), *Taraf*, 23 July

The exemption from trial of the command echelon did not remain limited to the demonstrated approach. The impossibilities originating from the military legislation were also among the determining factors. According to the military legislation, it was actually impossible to set up a court that could try commanders, because there were no commanders higher in rank than the accused commanders, who could serve in such a court. The public was able to learn of this impossibility only through the Şemdinli case. Hence it was revealed that in offences transferred from civilian judiciary to military judiciary, there was a large area of exemption from trial when it came to commanders.

Etyen Mahçupyan, who mentioned this shield of immunity created by the dual judicial system in his reviews during the Şemdinli process, pointed out the non-justiciability of commanders as follows:

> And now we see the cost of having a separate judicial system for the military... Yes, if Büyükanıt is charged, it will not be possible to try him, because according to the law created by the military for themselves, the judges must be two officers higher in rank than the accused officer. Turkey is a country that has given its own civil servants immunity from the judiciary. And there are some who overstep their boundaries and place themselves outside the law scope; surprising, isn't it?[66]

## CONCLUSION

The deep state, which became one of the main subjects of the media with the Susurluk scandal, came to be discussed more extensively with the ensuing investigations of Şemdinli, Hrant Dink murder and Ergenekon. In the media, some writers, mostly the nationalistic segment, emphasized the need for the state to go outside the boundaries of the law when required for its best interests. Based on this argument, the same segment criticized the developments, arguing that investigations and trial processes connected to the deep state should not harm the interests and institutions of the state. Only a portion of the media gave their unconditional support to deep state investigations. It can be said that this division evolving around judicial processes is a reflection of the division arising from differences in political and ideological mindsets. This position, which was supported by the alleged link between the political power and non-political power groups, shaped the media's perception on deep state trials. This situation, with partial differences, brought with it a partiality in imparting the news and facts, an increase in the tendency to limit the rights and freedoms of others, and an attempt to reinforce and legitimize prejudices with separatist, otherizing expressions when naming the incidents. Likewise, in general, the media avoided

66 Mahçupyan, Etyen, 2006, 'Where did it go beyond purpose' ('*Maksat nerede aşıldı*'), *Zaman*, 17 March

questioning the attitude of double-standard and the weaknesses demonstrated by the judiciary during the deep state trials. Exceptions to this did not suffice to change the picture.

In the failure of the deep state trials to gain depth, the distinction of military judiciary - civilian judiciary revealed itself as a major problem area. The existence of two different judicial systems subject to different procedures and rules, and the wide definition of the duties and powers of the military judiciary led to connection of deep state trials to military judiciary. The judicial processes first starting with the Şemdinli case where military people were tried by the civilian judiciary and continuing with the Ergenekon investigation were perceived, especially by the media supporting the investigations, as the duty domain of the civilian judiciary, and views in that direction were covered frequently. Yet, the media criticizing the investigations diligently reflected the claims and opinions that the cases fell under the duty domain of the military judiciary.

The dual system in the exercise of judicial authority comes as an important obstacle in ensuring the accountability of the military domain. The limited or zero access to information with regard to military trial processes makes it difficult for the press to watch the critical cases confined to this closed area and inform the public. This situation pushes the dispositions of the military judiciary outside democratic control. Therefore, as seen in the entirety of the study, it has not been possible to evaluate the perception of the media with regard to the decisions and practices of the military judiciary. This situation creates the impression that the military judicial practice is also kept "out of discussion", as in all other military dispositions.

# Judicial Independence

"Basic Principles on the Independence of the Judiciary"[67] of 1985 states that all government organs and institutions shall have the obligation to respect and take into account the independence of the judiciary, that judicial independence requires fair administration of cases by judicial organs and respect to the rights of the parties, and that there shall be no inappropriate or unwarranted interference with the judicial process.

As stressed in international norms and documents, all governmental and other institutions are obliged to respect and take into account the independence of the judiciary. However, the obligation to respect is not a formal but essential attitude, since otherwise it would not be possible for judges and courts to be free and isolated from external pressures and influences when casting their decisions.

Critical trial processes such as the deep state and party closure cases have been important cornerstones where independence and impartiality of the judiciary have been tested and discussed. The issue of judicial independence was perceived as a new area where the divisions existing in media, politics and society became deeper. With this aspect, investigation and trial processes were instrumentalized in the conflict between the political world and media organizations. And the situation got out of hand when the institutional and systemic weaknesses regarding the independence and impartiality of the judiciary were added. Alas, even the social reactions and sensitivities were not enough to change this situation.

It is also striking to see how the parties emphasize the independence of the judiciary in developments that agree with their own approaches, yet claim that the judiciary has lost its independence to interferences or manipulations when things are not on their side.

The emphasis on respect and trust in the judiciary carried a special meaning and significance in cases administered by the Constitutional Court, and mostly in party closure cases, due to its position in the judicial hierarchy and its function and expectation to protect the ideological foundations of the state. Therefore it

67 **Adopted by the 7th United Nations Congress on "the Prevention of Crime and the Treatment of Offenders" held at Milan on 26 Auguust-6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.**

was seen that the Constitutional Court's closure decisions against parties the official ideologies of which conflicted with or had problems with the state were left out of the discussion and treated with full respect and trust by those siding with the official ideology, including the media. This situation was more clearly observed in the process of the closure cases of DEP and RP, in parallelism with the perception of threat based on "separatism" and "Islamic reactionism". This attitude, which was seen in almost all the media, created a separation on the basis of political divisions in the RP case.

The closure decision against DEP was viewed as an expected and even delayed development by the media and political circles, while highlighting the idea that respect to the judiciary, and particularly the decisions of the supreme judiciary such as the Constitutional Court, was not open to discussion.

## RESPECT TO THE JUDICIARY: "NOT ONLY IN WORDS BUT IN ESSENCE"

Although the issue of "trust" in and "respect" to the judiciary is described based on the differing attitudes of political actors, it is possible to say the same for the reflections of this issue in the media. Attitudes that change according to the adopted position point at a problematic picture where "respect" to and "trust" in the judiciary is frequently emphasized in an exaggerated manner whereas the same diligence and care is not applied in reality. Repeated discourses on "respect" and "trust" have turned into an interference mode and message that holds the judiciary under pressure, rather than ensuring the independence of the judiciary.

When Ferhat Sarıkaya, investigating prosecutor of the Şemdinli case, included claims directed to Büyükanıt and high ranking commanders in the indictment, the Turkish General Staff published a declaration on 20 March 2006 urging constitutional institutions to do their duties with regard to the prosecutor; the declaration was the start of the process which ended in the disbarment of the prosecutor, and was described by writers in the media as a development that destroyed the independence of the judiciary.

Murat Çelikkan, columnist in *Radikal*, made a connection between the demonstrations taken up by the local people in Şemdinli for days and the trust in the judiciary, saying "Now the region cannot be calmed down. People are in an uproar to ensure that the incident is not covered up, is not shadowed and does not remain limited to the tip of the iceberg as the people in this geography are used to see. Why? Because no one in this country has confidence in the judiciary. The general opinion is that the rule of law and judicial independence exist only in words"[68].

68 Çelikkan, Murat, 2005, 'Judiciary is not independent and law has no supremacy' (*'Yargı bağımsız, hukuk da üstün değil'*), *Radikal*, 20 November

Maintaining public's respect and trust in the judiciary is one of the major dynamics of social accord. At this point, critical cases become the most important indicators of the society's trust in the judiciary. The network of relations revealed by the Susurluk accident and the picture arising with regard to immunity during the trial process played an important role in reducing the society's respect to and trust in the judiciary.[69]

## POLITICIZATION OF THE JUDICIARY

"Politicization of the Judiciary" is one of the issues at the core of the debates on the independence of the judiciary. In this framework, although it is the political actors who form the main axis of the accusations of political interference, it is seen that the judiciary itself also becomes a source for these claims.

The lack of any distance between the official ideology and the position of the judiciary is one of the foremost factors conditioning the debates. This situation renders the judiciary unable to be indifferent towards institutions and attitudes representing the official ideology, and hence results in increased doubts about the independence of the judiciary.

Stating that the developments witnessed in the Şemdinli incidents have revealed that the judiciary is fed from a mentality that is the extension of the official ideology, Etyen Mahçupyan argues that the judiciary, unable to remain out of politics, has lost its quality of being an arbitrator:

> The Şemdinli incident has almost completely denuded the state. This incident not only makes visible the role and position of the Turkish Armed Forces in the Kurdish issue, but also reveals that the judiciary is fed from a mentality that is the extension of the official ideology [...] and the judicial institution, which is expected to dispense justice and remain 'out of politics', is gradually losing its quality of being an arbitrator...[70]

Despite proofs of how the judiciary was under the influence of the official ideology, the issue of "politicization of the judiciary" was perceived and addressed mostly within the context of the interference of the political power, the executive, in the judiciary. This form of perception also included interferences by other political actors, or in other words the opposition parties, in critical cases. Arguments that the judiciary was being politicized, coming from the judiciary itself, were directed to the government in general.

69 See Mithat Sancar, Suavi Aydın, "Justice can be Bypassed Sometimes" Judges and Prosecutors in the Democratization Process, TESEV Yayınları, 2009, Istanbul.

70 Mahçupyan, Etyen, 2007, 'State is naked' (*'Devlet Çıplak'*), *Taraf*, 18 December

## MEDIA INFLUENCE ON THE JUDICIARY

Although the institution of politics has always had convenient channels and opportunities to enfeeble the independence of the judiciary, it was not the only power creating the pressure in this regard. Based on its role in the process of democratic control, it became evident in the debates on judicial independence that the media was one of the determining factors. Criticisms directed at the media for influencing the judiciary came from political actors, parties of the trials and from the media itself.

News and articles published in the media, which came to fore as an important means of pressure in critical cases, particularly disturbed the defendants being tried in the cases. The defendants accused the media of creating a pressure on the judiciary, claiming that their publications regarding the charges in the investigation or case turned the judicial process against them. The defendants, especially in cases where they encountered legal sanctions, saw the media as being responsible for it.

Korkut Eken, one of the defendants in the Susurluk case and sentenced to 6 years for being a gang leader, claimed that the adjudication was due to media pressure, in his reaction to the court's decision.[71]

During the Şemdinli incidents, all segments supporting the investigation, including the media, were accused by nationalist writers and columnists for being both the prosecutor and the judge and for influencing the judiciary.[72]

Another segment blaming the media for creating pressure on the judiciary was the political parties. In the Ergenekon investigation, the ruling and opposition parties accused the media, which supported the opposite side, for trying to replace the judiciary. MHP made mass accusations saying "The media is running the investigation", and called the media influencing the judiciary as the "religious media".[73]

Similar to opposition parties, government officials also stated that the media decided before the judges and prosecutors in the Ergenekon investigation. Government's speaker and Deputy Prime Minister Cemil Çiçek, in his statement, accused the media for influencing the judiciary in all sensitive processes.[74]

71 *Hürriyet*, 'Lock me up in İmrali' (*'Beni İmralı'ya hapsedin'*), 13.2.2001

72 Sorgun, Taylan, 2005, 'Şemdinli, Inviting the EU to Interfere, and the "alleged Kurdish issue"' (*'Şemdinli, AB'ni müdahaleye davet, "sözde Kürt sorunu"'*), *Ortadoğu*, 15 November

73 *Hürriyet*, 2008, 'Erdogan: Indictment should be finished ASAP' (*'Erdoğan: İddianame bir an önce bitmeli'*), 2 July; *Hürriyet*, 2008, 'They told Erdoğan to push the button, and he did' (*'Düğmeye bas dediler, Erdoğan da bastı'*), 12 July

74 *Hürriyet*, 2009, 'Media proclaims itself both judge and prosecutor' (*'Medya kendini hem hâkim, hem savcı ilan ediyor'*), 23 January

### MEDIA CALLS THE JUDICIARY TO DO ITS JOB IN "PARTY CLOSURE"

The media was among the determinants of the process also due to the language and discourse it used in its news, commentaries and reviews related to the cases. In some cases and investigations, the media did not hesitate to use partial discourses. Party closure cases provided critical data in this sense. Writers did not hesitate to write their desires and expectations related to the cases while the judicial process was still ongoing.

The media played an important role also in the process of closure of DEP, which came on the agenda before the closure of RP. The statements, speeches and attitudes of party executives were presented as justified reasons for closure. The DEP congress held after the filing of the closure case was announced by *Hürriyet* with the caption "Shocking statement from Dicle: A solution to Kurdish issue without the PKK is inconceivable. Now they used the Turkish flag".[75]

No differences were observed in the approach to DEP's closure process with regard to the newspapers and writers criticizing the closure process of RP. In this process, it was surprising that the media, which failed to develop a consistent and objective approach at principal level, supported the closure of DEP, and while doing so used a racist speech, refused to see DEP as a political party, and claimed that human rights and democracy cannot be used as an excuse.

### LEGISLATURE'S INTERFERENCE IN THE JUDICIARY

While the judicial process regarding deep state structures was continuing, the establishment of research commissions at the TGNA to research the relations and events unveiled, and the activities of these commissions brought onto the agenda heated arguments that the legislature was interfering in the judiciary. Debates on parliamentary commissions played an important role in making visible the problematiques on how the democratic institutions should function, how the relations between them should be and how they can protect their independence.

Due to the scope and depth of the deep state allegations, the legislature was able to mobilize its own control mechanisms and carry out researches and inquiries through its commissions only in the Susurluk, Şemdinli and Hrant Dink instances within the context of critical cases. Although the idea of parliamentary inquiry into the events and relations unveiled under the Ergenekon, the latest case connected to the deep state, was voiced in the media, no inquiries or researches took place due to the reluctance of the government. Among the incidents related to the deep state, the Susurluk Commission was the first

75 *Hürriyet*, 1993, 'Shocking statement from Dicle' (*'Dicle'den şok açıklama'*), 13 December.

parliamentary commission set up. However, this commission failed to deepen its inquiries since many of the institutions and public employees refused to give information, claiming that they were "state secrets", and ignored the commission's invitation to give information.

The debates on the separation and distribution of powers between the legislature and the judiciary first started during the inquiries of the Şemdinli Commission[76], which was established to research the Şemdinli incidents. The first reaction to the Şemdinli Commission claiming unconstitutionality came from the former Chief Public Prosecutor of the Supreme Court, Sabih Kanadoğlu, after the Commission's report was first announced to the public. Kanadoğlu stressed that the establishment of the commission eliminated the independence of the judiciary, and that in accordance with Article[77] of the constitution, no institution or person can exercise a power that is not based on the Constitution.[78]

Claims that the works of parliamentary commissions influenced the judiciary were also brought on the agenda during the works of the Research Commission on the Murder of Hrant Dink, which was established as a sub-commission under the TGNA Human Rights Inquiry Commission.

## THE LEGISLATURE-JUDICIAL BRANCH CONTENTION IN THE RP CLOSURE CASE

The problem experienced between the legislature and the judiciary in the DEP case with regard to lifting of immunities and detention of deputies whose parliamentary memberships became void with the closure decision was experienced in the case of RP's closure with regard to continuation of parliamentary works by the party and receipt of treasury aid. Following the announcement of the court decision, it was claimed that the party could not engage in parliamentary work since it was deemed closed, and hence that the decisions taken with the participation of RP deputies were invalid. Those regarding the court's decision as sufficient claimed that the party could not continue its parliamentary activities and could not get any treasury aid. However, Parliamentary Speaker Hikmet Çetin held his ground against all the criticisms, stating that the decision would not affect parliamentary works until the decision and its reasons are published by the Constitutional Court. This approach by Çetin made him the subject of critiques from the media. Writers supporting and

76 Established with general Assembly's decision no. 862 dated 23.11.2005 to Establish a Parliamentary Committee to Research the Incidents occurring in Hakkari Districts of Merkez, Yüksekova and Şemdinli, adopted at the 22nd session of the general Assembly.

77 Article 9 of the Constitution: Judicial power shall be exercised by independent courts on behalf of the Turkish Nation.

78 *Radikal*, 2006, 'Judiciary on the verge of collapsing' (*'Yargı çökmek üzere'*), 26 March

welcoming the closure decision called upon the Constitutional Court to finalize the drafting of the reasoned decision as soon as possible so as to bury RP into the "pages of the history".

*Hürriyet* addressed the issue with a news story captioned "Çetin: I am acting according to the Constitution", and said that the Parliamentary Speaker had drawn reactions also from his own party, CHP, because of his statements and attitude.[79]

Emin Çölaşan carried to his column the unease he felt about RP's continuing to do parliamentary work, and the initiatives and views of Vural Savaş regarding the matter; he demanded that the reasoned decision is published without delay, and pointed at the members who were opposing the decision.[80]

The debate on when RP would be deemed officially closed ended with the decision of the Constitutional Court on the treasury aid. The Court ruled that the legal entity of the party had ended with the closure decision and therefore that RP could not get treasury aid.[81]

## ARMY IN CRITICAL JUDICIAL PROCESSES

One of the most important findings reflected by the media in critical cases was that the army had an indisputable influence and superiority in the functioning of the judicial process in terms of both the domain of immunity created and the power to change the course of the process. In all the cases, the power and influence of the army was felt dramatically with the experiences observed within the specific conditions of each of the cases.

The Şemdinli case, which was the first deep state-related case able to breach the immunity of army members, was very important in terms of showing and unveiling the channels through which the army influenced the civilian judiciary. Yet in the Susurluk case, which had also brought deep state debates on the agenda, the immunities of army members could not be breached despite the fact that the gendarmerie was the institution at the centre of all allegations and the names of various commanders, particularly from JITEM, were involved.

In the Şemdinli case, for the first time in history, non-commissioned officers from JIT (Gendarmerie Intelligence Organization) were arrested and put on trial by judicial justice. However, this process suffered severe wounds with the traffic occurring between the government and the General Staff, and the consequent

79 *Hürriyet*, 1998, 'Cetin: I am acting according to the Constitution' (*'Çetin: Anayasa'ya göre davranıyorum'*), 4 February

80 Çölaşan, Emin, 1998,'In Kizilcahamam' (*'Kızılcahamam'da'*), *Hürriyet*, 3 February

81 *Hürriyet*, 1998, 'RP finished, no money' (*'RP bitti, para yok'*), 5 February

dismissal of Ferhat Sarıkaya, the prosecutor of the investigation, from the profession following the declaration issued by the General Staff.

### JUDICIARY'S ARMY SENSITIVITY

One of the major indicators of the sensitivity demonstrated in army-related accusations was the judicial decisions. The rationales of the decisions became documents best reflecting this sensitivity.

The impacts emerging during the process of dismissal of Şemdinli Prosecutor Sarıkaya from profession and evaluated as an attempt to intimidate the judiciary found their reflections in the rationale of the decision of the High Council of Judges and Prosecutors (HSYK) to dismiss Sarıkaya from profession. In the rationale for the dismissal, it was stated that Sarıkaya acted in violation of the circular on investigation of army personnel[82] and hence overstepped the boundaries of this powers:

Murat Belge, stressed how willingly and readily the army's immunity and its influence on the judiciary are accepted by the state, including the judiciary, which created red circled around the issue, basing his views on the decision of HSYK to dismiss Şemdinli prosecutor Ferhat Sarıkaya from profession.[83]

### ARMY'S ROLE IN PARTY CLOSURE CASES

The judiciary-army relation gained importance also during the party closure cases. The statements given by members of the judiciary serving in the closure cases, especially the prosecutors, both during and after the cases, were one of the important indicators reflecting the outlook of the high judiciary on the army.

During closure cases, it was witnessed that army representatives did not hesitate in making public their views, directly or indirectly, through the media. It was seen that these public statements were critical outbursts in guiding and influencing the judiciary.

In the reviews appearing in the media with regard to the RP closure case, the activities of political parties involved in the case were addressed based on the domestic threat perception of the army. Closure cases were regarded as legal solutions eliminating the army's obligation to make a coup. Hence, writers advocating the closure defended their opinions and attitudes based on the institutional power of the army and its reflex to protect the regime.[84]

82 Circular no 23 dated 1.1.2006 on "Investigations on Military Persons", signed by Minister of Justice Cemil Çiçek.

83 Belge, Murat, 2006, 'Prosecutor' (*'Savcı'*), *Radikal*, 22 April

84 Çölaşan, Emin, 1997, 'Fear settled on the mountains' (*'Korku dağları bürüdü'*), *Hürriyet*, 13 November

### TAF'S ERGENEKON REACTION

Despite the judicial branch, the independence of which is under constitutional guarantee, the Turkish Armed Forces (TAF) did not hesitate in voicing its distress and demands in critical trial processes. In critical investigations and cases, every attempt to interfere with the domain of military immunity met reactions from the TAF. The General Staff's declarations and statements during critical trial processes were perceived as a confirmation of the privileged status of the army in the system and a major indicator drawing the lines of the independence of the judiciary.

Within the framework of the Ergenekon investigation, the disapproval of the army regarding the detention and arrest of retired and active soldiers by civilian prosecutors due to coup crimes was voiced via several channels. The General Staff organized press releases and conferences on Ergenekon, and visited the arrested commanders, continuing to express its reactions and displeasure with regard to the course of the investigation.

In view of the Ergenekon investigation, *Taraf* columnist Lale Sarıibrahimoğlu based the discomfort felt by the army when soldiers were tried by civilian judiciary to TAF's desire to maintain its autonomous status.[85]

On the other hand, *Ortadoğu* addressed the Ergenekon investigation with an army-centred viewpoint, as in other critical judicial processes, and said that the aim of the investigation is to weaken the army. [86]

### JUDICIAL IMPARTIALITY

Another issue that came to fore in debates on the independence of the judiciary with regard to critical cases was the perceptions on the principle of "impartiality", which envisages that judicial authorities shall perform their judicial duties free of prejudice and favouritism and in conformity with the principle of equality, with no negative or positive feelings towards the involved parties or any interests.[87]

In critical trial processes, the media played an important role in reflecting the complaints and criticisms regarding the impartiality of the judiciary. The real developments causing comments and creating an agenda in the media in this framework took place during the Ergenekon investigation and case. Similarly, in cases filed for violation of Article 301 of the TPC regulating the offense of

85 Sarıibrahimoğlu, Lale, 2008, 'Officers are angry at their commanders' (*'Subaylar komutanlarına öfkeliler'*), *Taraf*, 9 July

86 Cansen, Ege, 2009, 'The calf under the cow' (*'İneğin altındaki buzağı'*), *Hürriyet*, 25 January

87 See Mithat Sancar, Eylem Ümit Atılgan, *"Justice can be Bypassed Sometimes...":Judges and Prosecutors in the Democratization Process*, TESEV Yayınları, 2009, p. 108-150.

"denigrating Turkishness, the Republic, or the institutions or organs of the state", which became a focal point in the Hrant Dink murder case, it was seen that members of the judiciary were unable to isolate themselves from the personal judgements and feelings they harboured towards the defendants, and that they reflected their own ideological approaches in their decisions.

The new information, documents and records revealed during the Ergenekon investigation and the accompanying debates caused a visible shift in the issue of judicial independence and impartiality, moving to the plane of "your judiciary - my judiciary". This was a historic milestone. The arrest and release decisions ruled with regard to retired *paşalar* (generals) who were arrested during the Ergenekon investigation were effective in this evolution of the problem.

The 301 trials came to fore with regard to judiciary's loss of independence. The most striking example of how the judges lost their impartiality in 301 trials was seen in the rationale of the decision to convict Hrant Dink. The rationale was an important proof demonstrating that the judge had reflected his partiality and prejudices in the decision.

Documents and records revealed during the ensuing phases of the Ergenekon investigation were like a confirmation of the allegations and suspicions regarding the independence of the judiciary. The contents of the phone call between Ergenekon defendants and the judge convicting Dink appeared in the media.

## CONCLUSION

It is not possible to say that the perception of the media, being fully aware of the public distrust in the judiciary, with regard to respect and trust in the judiciary is based on a principle or a standard. It is seen that daily papers feeling infinite confidence and respect towards the constitutional judiciary in political party closure cases did not have the same respect and trust in the Şemdinli and Ergenekon investigations. On the opposite, it was observed that newspapers demonstrating a distrust of the judiciary during the closure cases did not have the same concern in the other critical cases. Or, the fact that all these parties demonstrated a consensus on absolute agreement by leaving the court decision "out of discussion", as in the closure decision of DEP, points at another reality. This reality is that the idea of "sacred state" and its basic ideology have a dominion on the media in general. It would not be an exaggeration to say that differences mostly develop around being a supporter or opponent of the ruling party. In the background of the divisions seen in critical trial processes lies the distance of the relation of the media established with the political power and dominant institutions, and the fact that the media positions itself according to the sensitivities and balances imposed by this relation. At this point, reasons

originating directly from the judiciary and the scope and content of the cases should not be excluded.

Respecting and trusting the judiciary maintained its place among cliché expressions during deep state-related cases. This discourse, emphasized at every opportunity by political actors and TAF officials, became the centre of debates on interference in the judiciary. This emphasis on respecting and trusting the judiciary was also included in the statements and press releases of the General Staff, and created a perception of "warning" rather than respecting the judiciary. The contradiction between TAF's respect speeches and methods of interfering in judicial processes led to some writers calling for "respect by heart, not by words".

Another area where the media's perception of the judiciary was reflected was the debates around the principle of "judicial independence and impartiality". The only thing remaining unchanged despite the specific conditions of each case was the debate on whether the judiciary was or was not independent. Also triggered by the structure and functioning of the judicial system in Turkey, which are indeed contrary to independence criteria, the perception of this debate was limited only to the interference of the government, ignoring the other pressure groups on the judiciary and within the context of "politicization". Yet judicial independence requires being immune not only from political actors but also from non-political actors and all pressure groups, official or civilian, and having mechanisms to guarantee this. Critical trial processes have shown that official and unofficial powers such as bureaucracy, army, deep state, mafia and gangs are major pressure groups on the judiciary. However, a significant portion of the media did not see non-political pressure and interference methods, especially interferences from the army, as a problem and welcomed it with tolerance.

As in the Şemdinli and Ergenekon investigations, in critical processes it was explicitly voiced that the army should interfere in the process, through methods such as "declarations", "memorandums" and "coups". Accordingly, the statements and declarations of the General Staff and the traffic of talks with the government were presented as a "justified" and "natural" part of the judicial process. Similarly, judicial dispositions for expanding the scope of deep state-related investigations so as to include members of the army were met with speeches going beyond the boundaries of criticism and accusations that the aim is to weaken TAF. Moreover, detentions and indictments against high level commanders of the army by the civilian judiciary were perceived by the most of the media as "overstepping the limits" or "daring". Likewise, it was accepted as an ordinary or even delayed decision when Şemdinli prosecutor Ferhat Sarıkaya, who had filed a criminal complaint against Land Forces Commander Yaşar

Büyükanıt for attempting to influence the judiciary, paid the price of this "daring" by being dismissed from the profession.

Despite the tendency to not see the army among segments interfering with the independence of the judiciary, the legislature was seen among institutions threatening judicial independence. The works of research commissions established by the parliament within the framework of its bylaws and for the purpose of activating its own control mechanisms and the findings revealed through these works were regarded as interference in the judiciary. However, it is seen that the de facto hierarchy created between institutions as well as political and ideological excuses rather than legal reasons play a role in including in "interference" debates these two control mechanisms, which have different purposes, functions and working procedures and which are not the alternatives of each other. It is striking that the allegations of "interference in the judiciary" during the works of the parliamentary research commissions on Şemdinli and Hrant Dink murder emerged during the process when the inquiries regarding military persons were deepened. Yet here, the main issue with regard to the independence of the judiciary actually arose when information and documents capable of revealing the real picture and the material truth were held back from the judiciary, the Parliament and other supervisory organs by the security institutions of the state on the grounds of state secret, which prevented these institutions from deepening their inquiries and getting effective results. In deep state trials, the "state secret" excuse, used as a legitimate guise for holding back information from institutions the independences of which are guaranteed in the constitution, was in effect used as an arbitrary tool to create an illegal, secret and immune power domain for security intuitions and keep this domain away from democratic control methods.

In the Susurluk process, a significant portion of the media reacted to nondisclosure of prepared reports and some information and documents on the grounds of their being state secrets and also to holding back information from the judiciary, the legislature, the media and the public, while some writers opposed to disclosure of state secrets and escalated the issue until it reached the perception that "transparency is gullibility".

The fact that the works of parliamentary commissions, which were supported during the Susurluk process, caused arguments of "interference in the judiciary" in other cases and never used in the Ergenekon investigations also showed that no progress has been made in ensuring transparency and accountability of institutions. Similarly, deep state trials have revealed that the judiciary, which must have access to all kinds of information and documents, does not have

independence guarantees powerful enough to climb over the wall of "secrecy" built by security institutions.

Undoubtedly, the reason for the need to launch parliamentary inquiries in events which are still in the judicial process is the ineffectiveness of administrative and judicial processes/mechanisms in illuminating the events. At the point where there is no more hope from the executive and the judiciary, the legislature comes to mind as the last democratic resort in order to unveil all dimensions of the incidents. Yet, experiences to date have destroyed these expectations because even in the existence of many material findings, these findings are never able to get evaluated by the parliament or by other institutions.

# Guarantees For Judges (and Prosecutors)

The existence of mechanisms to ensure guarantees and protections for judges and prosecutors against all kinds of external influences and powers, particularly the executive, is an important element increasing the functionality of judicial independence. One of these mechanisms is the guarantees for judges (and prosecutors), which include guarantees against pressure due to dispositions for which they are authorized on behalf of the public within the framework of the trial activity, guarantees against dismissal from office, and guarantees against relocation or transfer to another place. On the contrary, all kinds of arbitrary acts and actions oriented to oppress and influence the discretionary power and decisions of judges and prosecutors, which they have to make according to their own conscience, prevent manifestation of justice.

Developments taking place in critical cases showed enough of the channels and foci of pressure to which judges and prosecutors are exposed to. This pressure process, running openly in some cases, has turned into traumatic experiences for judges and prosecutors. The media's approach to these experiences varies according to their positions. The media explained its attitude, which sometimes became totally incomprehensible, by taking it beyond material facts, in line with its general attitude in investigations and cases. It can be said that the media failed the test with regard to guarantees of judges (and prosecutors), which became a current issue particularly during the Şemdinli process, throughout the developments related to dismissal of Ferhat Sarıkaya, the Şemdinli prosecutor.

The Turkish experience shows that rather than guarantees, there are many pressure elements on the trial activities of judges (and prosecutors).

## DISMISSAL OF PROSECUTOR FERHAT SARIKAYA

When Sarıkaya sent the file on the commanders to the Military Prosecutor's Office of the Turkish General Staff, a historical process in terms of judicial independence and guarantees given to judges (and prosecutors) started. However, there is no doubt that the actual test in this process was for the media.

The fact that the Şemdinli indictment was leaked into the media before it was even accepted by the court and before the finalization of the legal process led to

making the indictment's contents public, activated all the factors influencing the judiciary and created an intensive pressure on the investigation's prosecutor. These pressure groups attributed extra purposes and functions to the indictment in addition to its being a part of the legal process. This caused a rapid digression from the substance of the case and killed the initial will, desire and commitment to illuminate the incident.

Reactions focused mostly on the unacceptability of attributing a crime to high ranking commanders of the army. *Hürriyet* and *Ortadoğu* reacted to the indictment since it included accusations against Yaşar Büyükanıt and other high ranking commanders, and they focused their criticism on this point.

These debates and publications, which also dissected the personality and private life of the Prosecutor, caused a shift in the media attention and interest in the Şemdinli investigation, drew the debates away from the investigation and deepened the image of "justice under the shadow of guns". Yıldırım Türker, in his column in *Radikal*, stated that the debate on Büyükanıt has rendered the ganging up in Şemdinli void, and that the air of doom created for trying to bring charges against the *paşa* goes beyond mere sensitivity to judicial independence and impartiality and is rather an attempt to cover up something else.[88]

The approaches of some of the writers eagerly awaiting and supporting the outcome of the disciplinary investigation can be summarized as follows: "it would have been better if they had issued a reprimand instead of dismissal". It was striking to see this interpretation adopted by writers who had previously used a severe discourse towards Sarıkaya. Although the criticism from these writers targeted the government and the HSYK as responsible for the dismissal decision, another important point was that the writers diligently avoided any mention of the share and role of the General Staff in this process.

## CONCLUSION

The judge (prosecutor) guarantee, which is an element of judicial independence, is another topic on which the media revealed its perception on the judiciary. The judge (and prosecutor) guarantee, which became symbolized with dismissal of Şemdinli's investigating prosecutor Ferhat Sarıkaya from profession, was like a real test of the respect to judicial independence. However, the media, the judiciary, the TAF, the government and other political actors all failed this test. It can be said that the dismissal of Prosecutor Sarıkaya for daring to accuse the commanders was in general welcomed in the media and served to shadow the material findings unveiled. This was later verified when the development starting the dismissal

88 Türker, Yıldırım, 2006, 'Don't touch my Pasha' (*'Paşama dokunma'*), *Radikal*, 13 March

process became publicly known before the end of the judicial process through media leakage of the indictment, which drew all eyes on it and hence pushed the material fact into the background.

Some writers deviating from the general trend perceived the events that nullified the guarantees of judges as a traumatic experience because of which judges and prosecutors will never again be able to file a suit in similar cases. These writers called the process of Sarıkaya's dismissal as the "Şemdinli syndrome". Similarly, in this process where commentaries and reviews emphasized the role of the government and General Staff in the dismissal, HSYK's decision to dismiss Sarıkaya was described as "uniting at military grounds" by *Hürriyet* columnist Cüneyt Ülsever.

# Fair Trial

The right to fair trial was at the core of the debates on judicial processes since it constitutes one of the guarantees of judicial independence and impartiality. Among the critical cases, the investigation and trial of Ergenekon became the judicial process in which the right to fair trial became most highlighted. The interest of the media and public in the investigation process initiated in mid 2007 actually started during the period when the investigation was deepened to encompass various segments including retired generals. In the media, divided on the axis of the investigation and trial, the right to fair trial became the priority agenda item of the media, especially the mainstream media. Some writers, explaining that they had avoided making any comments regarding the course of the investigation in the beginning so as not to influence fair trial, intensified their criticisms on violations of the right to fair trial during the process of expanding the operations.

## TRIAL IN A REASONABLE TIME

The rule of finalizing investigations and cases in a reasonable timeframe constitutes one of the major problems of the judicial practice revolving around the right to fair trial in Turkey. Yet, this general problem in Turkey usually became the topic of criticism from the other side with regard to deep-state related cases. The first case where this association first came on the agenda was Susurluk, in which it was claimed that the investigation was done too fast and hence sufficient evidence could not be collected. Yet, since deep state organizations were addressed as petty gang crime and their acts were addressed as local offenses, the danger of status of limitations in these cases always remained on the agenda.

### ŞEMDİNLİ CASE ACCUSED OF "FAST TRIAL"

When the No. 3 Heavy Penal Court of Van finalized the trial in a very short time and decided for conviction of the defendants, it turned the reactions and comments, which were previously centred on prosecutor, towards judges. The media questioned why the decision was given so fast.

*Ortadoğu* announced the news of the court's decision to convict the NCOs with the headline *"Deep treason"*.[89] The newspaper itself stated that the decision to convict was due to the pressure from the EU.[90]

89 *Ortadoğu*, 2006, 'Deep Treason' (*'Derin ihanet'*)-headline, 22 June

90 Sorgun, Taylan, 2006, 'EU's political war against TAF' (*'AB'nin TSK'ne karşı siyasi savaşı'*), Gül & Orhan Doğan", 'What Bahceli said' (*'Bahçeli'nin söyledikleri'*), *Ortadoğu*, 24 June

These "too fast" criticisms from nationalistic segments believing that the investigation was finalized too quickly became widespread among a larger population. A significant portion of the media, *Hürriyet* in the forefront, took a doubtful approach to the speed of the trial.

### "DELAYED" ACCUSATIONS IN ERGENEKON INVESTIGATION

While the decision to convict in the Şemdinli case received criticisms, the Ergenekon investigation was criticized for delayed trial. Those criticizing the Şemdinli decision for being too fast now criticized the Ergenekon investigation for its lengthened duration based on the right to fair treatment. In these criticisms, the issue of prolonged investigations or trials was addressed in connection with the right of the defendants to learn the charges made against them, on the basis of the EU negotiations and the decisions of the European Court of Human Rights.

The media supporting the investigation despite criticisms for its length saw nothing abnormal in the delay, emphasized that there must be reasonable reasons for it, and called these criticisms political, rather than legal.[91]

### PRESUMPTION OF INNOCENCE

The "presumption of innocence" meaning that no one is guilty until there is a finalized decision to convict against them, was one of the most commonly debated topic within the scope of the right to fair trial in the Ergenekon investigation. The delay in the preparation of the indictment triggered arguments of conviction of the detained or arrested individuals before trial. In the media, it was seen that individuals involved in the investigation were found guilty before official charges were brought with an indictment. The media supporting the investigation was accused of violating the rule of presumption of innocence. Accusations of this direction appeared mostly in the mainstream media.[92]

### CONFIDENTIALITY OF THE INVESTIGATION

The provision of Article 157 of the Code of Criminal Procedure (CCP) regulating the confidentiality of investigation came to fore as an important problem area in the Şemdinli and Ergenekon cases. Debates arose related to "violation of confidentiality" when, in the Şemdinli investigation the indictment was leaked into the media before finalization, and when in the Ergenekon investigation the information and documents under investigation scope were leaked into the media while the investigation was still going on. In both investigations, prosecutors were exposed to criticisms from the mainstream media and the opposition as the responsible party for these violations of confidentiality. These criticisms were expressed more widely and extensively during the Ergenekon investigation.

91 Bostancı, M. Naci, 2008, 'The irony in Ergenekon' (*'Ergenekon'daki ironi'*), *Zaman*, 15 July

92 Yılmaz, Mehmet Y.,.2008, 'Turkey will pay a lot in Ergenekon' (*'Ergenekon'da Türkiye çok para öder'*), *Hürriyet*, 4 July

However, this time the criticisms aimed not only the prosecutors but also the government and the police units.

The media appearance of investigation documents and information gave rise to mainstream media and opposition parties claiming that the documents and information were "leaked" into the pro-government media. The mainstream media published diligently and in detail the critiques and explanations of the General Staff, the opposition and the government representatives with regard to leakage of some information and documents to various segments.

The arguments of "leakage" and "dilution" by the parties of the division here became important indicators in terms of the media disclosing its own position and the revelation of the perception of the media with regard to the investigation. The media supporting the Ergenekon investigation and hence becoming exposed to accusations of "leakage" accused the mainstream media and opposition parties of "diluting" the case.

### ALLEGATION THAT "DEFENDANTS WERE NOT INFORMED OF THE CHARGES LAID AGAINST THEM" IN ERGENEKON

Although the exercise of the right to be immediately informed about the charges laid against one in the case of individuals deprived of their liberties is one of the main problem areas in implementation, it was expressed as an issue first in the Ergenekon investigation. Complaints and criticisms that the suspects detained during the investigation were not informed about the charges against them or did not know what they were charged with, appeared frequently in the mainstream media.

### CONCLUSION

The right to fair trial, which attracted no interest or coverage from the media in criminal trials, became the main topic of investigations and trials in the recent deep state-related investigations and trials. In this sense, the Ergenekon investigation had a special importance. It was observed that a wide segment of the society was sensitive towards the essential issues included under the right to a fair trial, such as the right to trial in a reasonable timeframe, presumption of innocence and the right to learn and be informed about the charges laid against one before detention. However, this sensitivity should not be considered as the end of the indifference towards issues related to fair trial. Likewise, it was witnessed that the groups criticizing the Şemdinli case for the too speedy decision to convict the NCOs evaluated the delay in the drafting of the indictment as a reasonable statute of limitations and in both cases regarded the process with doubts in terms of fair trial. Again during the same process, the media ignored the standards on fair trial and the situation of the accuseds exposed to (continuing to be exposed to) the same practices, and avoided in-depth analyses that revealed

the real dimensions of the issue. These objections, emerging only in the case of specific circumstances or individuals, and not reflecting an approach for radical solution of this fundamental problem of the judicial system, came to an end with the fulfilment of subjective expectations.

The most comprehensive debate on fair trial took place on "confidentiality of the investigation". In virtually all judicial processes, many documents and information under the investigation were either leaked or officially given to the media by relevant persons or institutions. This practice, aiming to manipulate the public and carried out openly as in the party closure cases, the lifting of the immunities and detention of DEP deputies etc., took a completely covert nature in rare occasions like the Hrant Dink murder. In the Dink murder, the rule of confidentiality of the investigation was applied strictly against the media and the parties of the investigation, as strict as seen in torture investigations. Hence, the rule of confidentiality was attributed a meaning beyond protecting the rights of the parties and ensuring the security of the evidences.

In the investigation processes of critical cases, the judiciary (prosecution) continues to rely on official news sources consisting of government institutions and security institutions. In cases where parliamentary research commissions were established, these commissions also served as important news sources for the media. Yet, media professionals are pointed at as responsible of the violations of investigational confidentiality originating from institutions, mainly the security institutions and prosecutor's offices.

The principle of ensuring that the trial is conducted publicly, which is an important element of fair trial, came on the agenda within the context of the unfavourable physical conditions of the courtroom built at the Silivri Prison where the Ergenekon case was being heard. However, in this instance the problem was addressed only from the angle of the unfavourable conditions of the courtroom. The evaluations did not focus on the harm likely to be done against "independent and fair trial" by the practice which limited access to the courtroom in a way resembling the trial of Abdullah Öcalan, which hence imposed a limited publicity, which normalized a practice specific to emergency regimes and circumstances with the new-type prison model, and which carried judicial authorities to locations where individuals were deprived of their freedoms. Meanwhile, it is seen that the government has opened the courtrooms (hearing halls) built as a part of the "campus prison" model developed in the recent years, for the practice of "on-site trial of convicts", and has legitimized this practice with the Ergenekon case. Although "security" is claimed to be the reason for this practice, it cannot be overlooked that this practice aims to completely isolate the arrested and convicted individuals from the outside world. And the media is content to reflect these new prison types to the public as an effort to "modernize", based on the social and cultural facilities they have and the opportunities provided to inmates by the work houses.

# Immunity and Impunity

> This organization called "deep state" is a crime organization. It constantly commits crime. And always remains free of punishment. Whenever it is not punished, Turkey stumbles. We have to disrupt this structure, which causes the country to stumble, just like all the other modern countries. The term deep state desensitizes us all. We keep saying deep state. I think it is time to wake up from this intoxication. They are still talking about coup preparations. Hence, we must now locate the deepest part, the core of this "deep state ". We have to reveal who leads it. The offending soldiers and other officials of the state, and those protecting them, should not remain unpunished. Whenever they are left unpunished... The punishment is exacted on the people of this country.[93]

The rightness of these evaluations by Ahmet Altan on the continuity and immunity of the deep state in Turkey was repeatedly proven during critical investigation and trial processes. Despite all that hope, all trial attempts remained limited to what the "deep state" agreed to dispense with or to what was already visible, or in some cases failed to reach any conclusions at all. Every new case or investigation meant a new judicial, administrative, legal or de facto obstacle or protection. The most dramatic aspect of this situation was that with every attempt, the feeling of ineffectiveness and futileness of judicial processes became more and more concrete and the belief that the incidents would be illuminated, that the deep state would be disbanded and the perpetrators would be punished proportionate to their offenses was completely lost. For this reason, the desire to see justice prevail formed an important part of the fight against the deep state. Hence, the demand for justice in the combat against the deep state became symbolized in the Susurluk process with the slogan "One Minute of Darkness for Continuous Enlightenment", and in the Hrant Dink murder case with the slogan "For Hrant, For Justice".

The deep tolerance and support shown to perpetrators and accuseds by security authorities, courts, prosecutors and judges during ineffective and passive trial processes, on the one hand wounded the victims of the deep state and the society in an indescribable way, and on the other hand greatly encouraged the defendants and their supporters. In this situation and environment, the forces

93 **Altan, Ahmet, 2008, 'Depth Intoxication' (*'Derinlik sarhoşluğu'*), *Taraf*, 25 January**

behind the wall of immunity retained their positions and continued on their path from where they had left.

In the face of this picture, the media's approach to the issue of immunity and impunity has always been of great importance in every period. However, it cannot be said that the media pursued a consistent and assertive publishing policy, barring a limited number of newspapers and writers. The perceptions of most newspapers and writers with regard to immunity and impunity developed according to their respective positions in critical cases. Newspapers and writers demonstrating an assertive and insistent stance for disbanding of the deep state were more sensitive towards the issue of immunity and impunity and to trial processes. Yet, newspapers and writers defending the "sacred state" idea, demonstrating militarist sensitivities and advocating that the state can resort to illegal organization forms, objected and reacted to the accusation and trial of security officials in particular within the scope of deep state. They strongly reacted against such investigations and trials, claiming that they would demoralize the other public employees, break the desire to fight and weaken the institutions.

## IMMUNITY IN THE SUSURLUK PROCESS

The Susurluk process became the name of a process where all reviewed offenses were left unpunished, except for the gang case. Many offenses and allegations revealed and reflected in official reports did not even find a mention in the investigation. This reality was summarized, on the fourth year of the cases, as follows "After four long years passing since the Susurluk Scandal, we are yet to see one take even a whiff of punishment".[94]

*Radikal*, in the news story titled "There was a Susurluk", provided a summary of the picture of immunity and impunity related to Susurluk, and stated that the real responsible persons behind the armed gang unearthed after the accident have never been brought to court, and the immunities of Mehmet Ağar and Sedat Bucak, whose names kept appearing with regard to gang relations, could never be lifted.[95]

Many of the offenses included in the investigation were tried in a dispersed manner and independent from the gang case. The conditional release act introduced in that period with an aim to protect the defendants and the statute of limitations were effective in the impunity seen in these cases which were filed at different courts. However, the acquittals were also very striking. Although it

94 Korkmaz, Tamer, 2000, 'Twenty Thousand plaques under the sea' (*'Denizler altında yirmi bin plaket'*), *Zaman*, 21 November

95 *Radikal*, 2003, 'Sezer's pardon to Ibrahim Sahin' (*'İbrahim Şahin'e Sezer affı'*), 16 July

was mentioned that the government would be taking many precautions and introducing a law oriented to ensure punishment, none of these came to fruition.

This picture presented by the media and writers could be described as "The power of justice was not enough to punish Susurluk", as stated by Adnan Keskin in *Radikal* under the headline "Susurluk cover up".[96] Under these conditions where institutions of the state held back information and documents, newspapers and journalists usually went ahead of the judiciary and contributed to it in making progress in the investigations.[97]

In the Susurluk case, the defendants spent most of the process on trial without arrest. The arrested defendants were released almost immediately with quickly issued release warrants. This quick release of the defendants was perceived as the inevitable outcome by the media, and was met with reactions.

## IMMUNITY IN THE ŞEMDİNLİ INVESTIGATION

The Şemdinli investigation, which attempted to surmount the military immunity identified with Susurluk, failed to create a break due to strong reactions rising from the media, high judicial circles, the government and other political parties, and most importantly from TAF. A significant portion of the media changed their course when the investigation, which they initially likened to the Susurluk process, turned towards high level commanders. With the leaked indictment the contents of which became known, the issue rapidly drew away from the chain of events forming the case, and focused on the daring demonstrated by attempting to breach a commander's immunity.

There were also opinions claiming that this process would be an important indicator testing the relations between the media and the army. Calling the case as the first of its kind due to containing the most extensive and gravest accusations against military personnel by the civilian judiciary, Ahmet İnsel stated that whether the media, which has the responsibility to watch the most extensive accusations of the Republican history, wears epaulets or not will also be understood as a result of this case.[98]

## IMMUNITY IN THE HRANT DINK MURDER CASE

The Hrant Dink murder case also proved to be a case where those with decisive roles and responsibilities were left outside of the judicial scope although there

96 *Radikal*, 2001, 'Susurluk cover up: General amnesty devoured Susurluk' (*'Susurluk ört bas: Af Susurluk'u yuttu'*)-headline, 17 October

97 Berkan, İsmet, 2000, 'The secret of the state secret' (*'Devlet sırrı'nın sırrı'*,) *Radikal*, 3 July

98 İnsel, Ahmet, 2006, 'Semdinli and its indictment' (*'Şemdinli ve iddianamesi'*), *Radikal 2*, 19 March

was the appearance of a trial, similar to the appearance given in Susurluk and other critical cases. Hence, the Dink murder trial continues with an approach which sees punishment as an option limited to available defendants, as has become a tradition, and which surrenders to the immunity of the powers behind the trigger.

Facts related to how Hrant Dink's impending murder was known in advance by security authorities and how the murder was not prevented despite this knowledge were included in an interview by Neşe Düzel with one of the joint attorneys, Fethiye Çetin. Çetin stated that both the gendarmerie and the police did not take any precautions although they knew that Dink was going to be killed.[99]

Perihan Mağden focused her disapproval and objections to the role played by security authorities who were aware of every phase of the murder, to the promotions they received in resemblance of a reward, and to their impunity assured by withholding permission to investigate them.[100]

Giving an account of his impressions on the day Hrant Dink's murder case was started, İsmet Berkan regarded the role of security officers in the murder as something beyond neglect, and described it as an attitude "going beyond negligence and amounting to encouragement", and he questioned the fact that this situation, which is likely to cause a scandal in any normal country, is not considered as such in Turkey.[101]

## TOUCHING THE IMMUNITIES IN THE ERGENEKON INVESTIGATION

The investigations and trials of Susurluk, Şemdinli, Hrant Dink murder and Ergenekon made it blindingly obvious that touching the military is found unacceptable and odd by a large segment of the society. In critical cases, punishment of those daring to touch the immune became inevitable, and they were made to pay for that daring.

The army's position over the political power and institutions despite remaining out of politics most of the time, and the fact that it has an independent and immune power domain as a power elite that has no democratic legitimization played an undeniable role in the formation of this perception of immunity with

99 Düzel, Neşe, Fethiye Çetin interview, 2007, 'Evidence is hidden from prosecutors in the Hrant case' (*'Hrant davasında savcılardan deliller saklanıyor'*), *Radikal*, 1 October

100 Mağden, Perihan, 2007, 'The square root of the Dink murder' (*'Dink cinayetinin karekökü'*), *Radikal*, 2 October

101 Berkan, İsmet, 2007, 'The criminal and the powerful' (*'Suçlular ve güçlüler'*), *Radikal*, 3 July

regard to soldiers. In this context, it can be said that the army has a wide privilege before the judiciary, as it has before other institutions.

Since the actors of the 12 September 1980 coup are under constitutional protection, the Ergenekon investigation is the first case where coup allegations could be brought to trial. Hence, the Ergenekon investigation witnessed unprecedented operations in which many retired generals were taken under custody. However, these operations were met with criticisms, as expressed by *Hürriyet* columnist Yalçın Bayer: "Is it rational to accuse people who have fought against terrorism for years of establishing a terrorist organization to topple the government?"[102].

*Taraf* described the detention of generals who were no longer immune from judicial trial after their retirement as the end of the tradition of impunity. Yasemin Çongar was one of the columnists putting store by the detentions and the investigation on this basis.[103]

Stressing the belief in impunity of those committing crimes on behalf of the state, Ahmet Altan also regards the developments in the Ergenekon investigation as the collapse of this belief, and says "they were late", stating that the murders could have been prevented if the intervention came a bit sooner.[104]

## THE HEAVY PRICE OF TOUCHING THE IMMUNITIES

Contrary to the developments witnessed in the recent past within the framework of the Ergenekon investigation, the Susurluk and Şemdinli processes, which found the opportunity to get even with the deep state way before Ergenekon, were critical turning points where those attempting to breach the military immunity paid heavy prices.

The Susurluk process was the first case where those accusing the army and its commanders were punished. The inclusion of Veli Küçük's name in state reports for the first time through the allegations against him, and his inclusion under the protection of the army happened simultaneously. The initial accusations against Küçük were voiced for the first time by Hanefi Avcı, the Head of the Intelligence Department of the General Directorate of the Police, who gave information to the Parliamentary Commission on Susurluk. However, these statements of Avcı brought to the agenda not Küçük's but Avcı's investigation and punishment.

102 Bayer, Yalçın, 2008, 'AKP turned Turkey into a fear society' ('*AKP, Türkiye'yi korku toplumuna dönüştürdü*'), *Hürriyet*, 4 July

103 Çongar, Yasemin, 2008, 'Was a bad day for epaulet-wearing Raskolnikovs and supporters' ('*Apoletli Raskolnikovlar ve destekçileri için kötü bir gündü*'), *Taraf*, 2 July

104 Altan, Ahmet, 2008, 'Is there no one else?' ('*Başka kimse yok mu?*'), *Taraf*, 1 November

When evaluating the developments regarding Avcı, the Head of the Parliamentary Commission on Susurluk, Mehmet Elkatmış also recalled what had happened to those who had opened their mouths, and said that there were attempts to silence Avcı and intimidate those wishing to talk through him:

> Not everybody chose to talk in the Susurluk incident. Only a few people talked. One of them was Hanefi Avcı. Yet Avcı was tried to be silenced. Whoever desires to talk, that person is eventually silenced. [...] Through Avcı, everyone who has information is being intimidated. [...] They want to say "No one talks, we will hurt whoever talks".[105]

Fikri Sağlar, who was among the deputies insistently advancing on the incident, was also among those suffering an investigation under the prevailing conditions where the political connections of Susurluk could not be punished and brought to court.[106]

There were also members of the judiciary among those paying the price of touching the immune. One of the reasons behind the decisions of transfer, reappointment or full dismissal of judges and prosecutors was the daring demonstrated by these members of the judiciary by having the courage to poke at the immune. The prosecutor of the Şemdinli case, Ferhat Sarıkaya paid the heaviest price for these attitudes.

## THE "STATE SECRET" BARRIER TO PREVENT DEEPER INVESTIGATION

An important factor providing a protective shield around offending state employees and other forces was the security and intelligence institutions, which were in possession of all the information that would open the path for the judiciary, expanding their immunity domains by hiding information from the basic organs of the state, such as the judiciary and the legislature, on grounds of "state secret" or "confidentiality". This attitude, which prevented deepening of the investigations, ensured that many crimes and criminals were kept away from the judiciary.

This problem, starting with the Susurluk case and continuing with the Hrant Dink and Ergenekon cases, was one of the major debates finding its way into the media. The Susurluk process had an important place in terms of the debates on state secrets. Newspapers and journalists advocating the sacredness of the state and its interests claimed that the secrets of the state cannot be disclosed for the sake of transparency. Yet, those advocating transparency of the state and its institutions did not hesitate to voice their criticisms regarding state secrets.

105 *Hürriyet*, 1997, 'Revolt against military blacklisting' (*'Askeri fişlemeye isyan edin'*), 21 July
106 Erkoca, Yurdagül, Fikri Sağlar interview, 1998,'Top of the state knows' (*'Devletin tepesi haberdar'*), *Zaman*, 31 August

As seen in the developments reflected in the media, the excuse or rationale of "state secret" played a major role in preventing the deepening of the investigations and cases in order to reveal the gangs. This excuse was used effectively in protecting and favouring the connections within the state.

*Zaman* columnist Fehmi Koru described "state secret" as a cunning used to cover up the sordid facts of the past.[107]

The most radical advocate of the "state secret" concept and practice came from *Ortadoğu*. At every opportunity, the newspaper defended its view that state secrets should exist because of the need to protect the best interests of the state. This was an approach reflecting the "sacred state" mentality of the newspaper and its writers.

## "STATUS OF IMPUNITY" BY LAW

Deep state trials showed that one of the biggest obstacles before trial of public employees was the provisions of Law no. 4483[108] governing the rules and conditions concerning the trial of civil servants. This is because the law binds the trial of offending public employees to granting of permission by the administrative superior. As proven in practice, superiors and permission authorities used this power mostly to protect their employees. However, more importantly, this permission system envisaged in the law was very broadly interpreted and its implementation area was expanded. This privilege/guarantee granted to public employees by law turns into an important obstacle especially with regard to trials of public employees responsible for human rights violations, and becomes one of the priority issues of the phenomenon of immunity and impunity.

Reviews on the role of the law in critical trial processes were penned by columnists, although rarely. Tarhan Erdem said that this regulation concerning the trial of civil servants was a type of "impunity status", and emphasized its contradiction with the principle of equality before the law.[109]

## LACK OF POLITICAL WILL

The assessments made in the media and the developments witnessed in critical cases revealed lack of political will as another phenomenon effective in the practice of immunities. The need for political will was always felt with regard to enabling progress in judicial processes, surmounting the wall of immunity,

107 Koru, Fehmi, 1998, 'You cannot close' ('*Kapatamazsınız*'), *Zaman*, 25 February

108 Law no 4483 of 2.12.1999on Trial of Civil Servants and other Public Employees (*Devlet Memurları ve Diğer Kamu Görevlileri'nin Yargılanmaları Hakkında Kanun*), Official Gazette dated 4.12.1999, nr. 23896.

109 Erdem, Tarhan, 2001, 'Laws will cover up Susurluk' ('*Susurluk'u yasalar örter*'), *Radikal*, 18 October

unearthing the deep relations, and enabling effective and extensive trials. At every phase, it became more and more important to have the necessary political will in order to tackle the gangs.

While Susurluk and Dink cases came to fore with regard to lack of political will, Şemdinli and Ergenekon investigations were in the foreground mainly with allegations that the political will was interfering in the judicial process.

## THE ENCOURAGING ENVIRONMENT CREATED BY IMMUNITY AND IMPUNITY

Turkey came across the fact that immunity and impunity encouraged defendants and gangs, for the first time during the Susurluk process. The defendants tried in the Susurluk case regarded and advertised their acts as a manifestation of their brave heroism, and did not hesitate to continue their aggressiveness and threats at every opportunity.

Since Turkey failed in producing a proper reckoning in Susurluk, people who are actually gang members extorting tributes and killing people without blinking an eye came out as heroes and virtually bragged about their deeds.[110]

A news article on the case of the lost weapons and the picture of impunity in Susurluk, covered in the headlines in *Radikal*, resulted in journalist Adnan Keskin receiving threats.[111]

## CONCLUSION

Immunity and impunity became a major issue putting its mark on critical trial processes. This issue, starting with the Susurluk case, continuing with Şemdinli and gaining a new dimension with the murder case of Hrant Dink, gains importance with the role played by the judiciary as well as with the way it is perceived in the media. Particularly, the Susurluk process showed that immunity and impunity were the product of inter-institutional cooperation and processes and that a wide domain of immunity is created in cooperation by these institutions, despite the performance of the media in parallelism with the extraordinary support of the society. Among the trials concerning the deep state, Susurluk was the only trial completed. However Susurluk became the name of a case where more than ten cases, each of which were administered in different courts, were left unpunished due to acquittals or statutes of limitation, and where the rare convictions were rendered ineffective through mechanisms such as conversion into money or deferral. The decision to convict finally arriving in the gang case on

110 Berkan, İsmet, 2004, "Sedat Bucak's 'secrets'" (*'Sedat Bucak'ın 'sır'ları'*), *Radikal*, 1 October

111 *Radikal*, 2001, 'Threat to Radikal: 'Message' from Agar (*'Radikal'e tehdit: Ağar'dan 'mesaj' var'*)-headline, 20 October

the verge of the statute of limitation never succeeded in satisfying the public conscience. The decision resulted in frequently repeated claims that the scandal was covered up and that the deep state was not disbanded, with comments like "what is convicted is only the visible tip of the iceberg".

In the Susurluk process, despite numerous allegations against the gendarmerie, specifically through JİTEM, no soldiers were included in the judicial process and the prominent names of the scandal, Mehmet Ağar and Sedat Bucak, escaped trial for a long time due to their political immunities. In the Şemdinli process, the practice of effective and speedy punishment, which was not applied to the defendants, was applied against the prosecutor who included accusations against high ranking commanders in his indictment. In the Hrant Dink murder case, the provincial governorate did not give permission for trial of the police chiefs who did nothing to prevent the murder although they were informed about it beforehand, and who thus turned a blind eye to Dink's murder, and the trials of high ranking commanders and other gendarmerie personnel serving in Trabzon became possible only after a long and challenging process, which was disproportionate to the weight of the offense. Likewise, in Samsun, the trials of security officers having their pictures taken with the murder suspect with words and behaviours approving the murder resulted in acquittal. This whole picture verified the significant share of the administration, the legislature, the political will and the judiciary itself in the incident.

At the point reached, it is obvious that the priority of protecting the best interests of the state is dominant and that a tradition of effective judicial immunity has been created to ensure the sustainability of this dominance even through illegal acts. It is seen that this tradition is further strengthened every day through new instruments to prevent a reckoning before judicial authorities and through legal, administrative and de facto protection mechanisms serving the perpetrators of deep state-related incidents, such as torture and violation of the right to life. Therefore, it is exceedingly difficult to say that the exceptional initiatives to go outside this tradition portent the collapse of this tradition. For the same reason, it is also not possible to say that the extraordinary attitudes of the judges and prosecutors who paid a heavy price for touching the immune constitute a stable, constant practice or the start of a new process. The radical changes witnessed in the course of the case after the dismissal of the prosecutor and relocation of the judges in the Şemdinli case gave enough support to this argument.

It was witnessed that newspapers and writers on the one hand wanting the deep state disbanded and on the other hand stating that it is normal and necessary for the state to resort to illegal means developed a discourse and attitude justifying and legitimizing the granting of judicial immunity to institutions such as TAF, positioned at the centre of deep state trials, and to their members. This attitude

of partiality, no doubt fed from the idea of the sacredness of the state, used an aggressive and disproportionate style even against initiatives to overcome the immunity shield.

The media's failure to isolate itself from the official ideology became blatantly visible in party closure cases. Closure cases developing around the axis of "Islamic reactionism" and "separatism" threats showed that the media perceived the high judiciary as the last obstacle before an army intervention to protect the regime. In closure cases, the exact reflection of the dominant perception on the basis of the "coup-closure" dilemma, the usage of expressions naturalising and normalising the process in harmony with the official ideology, and the disproportionate language and discourses used created serious concerns about the role of the media in the democratization process.

The media tried to prove that the political parties had become the focus of "separatist" and "reactionist" activities, by arguing that the speeches and statements of party members and officials which formed the basis of the closure cases could not be considered as freedom of expression. Publishing the news originating from the State Security Court (DGM) and the police without any filters, the media demonstrated an extraordinary harmony with the official ideology right from the start, and drew further and further away from the criteria of impartiality and objectivity. In the DEP case, the majority of the media launched a campaign to justify and legitimize the lifting of the immunities of the deputies by the Parliament without waiting for the result of the case. This consensus and harmony achieved by virtually the whole media in the DEP case was somewhat dispersed in the RP closure case due to secular-anti-secular divisions.

The member profile of the Constitutional Court and the Chief Public Prosecutors of the Supreme Court having the power to file closure cases became the elements determining the agenda and the process. Statements of the Chief Public Prosecutor and the President of the Court emphasizing the judiciary's reflex of protecting the regime surpassed the content of the cases. Hence, the media did not find it difficult to come up with conclusions and predictions on the decision to be cast by the court.

These cases, which carried great importance in terms of freedom of association and freedom of expression, were not subjected to a review in terms of democratic principles and standards such as content, procedure, compliance with democratic norms and democratization of the legislation. No heed was paid to the criteria envisaged in international human rights norms and standards and in the case laws of the European Court of Human Rights –which were formed mainly with the contribution of applications regarding Turkey.

# In Place of a Conclusion

The quality of the relationship between the "media" and the "judiciary", which is one of the driving forces in ensuring internalization and sustainability of the democratization process, and its reflections on the society, are becoming more and more important every day.

In democratic societies, the function of monitoring the activities of the basic organs, which are the legislature, the executive and the judiciary, and of conveying them to the public is one of the determining factors in why the media is called the fourth power. When done in accordance with the principals of ethics, this monitoring and conveying no doubt turns the media into a powerful instrument of democratic control, together with factors enhancing its functionality such as meeting the information needs of the society, ensuring institutional transparency and creating public opinion. However, the prerequisite for effective functioning of this control is to base this activity, which is done on behalf of the society, on ethical principles such as independence, impartiality, objectivity and conformity with facts.

However, in practice, the position of the media does not always develop in accordance with this function. The growing and expanding commercial activities of media organizations and the relationships of mutual interest they build with institutions cause a change in the positioning of the media in democratic control. This situation brings with it the danger of a media perceiving and reflecting the events and facts not within their own realities but on a legitimizing ground based on commercial concerns and interests.

In this context, it is possible to summarize the characteristics echoing the perception of the media regarding critical trial processes. The first of these characteristics is that the media adopts a line based on the rights and freedoms of the society and which approves and supports the institutionalization of a nationalistic judiciary, which goes beyond a judicial institutionalization in compliance with democratic standards.

This approach, which sanctifies the best interests of the state and justifies resorting to illegal means by institutions for the sake of these interests, naturally perceives the function of the judiciary as a priority to protect the regime and the state. In this perception, the democracy needs and expectations of the society

with regard to judicial processes are pushed to the background. Hence, critical trial processes followed a line where new points of division emerged at every opportunity and which supported the maintenance of the status quo.

In connection with this, another characteristics of the perception of the media with regard to the judiciary is the care and importance attributed by the media to balance calculations and institutional sensitivities (mostly of the army), even when the topic is independent and impartial judiciary. In almost all critical trials, the judiciary was expected to and desired to act in accordance with the same sensitivity. Every development associated with the TAF in judicial processes was perceived as an attempt to weaken the army. This institutional privilege and supremacy attributed to the army found its exact echo on judicial independence, judge guarantee, immunity, fair trial and evaluation of deep state organizations. Based on this approach, it can be said that the media fulfils its function of informing the public about judicial dispositions on the basis of legitimacy and with a militarist perspective.

Another characteristic is that the media addresses events and facts with no concerns of delving deeper on the conceptual and theoretical plane, with a method based on fruitless contentions with too many polemics targeting the opponents, and in total disregard of ethical principles. With this method, which does not touch on the essence or content of judicial dispositions, it cannot be said that the media has managed to keep to a line that clears the path and enables the democratisation of the judiciary and the society in accordance with the requirements of the freedom of expression and criticism. Against this tangible situation, the function of the media has failed to go beyond serving to reify and procure acceptance for facts and events in general, let alone revealing the truth and changing the status quo.

Nonetheless, we should not ignore the attitude adopted by those remaining outside the prevailing trend in the media, taking a concerned interest in democratization and transparency in the society and in the judiciary, without holding back any criticisms to this effect. We cannot deny the contribution and decisive role of journalists and writers who sometimes penned outbursts conflicting with the publishing line of their own newspapers, who demonstrated an attitude that went ahead of the judiciary and contributed greatly in recovering the truth, who sometimes engaged in insistent follow-ups on judicial processes and who pointed at the double standards practiced in the judiciary in favour of defendants in critical cases in an effort to inform the public about the actual facts behind the events, and who stood apart with their eccentric stances. This study made considerable use of such news, commentaries and reviews presenting concrete data on the backgrounds of events and developments.

# About the Authors

### SUAVİ AYDIN

Born in 1962 in Ankara, he graduated in 1986 from Hacettepe University, Department of Sociology. After receiving his MA from the same Department, he received his PhD from the Hacettepe University, Department of Anthropology, where he still works as a lecturer. His studies focus mainly on ethnicity, nationalism, the state problematique, ethno-history, local history and settlement history. Still a member of the editorial boards of magazines *Toplum ve Bilim*, *Tarih ve Toplum* and *Kebikeç*, he has many published articles, and also many published studies, including *Modernleşme ve Milliyetçilik* (1993), *Kimlik Sorunu, Ulusallık ve "Türk Kimliği"* (1998), *Mardin: Aşiret, Cemaat, Devlet* (2000 – co-authred by Kudret Emiroğlu, Oktay Özel and Süha Ünsal), *Antropoloji Sözlüğü* (2003 – co-authored by Kudret Emiroğlu), *Küçük Asya'nın Bin Yüzü: Ankara* (2005, co-authored by Kudret Emiroğlu, Ömer Türkoğlu and E. Deniz Özsoy).

### MERYEM ERDAL

Born in 1966 in Adana, she graduated in 1988 from Ankara University, Faculty of Law. She wrote her first book, *Gözaltında Tecavüz* (Çiviyazıları, 1997) based on her observations and experiences during her anti-torture works. She gave conferences and published articles on state-led violence towards women and rape as a dirty war method. In addition to her books *Son On Yılda Geçirdiği Değişikliklerle Türk Hukuk Mevzuatında İşkence* (İHD, 2004), *İşkence ve Cezasızlık 2005* (TİHV, 2005), and *Soruşturma ve Dava Örnekleriyle İşkencenin Cezasızlığı Sorunu* (İHD, 2006), in which she analyzes the place of torture in the legislation, she has numerous articles on international mechanisms and independent monitoring mechanisms in preventing torture. Meryem Erdal worked as legal consultant in TESEV's Project titled, *Civil Capacity Building and Democratic Awareness Raising on Security and Human Rights*.

## MİTHAT SANCAR

Born in 1963 in Nusaybin, he graduated from Ankara University's Faculty of Law in 1984. In 1985-1990, he worked as research assistant at the Faculty of Law of Dicle University. He received his MA and PhD degrees from the Ankara University. In addition to his books *"Devlet Aklı" Kıskacında Hukuk Devleti* (2000), *Mülteciler ve İltica Hakkı* (2002, co-authored by Bülent Peker) and *Geçmişle Hesaplaşma - Unutma Kültüründen Hatırlama Kültürüne* (2007), he has had a huge number of articles published in various magazines and journals. After working as a columnist in the *Birgün* newspaper, he began writing in the daily newspaper *Taraf*. He still works as a professor at the Ankara University, Faculty of Law.

## EYLEM ÜMİT ATILGAN

Born in 1975 in Gaziantep, she graduated from Ankara University's Faculty of Law, and was accepted as an assistant at the same Faculty in the Department of Philosophy and Sociology of Law. She completed her MA with her thesis "Aristotales'in Devlet Kuramı ve Modern Kuramlara Katkısı", and her PhD with her thesis "Kentte Suça Karışmış Çocuklarda Toplumsal Ortam ve Ceza Ehliyeti Araştırmaları". She still works at the same Faculty as associate professor.

**Perceptions and Mentality Structures**

## Just Expectations

## A Compilation of TESEV Research Studies on the Judiciary in Turkey

Since the European Union membership process has gained a central position in politics, Turkey has become focused on reforms and change. Turkey's need for reform perhaps shows itself most keenly at the state institutions. It looks like it is a must for virtually the entire bureaucracy, and mainly the armed forces, the judiciary and the police, to restructure in terms of mentality, organization and functions. Taking this into consideration, Turkish Economic and Social Studied Foundation (TESEV) Democratization Program (DP) decided to continue its studies on "Perceptions and Mentalities" with bureaucratic institutions and address the judiciary as the first institution.

One of the main reasons behind this choice was that there were very few studies on the judiciary, an institution that is in a central position in terms of democratization, law, and state-citizen relations in Turkey. Taking this shortcoming into account, a research series comprised of three separate studies that complement each other were prepared with an aim to inform and guide the public debate on the judiciary in Turkey. Based on these research projects conducted between early 2007 and mid-2009, TESEV DP published three separate books on judiciary in Turkish.

The first book authored by Mithat Sancar and Eylem Ümit Atılgan attempted to shed light on the mentalities of judges and prosecutors and how they approach the concepts of state, justice and rights. The second book authored by Mithat Sancar and Suavi Aydın aimed to determine the perception of justice in the society and the functionality attributed to the judiciary as an institution in the public mind. The third book authored by Meryem Erdal takes a look at the press as an essential area for the institutional transformation of the judiciary based on democratic principles and norms as well as for the formation of the social perception that seeks a transformation as such.

This English edition consists of an extensive summary of each of these three books with the aim to present their core findings in one volume.

Turkey's requirements in its democratization process are the formation of a citizenship in conformity with the universal norms recognized today, along with its administrative mechanisms. The bureaucracy of law and, hence, the judiciary are in a central position as the indispensible guarantees of such a transformation. We hope that this study will make serious contributions to discussions on the reforms that will be made in such an important area...

ISBN 978-605-5832-63-6