

Turkey: the Judicial System in Peril

A briefing paper

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1. INTRODUCTION

This briefing paper analyses the current state of the independence of the judiciary and prosecution service, and threats to the security and independence of lawyers in Turkey, in light of applicable international law and standards. It draws on a research mission to Turkey conducted by the International Commission of Jurists (ICJ) in December 2015. The mission visited Istanbul and Ankara, and met with lawyers, NGOs, associations of judges, bar associations, the High Council for Judges and Prosecutors (HSYK), and the Ministry of Justice, as well as academic experts and international organizations. The ICJ is grateful for the co-operation and support of all those with whom it met, and for the openness of the Turkish authorities to discussion of the ICJ's concerns in relation to the administration of the judiciary and prosecution service.

National Context

Since 2014, there have been a series of alarming developments affecting the institutions of the Turkish judicial system, including retrogressive amendments to the legislative framework, increased executive control in practice of the governing institutions of the judiciary and prosecution service; the arrest, dismissal and arbitrary transfer of judges and prosecutors; and recurring instances of violence and threats against lawyers. There are strong indications that, taken together, these measures may amount to a concerted attack on the independence of the judiciary, prosecution and legal profession, whose integrity and effectiveness is essential to the operation of the Turkish justice system and to the maintenance of the rule of law.

The extension of executive control over the judiciary and prosecution service takes place at a time when the protection of human rights and the rule of law in Turkey are being severely curtailed. Freedom of expression by the media, academia and the general public have been subject to repressive measures, apparently for the purposes of political control and suppression of dissenting or unwelcome opinion.¹ Criticism of the ruling party, and in particular of the President, has been strongly suppressed; journalists have been arrested, and media organizations subjected to closure or deprived of independence.² There has been an alarming escalation in the number of prosecutions for speech offences, in particular for "insult to the President". The EU and Venice Commission have noted that 962 investigations for such offences were launched in the first half of 2015 alone.³ These measures, enforced through the courts, are closely linked to attempts by the government to gain greater control over the justice system, including the judiciary and prosecution.

Politically, the move towards undue executive influence over the judiciary and prosecution is grounded in the ruling Justice and Development Party's (AKP) battle with the Gülen movement, a religious-based organization led by Fethullah Gülen, which was, until 2013, closely allied with the AKP party. Following its split with the Gülen movement, President Erdogan alleged that the movement has been seeking to seize power in Turkey by forming a "parallel State", infiltrating State institutions, including the judiciary, prosecution and law enforcement authorities, with its representatives.⁴ The Government, as well as prosecutors in cases concerning the Gülen movement, have labelled it as a criminal and

¹ Amnesty International, Annual Report, Turkey 2015/2016, <https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/>; OHCHR, Turkey: Zeid concerned by actions of security forces and clampdown on media, 1 February 2016; PEN International, Turkey: Arrest of Academics is an unacceptable violation of freedom of expression, 15 January 2016.

² OHCHR, Turkey / freedom of expression: UN expert raises alarm at government's seizure of independent media group, 8 March 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17172&LangID=E>; Human Rights Watch, World Report 2015, Turkey, <https://www.hrw.org/world-report/2015/country-chapters/turkey>; Council of Europe Commissioner for Human Rights, Commissioner Muižnieks deplores new case of judicial harassment against media in Turkey, 4 March 2016, <http://www.coe.int/en/web/commissioner/-/commissioner-muiznieks-deplores-new-case-of-judicial-harassment-against-media-in-turkey?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>.

³ European Commission for Democracy through Law (Venice Commission), CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11–12 March 2016), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e); European Commission, Turkey 2015 Report, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 10 November 2015, SWD(2015) 216 final, p. 64.

⁴ BBC, Turkey's Erdogan battles "parallel state", 17 December 2014, <http://www.bbc.com/news/world-europe-30492348>.

even a terrorist organization,⁵ and the reorganization of the institutions of the judiciary as well as measures against individual judges and prosecutors have been driven by the perceived need to purge the judiciary of Gülenist influence.⁶ Control or undue influence of the judiciary by a political or religious movement that distorts individual judges' decision making would indeed be a cause for great concern. However, whether or not fears of Gülenist capture of the judiciary are correct, they appear to have opened the door to the danger of dominance of the judiciary by the executive, and to wider purges of all those not seen as loyal to government interests.

These developments also take place against the background of a deteriorating security situation in Turkey, including multiple terrorist attacks. Mounting tension in the southeast of Turkey related to the breakdown of the peace process with the Kurdistan Workers' Party (PKK) in 2015,⁷ has also affected the work of some judges, prosecutors and lawyers. There have been allegations of serious human rights violations related to anti-terrorism operations by the security forces and the imposition of highly restrictive curfews in the southeast.⁸ It was in this context that the head of the Diyarbakır Bar Association, Tahir Elçi, was prosecuted for publicly stating that the Kurdistan Worker's Party (PKK) is not a terrorist organization. Tahir Elçi was killed in unclear circumstances in November 2015, raising serious concerns for the security of lawyers in Turkey.⁹ During its mission to Turkey, which took place in the immediate aftermath of Mr Elçi's death, the ICJ was struck by the widespread shock and concern at the killing and at its implications for the security and effective functioning of the legal profession in Turkey.

International law and standards

An effective justice system, with an independent and impartial judiciary, an independent legal profession and a functionally independent prosecution service is an essential foundation for the rule of law and for the protection of human rights. Developments in the judiciary, prosecution and legal profession in Turkey must therefore be assessed in the framework of its obligations under international human rights law, including under the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which affirm the right to a fair hearing before an independent and impartial tribunal, and the right to an effective remedy for violations of human rights. The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, has held that ". . . [i]n determining whether a body can be considered to be "independent"—notably of the executive and of the parties to the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."¹⁰

International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors, also provide authoritative standards against which recent developments in the Turkish judicial system should be measured.

⁵ The Guardian, Turkey arrests more journalists, alleging "terrorist" link to Erdogan opponent, 2 September 2015, <http://www.theguardian.com/media/2015/sep/02/turkey-arrests-more-journalists-alleging-terrorist-links-to-erdogan-opponent>.

⁶ ICJ meeting with the Ministry of Justice, December 2015.

⁷ The Guardian, Turkey says Kurdish peace process impossible as NATO meets, 28 July 2015, <http://www.theguardian.com/world/2015/jul/28/turkey-erdogan-not-possible-peace-process-kurdish-militants>.

⁸ Council of Europe Commissioner for Human Rights, Turkey should ensure the protection of human rights in the fight against terrorism, 18 November 2015, <http://www.coe.int/en/web/commissioner/-/turkey-should-ensure-the-protection-of-human-rights-in-the-fight-against-terrorism?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>.

⁹ OHCHR, Turkey: UN rights expert condemns killing of Tahir Elçi and calls for thorough, independent and transparent investigation, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16827&LangID=E#sthash.LpR9uCEc.dpuf>.

¹⁰ See *Campbell and Fell v. the United Kingdom*, ECtHR, Application No. 7819/77, Judgment of 28 June 1984, para. 78. See also, UN Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

There has already been international criticism of Turkey, notably by the Venice Commission,¹¹ for its failure to comply with international law and standards in respect of the independence of judges, prosecutors and lawyers.¹² The European Union, in the context of the prospective accession of Turkey to the EU, has expressed concerns regarding erosion of judicial independence in Turkey, most recently in its accession report on Turkey in November 2016.¹³ In the following sections, the ICJ provides its assessment of the compliance of Turkish law and practice with international law and standards and makes recommendations designed to ensure compliance with them.

¹¹ Venice Commission, Declaration on Interference with Judicial Independence in Turkey, 20 June 2015, <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>; See also Council of Europe, Consultative Council of European Judges, Challenges for judicial independence and impartiality in the member states of the Council of Europe, 24 March 2016, [http://www.coe.int/t/dghl/cooperation/ccje/textes/sginf\(2016\)3rev%20challenges%20for%20judicial%20independence%20and%20impartiality.asp?#P231_17807](http://www.coe.int/t/dghl/cooperation/ccje/textes/sginf(2016)3rev%20challenges%20for%20judicial%20independence%20and%20impartiality.asp?#P231_17807).

¹² See also, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to Turkey, A/HRC/20/19/Add.3, 4 May 2012, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-19-Add3_en.pdf.

¹³ European Commission, Turkey 2015 Report, *op. cit.*, sections 2.3 and 2.43.

2. NATIONAL LEGAL FRAMEWORK

Judicial Independence under the Turkish Constitution

The principle of the rule of law is enshrined in article 2¹⁴ of the Turkish Constitution which describes the State as “a democratic, secular and social state governed by the rule of law”. In the Turkish legal system, the Constitution is the supreme law of the land and all laws, executive, legislative and judicial organs, administrative authorities, institutions and individuals are bound by its provisions and must comply with them.¹⁵

The independence of the Turkish courts is stipulated in article 138 of the Constitution as follows:

- Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, 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.
- 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.

Article 139 establishes the security of tenure of judges and public prosecutors. It stipulates:

- Judges and public prosecutors shall not be dismissed, or unless they request, shall not be 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 a court or a 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 because of ill health, or those determined as unsuitable to remain in the profession, are reserved.

Article 140 of the Constitution and article 4 of the Law No. 2802 on Judges and Prosecutors establish that “judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges.”

The structure of the courts

Under article 9 of the Constitution, the judicial power is exercised by “independent courts on behalf of the Turkish nation.” Within the judicial system, there are six higher courts with separate jurisdictions: Constitutional Court, High Court of Appeals, Council of State, High Military Court of Appeals, High Military Administrative Court and Court of Jurisdictional Disputes.

Historically, the Turkish Republic has often resorted to special criminal procedures applied by special courts to crimes against the security of the State and against the constitutional order. Such courts are no longer in operation: State Security Courts were abolished in 2004¹⁶ and criminal courts with special powers (Specially Empowered Courts), the heirs of State Security Courts, were abolished in February 2014,¹⁷ a progressive step, given the failure of such courts to uphold the right to fair trial.¹⁸

¹⁴ Article 4 of the Constitution.

¹⁵ Article 11 of the Constitution.

¹⁶ Law No. 5190 on the Amendment to the Law on Criminal Procedure and the Abolishment of the State Security Courts (adopted on 16 June 2004), article 3.

¹⁷ Law No. 6526 on the Amendments to the Law on Fight against Terrorism, the Law on Criminal Procedure and certain laws (adopted on 6 March 2014), article 1.

¹⁸ TESEV, Assessment on Changes regarding the Specially Empowered Judicial System in Turkey, Hande Ozhabes, April 2014; Report of the Special Rapporteur on the Independence of Judges and Lawyers, *op. cit.*, paras. 47–54; *Incal v. Turkey*, ECtHR, Application No.2278/93, Judgment of 9 June 1998.

Constitutional Court

The Constitutional Court is the only court within the constitutional jurisdiction. It is composed of seventeen members,¹⁹ three of whom are selected by the Grand National Assembly and fourteen by the President of the Republic. Of the three members selected by the Grand National Assembly, two are selected from among candidates nominated by the Court of Auditors (Cour de Comptes) and one from candidates nominated by the heads of bar associations. Of the members selected by the President of Republic, four are appointed by the President directly; the other ten are appointed from the candidates nominated by the High Court of Appeals (three members), the Council of State (two members), the High Military Court of Appeals (one member), the High Military Administrative Court (one member), and the Council of Higher Education (three members).²⁰

The Constitutional Court has the power to review the constitutionality of laws in both form and substance and to review constitutional amendments in form only.²¹ It can decide on individual applications,²² and has jurisdiction to try the President, the Prime Minister or the members of the high courts or the military in its capacity as the Supreme Court;²³ to decide on the dissolution of political parties; auditing of political parties; and to review decisions on lifting parliamentary immunity of a member of Parliament and the loss of membership of a member of Parliament.

Civil and Criminal Courts

The High Court of Appeals is the highest court in the civil and criminal jurisdictions. It has power to review the judgments of first instance civil and criminal courts. Its members are appointed by the High Council of Judges and Prosecutors (HSYK).²⁴ It is composed of two plenary chambers, one for civil and one for criminal cases, under which operate thirty-eight chambers. A legal framework for district or regional courts of justice was formally established in 2004 but at the time of writing these courts were not yet operational.²⁵

First instance civil courts are divided into two categories: general courts (including civil courts of peace and civil courts of general jurisdiction) and specialized courts (including family courts, commercial courts, cadastral (real property) courts, labour courts and civil courts for intellectual and patent rights).

First instance criminal courts are divided into three categories: criminal courts of general jurisdiction, assize courts and the recently established "criminal judgements of the peace" which supervise criminal investigations (see further below).²⁶ There are also specialized assize courts for juveniles.

Council of State and administrative courts

The Council of State is the highest tribunal of administrative jurisdiction, with the power to review the decisions and judgments of all administrative courts. It is also entitled to give opinions on government bills.²⁷ Three quarters of its members are appointed by the HSYK and the remaining quarter by the President of the Republic. First instance administrative courts include general administrative courts and tax courts. The judgments of these courts can be challenged before the regional administrative courts for appeal, and, ultimately, before the Council of State.

¹⁹ Article 146/1 of the Constitution. The constitutional amendments of 2010 increased the number of its members from eleven to seventeen.

²⁰ Article 146 of the Constitution sets out the full election procedure and the minimum qualifications of the members.

²¹ Article 48 of the Constitution.

²² Article 148 of the Constitution.

²³ Article 148/6 and 7 of the Constitution.

²⁴ Article 154/2 of the Constitution.

²⁵ Law No. 5235 relating to the Establishment, Functions, and Competencies of First Instance and Regional Courts of Justice enabled the establishment of regional courts in 2004. Regional courts are due to begin operating in July 2016 according to the decision of the Ministry of Justice published in the Official Gazette on 7 November 2015.

²⁶ The criminal courts of peace were replaced by criminal judgements of peace in 2014 by the Law No. 6545. Both are composed of one judge.

²⁷ Article 155/2 of the Constitution.

Military Courts

There are two high courts of military jurisdiction: the High Military Court of Appeals and the High Military Administrative Court. Members of both courts are appointed by the President of the Republic. The High Military Court of Appeals has the power to review judgments of first instance military courts and military disciplinary courts which “have jurisdiction to try military offences committed by military personnel and offences committed by military personnel against military personnel or related to military services and duties.”²⁸ Civilians cannot be tried in military courts.²⁹ The High Military Administrative Court is the sole court entitled to review “disputes arising from administrative acts and actions involving military persons or relating to military service, even if such acts and actions have been carried out by non-military authorities.”³⁰

Court of Jurisdictional Disputes

The Court of Jurisdictional Disputes has the power to deliver final judgments on disputes between civil, administrative, and military courts related to their jurisdiction and judgments.³¹ Its members are appointed by the Constitutional Court.

The prosecution service

Turkish prosecutors form part of the judicial system, although they have distinct powers and functions to those of judges.³² Prosecutors have powers and competences in civil and criminal, administrative and military jurisdictions. Only those working in civil and criminal jurisdictions are named as “public prosecutors”. They include the chief public prosecutor of the High Court of Appeals, chief public prosecutors of cities and districts, deputy-chief public prosecutors and ordinary public prosecutors.³³ In the administrative jurisdiction, prosecutors work for the Council of State, except in the first instance and district administrative courts. Military prosecutors, similar to public prosecutors, serve both first instance and high military courts. Chief and deputy-chief prosecutors of the High Court of Appeals and High Military Courts are appointed by the President of the Republic.³⁴ The chief public prosecutor of the Council of State is elected by the Council’s plenary.³⁵

The role of public prosecutors is particularly important in Turkey during the pre-trial phase of criminal proceedings. They have the duty to investigate the facts promptly after being informed about a crime³⁶ and must gather and secure evidence both in favour of and against the suspect. Throughout the investigation, the judicial police are under the command of public prosecutors.³⁷ If the public prosecutors believe that there is sufficient suspicion of a crime, they are obliged by law to file indictments.³⁸

The role of lawyers

Under Turkish law, the work of lawyers is described as an independent public service.³⁹ In order to practice law, a lawyer must be registered with the bar association of the city where he/she resides, after the end of a one-year internship. The bar associations, including the Union of Turkish Bar Associations at national level and the regional bar associations, are responsible for the admission of candidates to the profession, the regulation and the conduct of their internship and disciplinary investigations.

The Ministry of Justice retains a significant role in the admission of lawyers to the profession and in their disciplinary system. The admission decisions of the Union of Turkish

²⁸ Article 145 of the Constitution.

²⁹ Article 145/2 of the Constitution.

³⁰ Article 157 of the Constitution.

³¹ Article 158 of the Constitution.

³² Article 139 and 140 of the Constitution.

³³ Article 3 (b) of the Law No. 2802 on judges and prosecutors.

³⁴ Article 104/2 (c) of the Constitution.

³⁵ Article 155/4 of the Constitution.

³⁶ Article 160 of the Law on Criminal Procedure.

³⁷ Article 161 of the Law on Criminal Procedure.

³⁸ Article 170 of the Law on Criminal Procedure.

³⁹ Article 1/1 of the Law on Practice of Law.

Bar Associations are subject to the approval of the Ministry, which is also needed to launch criminal investigations and impose some disciplinary measures against lawyers.⁴⁰

The High Council for Judges and Prosecutors

The High Council for Judges and Prosecutors (HSYK) is the centralized body responsible for the organization of the judiciary, with power to decide on admission, appointment, transfer, promotion, disciplinary measures, dismissal, and supervision of judges and public prosecutors. The Constitution describes the powers of the HSYK as follows:

The Council shall make the proceedings regarding the admission of judges and public prosecutors of civil and administrative courts into the profession, appointment, transfer to other posts, the delegation of temporary powers, promotion, and promotion to the first category, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office; it shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions given to it by the Constitution and laws.

Constitutional amendments enacted in 2010 transferred the power of supervision of the Judiciary and the prosecution service from the Ministry of Justice to the inspectors of the HSYK,⁴¹ with regard to the performance of their duties in accordance with laws, regulations, by-laws and circulars. Investigation into whether judges have committed offences in connection with, or in the course of, their duties, and into whether their behaviour and conduct are in conformity with the requirements of their status and duties, are carried out by the Council's inspectors, with the permission of the President of the HSYK. The inquiries and investigations may also be carried out by a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated.⁴²

The HSYK is composed of twenty-two regular and twelve substitute members. The Minister of Justice is its ex officio President and the Undersecretary to the Ministry of Justice is an ex officio member.⁴³ Of the remaining members, four are selected by the President of the Republic; five members (and five substitute members) are selected by the plenaries of the High Court of Appeals and Council of State; one member (and one substitute member) by the Justice Academy of Turkey; and ten members (and six substitute members) by the senior civil and administrative judges and prosecutors.⁴⁴ Elections for membership of the HSYK are held every four years.

⁴⁰ Articles 8, 58 and 71 of the Law on the Practice of Law.

⁴¹ Law No. 5982 on the Amendments to certain provisions of the Constitution of the Turkish Republic (adopted on 7 May 2010; entered into force on 23 September 2010).

⁴² Article 159/9 and 10. The Board of Inspectors was established within the HSYK after the adoption of the Law on the HSYK. Articles 14 and 15 of this law regulate the composition and powers of the Board.

⁴³ Article 159/3.

⁴⁴ Law No. 6087 on the High Council of Judges and Prosecutors, article 18.

3. ISSUES OF CONCERN

Independence and politicization of the judiciary

International standards

The separation of powers, particularly between the political branches of government and the judiciary, is a core precept of the rule of law. Central to this principle is that the judiciary must be, structurally and in practice, independent. Thus, the universally accepted principle is that: “[t]he 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 governmental and other institutions to respect and observe the independence of the judiciary.”⁴⁵

Situation in Turkey

Both the institutional independence of the judiciary and the personal independence of individual judges are significantly compromised in Turkey by the politicization of the judiciary and its institutions. “Politicization” in this context means actions which tend to blur the distinctive function and character of the judiciary and effectively make them instruments of the political branches of government. This may be brought about by “inappropriate or unwarranted interference with the judicial process” by political actors; including direct or indirect “restrictions, improper influences, inducements, pressures, threats or interferences”.⁴⁶ It may also be brought about by formal, legal and structural arrangements which impose impediments to the independent functioning of the courts. In some instances, it may be caused by the posture and attitudes of individual judges themselves.

The ICJ was told by numerous interlocutors that inappropriate political influence on the judiciary is by no means a new phenomenon in Turkey. It is clear that in recent decades, the judiciary has been a battleground for different political interests—nationalist, Gülenist, AKP—which have vied for influence and control, and have held significant sway over the judiciary and its institutions at different times.⁴⁷ This deeply rooted tradition of politicization has laid the ground for recent moves towards a more direct capture of the judiciary, by the executive itself, not only by political interests associated with or allied to the government. Since 2014, through a combination of legislative measures, institutional reforms initiated by the executive, and arbitrary application of criminal and disciplinary sanctions, the executive has asserted an unprecedented degree of control of the judiciary, and has taken steps towards purging it of those judges perceived to have affiliations to interests other than those of the governing party.

The Government, including the Ministry of Justice,⁴⁸ have justified the arrest, prosecution and disciplinary measures against judges since 2014 as a purge of Gülenist “parallel state” interests which had sought to infiltrate and seize control of the judiciary, as well as other core State institutions, to further their own interests. This is represented as a threat to the security of the State, as a potential “judicial coup” and even sometimes as a “terrorist” threat. Other commentators told the ICJ, however that, prior to 2013, the AKP facilitated and encouraged Gülenist control of the judiciary, since the movement was aligned to and furthered the government’s interests. The AKP’s split with the Gülenist movement seems to have precipitated action to assert more direct control, and the purge of Gülenist judges appears to have also involved an opportunistic attack on other independent judges not seen as sufficiently favourable to the wishes of the executive.

The ICJ is not in a position to assess the extent of Gülenist influence within the judiciary or prosecution, currently or in the past. Whatever the reality of such influence, it cannot justify executive control of the judiciary and its institutions. Many of those with whom the mission met noted that there are now unprecedented levels of pressure, division, distrust and fear in the Turkish judiciary. There are alarming signs that this

⁴⁵ UN Basic Principles on the Independence of the Judiciary, Principle 1.

⁴⁶ UN Basic Principles on Independence of the Judiciary, Principles 2 and 4.

⁴⁷ See for example, ICJ, The Independence of Judges and Lawyers in the Republic of Turkey report of a mission, 14–25 November 1999, pp. 98–101.

⁴⁸ Meeting of the Ministry of Justice with the ICJ, December 2015.

has already led to manipulation of the judicial system on political grounds, including to target government opponents, or to criminalize and prosecute criticism of the government.⁴⁹ Of particular concern, as noted above, is the high number of prosecutions for offences restricting freedom of expression, in particular for the offence of “insulting the President”.⁵⁰

In this politicized environment, what is missing is a conception and culture of the judiciary as a politically uncompromised power, which can hold the executive as well as other interests to account through impartial adjudication in accordance with the rule of law. This idea of the role of the judiciary is expressed in the UN Basic Principles on the independence of the judiciary which affirms that the “judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁵¹ The UN Human Rights Committee has stated that to respect and fulfil the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights (ICCPR), “States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making [and it is necessary to protect judges against conflicts of interest and intimidation.”⁵²

It is also a matter of concern for judicial independence in Turkey that representatives of the executive have publicly refused to accept or implement certain decisions of the courts and have strongly criticized the judiciary and judicial decisions as politically biased against the Government. Such actions undermine the judiciary’s credibility, in a manner that risks representing the independent exercise of judicial power as political conspiracy against the Government.⁵³ Notably, President Recep Tayyip Erdoğan, following a decision of the Constitutional Court in February 2016 finding the detention of two journalists unconstitutional as in violation of rights to liberty and security and freedom of expression, stated that he “does not accept” and “will not abide by” the ruling of the Constitutional Court.⁵⁴ Such comments undermine the principle of separation of powers and the independence of the judiciary, and run counter to international standards and obligations of Turkey, including under article 6 of the European Convention on Human Rights, article 14 of the ICCPR and the UN Basic Principles on the Independence of the Judiciary, which stipulates in Principle 1 that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The Council of Europe’s Recommendation on judges further specify that “the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges’ decisions, other than stating their intention to appeal.”⁵⁵

The influence of the Executive on the HSYK

International standards

In accordance with international standards on the independence of the judiciary, the governing bodies of the judiciary must be independent of the executive and legislative

⁴⁹ See above, Section 1, “National context”. See also, Human Rights Watch, World Report 2015, *op. cit.*; European Commission, Turkey 2015 Report, *op. cit.*, pp. 9, 23, 64; Venice Commission, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, *op. cit.*

⁵⁰ According to the European Commission Turkey 2015 Report, p. 64, files submitted to the Ministry of Justice for permission to launch investigation on insult to the President increased from 397 in 2014 to 962 in the first six months of 2015. In the first six months of 2015 the Ministry of Justice authorised judicial investigation in 486 files. See also, Venice Commission, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, *op. cit.*, para. 52.

⁵¹ Basic Principles on the independence of the judiciary, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 2. See also, Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”), 1985, article 2.

⁵² Human Rights Committee, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, section III.

⁵³ See, European Commission, Turkey 2015 Report, *op. cit.*, para. 57.

⁵⁴ Comment of 28 February, The Independent, Turkey’s President Erdogan rejects court ruling to free journalists, 28 February 2016, <http://www.independent.co.uk/news/world/europe/turkey-recep-tayyip-erdogan-rejects-court-ruling-to-free-journalists-can-dundar-and-erdem-gul-a6901726.html>.

⁵⁵ Council of Europe Recommendation on judges: independence, efficiency and responsibilities CM/Recommendation(2010)12, para. 18.

powers. The European Charter on the Statute for Judges envisages an authority “independent of the executive and legislative powers” for every decision “affecting the selection, recruitment, appointment, career progress or termination of office of a judge”.⁵⁶ The Council of Europe’s European Commission for Democracy through Law (Venice Commission), which is charged with providing legal advice to its Member States, has stressed the importance of establishing “a politically neutral High Council of Justice or an equivalent body.”⁵⁷ International standards indicate that a majority of the members of such a body should be judges elected by their peers⁵⁸ in order to avoid their becoming “merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly”.⁵⁹

Situation in Turkey

In Turkey, changes to the structure, procedures and personnel of the HSYK have significantly undermined the institutional independence of the judiciary from the executive, reversing the gains from the constitutional reforms enacted in 2010.

The constitutional amendments of 2010 retained the Minister as *ex officio* president of the HSYK, and the Undersecretary of the Ministry of Justice as an *ex officio* member—which was and remains at odds with international guidance on the composition of Judicial Councils—but put in place a system of elections to the HSYK by all ranks of the judiciary, which means that a significant majority of HSYK members were judges elected by their peers, in conformity with international standards. Before the adoption of these amendments, the HSYK was composed of only seven regular and five substitute members, all except two of whom were appointed by the President of the Republic from among candidates nominated by the plenaries of the High Court of Appeals and the Council of State. Following the Constitutional amendments of 2010, the influence of the Ministry of Justice on the composition of the HSYK was, in theory, significantly limited.

Importantly, the 2010 Constitutional amendments established the HSYK’s administrative and budgetary autonomy from the Executive. According to the Law on the High Council of Judges and Prosecutors, adopted in 2010, the HSYK has its own budget and its own staff and premises.⁶⁰ The 2010 amendments also subjected decisions on dismissal of judges and prosecutors to judicial review, but left exempted other decisions and measures taken by the HSYK—such as transfer of judges.⁶¹ They further provided that the President of the HSYK (i.e. the Minister of Justice) is responsible for the administration and the representation of the HSYK but cannot participate in the work of the chambers. The undersecretary of the Ministry of Justice, in his or her capacity as an *ex officio* member, does however participate in the work of the chambers.

The legislative amendments of 2014 (Law No. 6524) allowed for the re-assertion of ministerial control of the HSYK, significantly eroding the institutional independence of the judiciary. The political context for these amendments was a December 2013 corruption crisis, involving the arrest and investigation of family members of government ministers, several businessmen and a mayor on charges of corruption.⁶² Amendments to the regulation on the judicial police were introduced in the wake of this crisis, obliging police officers involved in prosecutorial criminal investigations to inform administrative authorities about their investigation. A public statement by the HSYK criticizing these measures as weakening the independence of the judiciary provoked a hostile reaction

⁵⁶ European Charter on the Statute for Judges, 1998, Principle 1.3.

⁵⁷ Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5.

⁵⁸ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CoM Recommendation (2010)12, para. 27. See also the European Charter on the Statute for Judges, Principle 1.3 (“at least one half of those who sit are judges elected by their peers”).

⁵⁹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28. See also, Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

⁶⁰ Article 5 of the Law on the High Council of Judges and Prosecutors presents the organization of the HSYK and article 44 of the same law states that “the Council is governed with its own general budget”.

⁶¹ This position is criticized by Gabriela Knaul, Report of the Special Rapporteur on the independence of judges and lawyers: Mission to Turkey, UN Doc. A/HRC/20/19/Add.3, 4 May 2012, para. 30; See also, Thomas Giegerich, Judicial Independence in Turkey with Particular Emphasis on the High Council of Judges and Prosecutors, 5 February 2015, p. 4.

⁶² See Today’s Zaman, Highlights of major corruption, bribery operations of 17 and 25 December 2013: http://www.todayzaman.com/anasayfa_highlights-of-major-corruption-bribery-operations-of-dec-17-25_357703.html.

from the government, including the Prime Minister⁶³ swiftly followed by legislation to amend the governance of the HSYK.

The 2014 law gave the power to the Minister of Justice, as *ex officio* President of the HSYK, to determine the composition of the Council's chambers.⁶⁴ In turn, the chambers of the Council were accorded stronger powers—at the expense of the Plenary of the HSYK—to elect their chairpersons and other office holders. The power of the President over disciplinary investigations of judges was increased and, significantly, key positions within the HSYK—the Secretary General, assistant secretaries general, the Chairman of the Board of Inspectors and the Vice-Chairmen, Council inspectors, reporting judges, and administrative personnel—were terminated, thereby giving the Minister the power to make new appointments.⁶⁵

Although in April 2014 the Constitutional Court annulled these provisions, as contrary to the constitutional guarantees of judicial independence and of the independence of the HSYK under article 159 of the Constitution, the Court's judgment had no retroactive effect and could not alter the administrative decisions already made by the Minister to terminate existing positions and make new appointments.⁶⁶ Therefore, the annulled provisions of the 2014 law still have a significant negative effect on the institutional independence of the HSYK.

In late 2014, elections took place for the HSYK members appointed by senior (known as "first-degree") judges and prosecutors that appear to have been crucial in strengthening executive control of this institution. In particular, the ICJ heard allegations that the 2014 elections were heavily influenced by the Ministry of Justice through the "Platform for Judicial Unity", an organization of judges and prosecutors established just prior to the elections, which later became the Association for Judicial Unity. It has been alleged that the Platform was used as a means to promote government-supported candidates for the elections and that the government contributed resources to and arranged meetings and advocacy for, the Platform's election campaign.⁶⁷

Government co-operation with the Platform was even acknowledged by the then Prime Minister (now President) Erdogan, when he stated on national television that he had created the Platform for the purpose of the elections. The Platform for Judicial Unity enjoyed considerable success in the elections which resulted in the election of a majority of the judges and prosecutors close to the Ministry of Justice.⁶⁸

In summary, the Ministry of Justice now holds significant and improper power within the HSYK. The Minister is *ex officio* President of the HSYK—a position that carries, at minimum, symbolic and persuasive power—though he does not have a right to vote; and the Undersecretary of State, another Executive *ex officio* member, has one vote on the Council. In addition to these formal positions, the legislative amendments of 2014, despite the judgment of the Constitutional Court, have allowed the Minister of Justice to appoint key personnel to the HYSK and to determine the composition of its chambers, including those responsible for judicial appointments, disciplinary action and transfers. As a result of the 2014 elections the Government can also count on the support of a large majority of elected members of the HSYK.

The ICJ is concerned that the Government's dominance of the HSYK has effectively co-opted this core constitutional institution to the Executive and that this undermines the independence of the judiciary, allowing it to shape the composition of the judiciary,

⁶³ At that time Prime Minister Erdoğan strongly opposed this action of the HSYK. See, Hurriyet Daily News, I would judge the Supreme Council of Judges and Prosecutors if I had the authority, <http://www.hurriyetdailynews.com/i-would-judge-the-supreme-council-of-judges-and-prosecutors-if-i-had-authority-turkish-pm.aspx?pageID=238&nID=60233&NewsCatID=338>.

⁶⁴ Article 25 of the Law No. 6524. Also see the powers of all three chambers in Article 9 of the Law on Judges and Prosecutors.

⁶⁵ Article 39 of the Law No. 6524.

⁶⁶ Constitutional Court decision E. 2014/57, K. 2014/81 (14 April 2014). According to article 153 of the Constitution, the judgments of the Constitutional Court are not retroactive. This means that the Court cannot abrogate the decisions taken before the date of the judgment.

⁶⁷ Regarding allegations of undue influence over the election process, see European Commission, Turkey report 2015, p. 56. Ergun Özbudun, Turkey's Judiciary and the Drift Toward Competitive Authoritarianism, *The International Spectator*, Issue 50/2, DOI: 10.1080/03932729.2015.1020651, pp. 42–55.

⁶⁸ Ergun Özbudun, *op. cit.*

affecting the transfer of judges and the allocation of judges to sensitive cases, and allowing channels for executive pressure on individual judges. This situation has serious consequences for the protection of human rights through the justice system.

Selection and appointment of judges

International standards

International standards on judicial independence stipulate that judges must be appointed through strict selection criteria through a fair and transparent process, which must be effective in safeguarding against appointments for improper motives.⁶⁹ Furthermore, the authorities ultimately in charge of selection and appointment of judges should be “independent of the executive and legislative powers”.⁷⁰ The Venice Commission, in its Judicial Appointments Opinion concluded that an “appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy”⁷¹ and that “[s]uch a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.”⁷²

Situation in Turkey

In Turkey, the selection process for judges and prosecutors involves a written examination held by the Centre for Measurement, Selection and Placement (OSYM), and an oral interview by a board consisting of seven members, five of them representatives of the Ministry of Justice.⁷³ Candidates must then complete two years of training. Appointments of judges and prosecutors are then made by the first chamber of the HSYK.⁷⁴

The ICJ heard widespread allegations—from different quarters including the Ministry of Justice and associations of judges—that the recruitment process for judges has been manipulated by various interests, through cheating in or corrupt marking of the examinations. The Ministry of Justice told the ICJ that a number of candidates had already had their admission to the profession cancelled because of cheating in the examination, and that there was an ongoing investigation into the possibility of Gülen-organized cheating through advance distribution of questions. Other commentators raised concerns about possible executive manipulation of the selection process, made possible by the lack of transparency of the process, and by the dominance of government interests at all of its stages.

The European Commission, in its 2015 accession report, criticized the influence of the Ministry of Justice on the interview boards.⁷⁵

It is notable that, in the past two years, large numbers of additional judges have been appointed.⁷⁶ This has been partly due to the addition of new chambers to the Court of Appeals and to the Council of State, as well as the creation of the new courts of “judge-ships of the peace” (judges of the peace). YARSAV reported to the ICJ that in 2014 the new HSYK had assigned 144 new members to the Supreme Court of Appeals and 33 new members to the Council of State.⁷⁷ There are concerns within the legal community that these new appointments are an instrument for establishing Government dominance over the judiciary.

The ICJ is concerned that the dominant role of the Ministry of Justice in the selection of judges, in particular in the oral interview, carries significant risks for judicial indepen-

⁶⁹ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 10.

⁷⁰ European Charter on the Statute for Judges, Principle 1.3.

⁷¹ Judicial Appointment, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), para. 48.

⁷² *Ibid.*, para. 49.

⁷³ Article 9 (a) of the Law on Judges and Prosecutors.

⁷⁴ Under the Law on the High Council of Judges and Prosecutors (article 9 (1)), the First Chamber is responsible for appointments. Under article 9 (3), the Third Chamber is responsible for admission to the profession.

⁷⁵ European Commission, Turkey 2015 Report, *op. cit.*, p. 57.

⁷⁶ Özbudun, Turkey’s Judiciary and Drift Toward Competitive Authoritarianism, *op. cit.*

⁷⁷ The appointments were made under two decrees of December 2014, available at: http://www.hsyk.gov.tr/duyurular/2014/aramlik/yargitay_uyeleri.pdf; http://www.hsyk.gov.tr/duyurular/2014/aramlik/danistay_uyeleri.pdf.

dence. When taken together with the influence of the Ministry within the HSYK, which is responsible for appointments, it means that the selection and appointment process as a whole is highly susceptible to Executive manipulation, and likely to be weighted against candidates who are not seen as supportive of the government. This is a matter of particular concern in the context of current attempts by the government to eliminate from the judiciary anyone whom it associates with the Gülen movement.

Criminal charges and disciplinary action against judges and prosecutors

International standards

International standards on judicial independence require that judicial administration and disciplinary action must be carried out in accordance with established standards of judicial conduct by independent bodies that include substantial judicial representation.⁷⁸ Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁷⁹ Proceedings for judicial removal or discipline should be held before a court or a board predominantly composed of members of the judiciary and, when the power to remove or discipline is vested in the legislature, the action should be taken upon a recommendation of such a court or board.⁸⁰ It is widely accepted in both European and universal standards on judicial independence, including the UN Basic Principles, that disciplinary, suspension or removal proceedings decisions should be subject to an independent review.⁸¹ The Council of Europe Committee of Ministers has stipulated that such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate to the misfeasance.⁸²

The UN Basic Principles on the Independence of the Judiciary provide that complaints against judges should be processed expeditiously and fairly under an appropriate procedure in which a judge enjoys the right to a fair hearing.⁸³ Council of Europe standards stipulate that disciplinary proceedings should be conducted "with all the guarantees of a fair trial", providing the judge with the right to challenge the decision and the sanction.⁸⁴ In matters of judicial discipline, particular importance is attached to procedures guaranteeing full rights of defence.⁸⁵

As regards prosecutors, the UN Guidelines on the Role of Prosecutors provide that disciplinary action against prosecutors must be processed expeditiously and fairly under appropriate procedures, in accordance with the right to a fair hearing and subject to independent review.⁸⁶ Disciplinary proceedings against prosecutors must guarantee an objective evaluation and decision and must be determined in accordance with the law, the code of professional conduct and other established standards and ethics.⁸⁷

International standards on the role of both judges and prosecutors affirm that they have rights to freedom of expression and association, to be exercised in a manner consistent with the dignity and ethics of their professions.⁸⁸ They should not therefore

⁷⁸ The Universal Charter of the Judge, article 11, second indent.

⁷⁹ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 18.

⁸⁰ Singhvi Declaration, article 26 (b).

⁸¹ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 20.

⁸² Council of Europe Committee of Ministers Recommendation No. R (2010) 12 to Member States on judges: independence, efficiency and responsibilities, article 69.

⁸³ The UN Basic Principles on the Independence of the Judiciary, Principle 17.

⁸⁴ The Council of Europe recommendation R (2010) 12 on judges, article 69; See also the European Charter on the statute for judges, which refers to the need for "proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation." The UN Human Rights Committee has stated that "judges should be removed only in accordance with an objective, independent procedure prescribed by law": Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc. CCPR/CO/75/MDA, para. 12.

⁸⁵ Opinion No. 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, para. 60 (b).

⁸⁶ UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990, Principle 21.

⁸⁷ UN Guidelines on the Role of Prosecutors, *op. cit.*, Principle 22.

⁸⁸ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principles 8 and 9; UN Guidelines on the Role of Prosecutors, guidelines 8 and 9.

be subject to disciplinary action or criminal charge on the basis of opinions expressed in accordance with these principles or on the basis of their perceived political opinions.

Situation in Turkey

According to the Law on the High Council of Judges and Prosecutors,⁸⁹ the third chamber of the HSYK has powers to investigate whether judges and prosecutors exercise their duties in accordance with law, including criminal law, and whether their “manners and acts” are in compliance with standards of judicial ethics. The law provides that the Minister of Justice has the power to request the review of decisions on disciplinary measures.⁹⁰ The approval of the Minister of Justice is needed before criminal investigations can be initiated against judges and prosecutors.⁹¹ Therefore, although following the 2010 constitutional amendments, the principal powers of inspection and supervision are accorded to the HSYK, the Minister of Justice appears to preserve a decisive role both in law and in practice.

Allegations, after the corruption crisis of December 2013, that judges and prosecutors had formed a Gülen movement “parallel structure” within the core institutions of State, have led to criminal as well as disciplinary charges against individual judges and prosecutors suspected of involvement in the movement.

In April 2015, the HSYK authorized the arrests of two judges of the Istanbul 32nd Court of First Instance, Metin Özçelik and Mustafa Başer, who ordered the release of 63 police officers from pre-trial detention. The police officers had been detained as a result of their investigation into the corruption allegations. Following the Istanbul Court’s order for the release of the police officers on 25 April, the Istanbul Chief Public Prosecutor’s Office refused to comply with the order for release, claiming that the judges had acted outside their jurisdiction. On 27 April, the HSYK removed the two judges from office. The HSYK also authorised their prosecution and arrest on 30 May on charges of being members of a terrorist organization.⁹² Public statements by both the Prime Minister and the President appeared to put pressure on the HSYK and prosecution service to take action against the judges.⁹³

A second case concerned four public prosecutors, Zekeriya Öz, Celal Kara, Mehmet Yüzgeç and Muammer Akkaş, who conducted a corruption investigation against persons close to the ruling Justice and Development Party (AKP), as well as a judge, Süleyman Karaçöl, involved in the same case. All five were dismissed from office by the HSYK in May 2015.⁹⁴ The Chief Public Prosecutor in Istanbul issued an arrest warrant against one of these prosecutors, Zekeriya Öz. Zekeriya Öz and another public prosecutor, Celal Kara, subsequently left Turkey.⁹⁵

In April 2015 four public prosecutors, Süleyman Bağrıyanık, Ahmet Karaca, Aziz Takçı, Özcan Şişman, who ordered the stop and search of a truck which was allegedly carrying weapons through Turkey to Syria, were suspended from office and were arrested, along with a former senior police officer, Ozkan Cokay, on charges of attempting to overthrow the Government.⁹⁶ The prosecutors were dismissed from office in January 2016.⁹⁷

⁸⁹ Article 9 (3) (b); Article 17.

⁹⁰ Article 73 of the Law on Judges and Prosecutors.

⁹¹ Article 82 of the Law on Judges and Prosecutors.

⁹² Hürriyet Daily News, Turkish Judges who ruled release of Gülen linked police officers arrested, <http://www.hurriyetdailynews.com/turkish-judges-who-ruled-release-of-gulen-linked-police-officers-arrested.aspx?pageID=238&nID=81800&NewsCatID=509>.

⁹³ *Ibid.*

⁹⁴ Hürriyet Daily News, Prosecutors, Judge of Turkey’s massive graft probe dismissed from profession, 12 May 2015, <http://www.hurriyetdailynews.com/prosecutors-judge-of-turkeys-massive-graft-probe-dismissed-from-profession.aspx?pageID=238&nID=82294&NewsCatID=509>.

⁹⁵ Daily Sabah, Gülen Movement-affiliated former prosecutors Zekeriya Öz, Celal Kara flee to Armenia through Georgia, <http://www.dailysabah.com/investigations/2015/08/10/gulen-movement-affiliated-former-prosecutors-zekeriya-oz-celal-kara-flee-to-armenia-through-georgia>.

⁹⁶ Bianet, Four prosecutors and one gendarme commander arrested, <http://bianet.org/english/human-rights/164404-four-prosecutors-and-one-gendarme-commander-arrested>.

⁹⁷ Hürriyet Daily News, Prosecutors who ordered stopping of MIT trucks dismissed, 14 January 2016, <http://www.hurriyetdailynews.com/prosecutors-who-ordered-stopping-of-mit-trucks-dismissed.aspx?pageID=238&nID=93881&NewsCatID=509>.

Most recently, on 6 March 2016, the Government-affiliated newspaper, Sabah, announced that the HSYK would suspend 680 judges and prosecutors on grounds of membership of the Gülenist “parallel structure”.⁹⁸

The Venice Commission, in a statement issued in June 2015, considered that such cases “amount to a pattern of interference with the independence of the judiciary in clear violation of European and universal standards.”⁹⁹ The ICJ supports this finding and is concerned at this reported escalation in the scale of suspension and dismissals of judges and prosecutors by the HSYK. The ICJ emphasizes that all disciplinary action against judges and prosecutors must comply with the right to a fair hearing and must be subject to appeal before an independent and impartial court.

Transfers of judges and prosecutors

International standards

International standards establish that decisions on conditions of tenure, including the assignment and transfer of judges, should be the responsibility of judicial authorities, in order to protect against improper motives in such decisions, and ensure that transfers are not applied as disguised sanctions. Amongst other instruments, the International Bar Association’s Minimum Standards of Judicial Independence provide: “[t]he power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent, such consent not to be unreasonably withheld.”¹⁰⁰

The way in which the rotation system for judges and prosecutors is applied in Turkey raises concerns that it is applied as a means of executive control, rather than on the basis of objective criteria.¹⁰¹ In the Turkish system, transfers of judges and prosecutors between districts—graded as first, second or third degree for the purposes of career progression—and between courts, is a normal part of the judicial or prosecutorial career. As such, transfers normally occur with the judge’s consent. However, judges and prosecutors can be transferred from one post to another and from one city or district to another without their consent.¹⁰²

Transfer decisions made by the first chamber of the HSYK can be appealed to the plenary session of the HSYK, but there is no judicial review of such decisions, unlike in the case of dismissals. Representatives of the Ministry of Justice suggested to the ICJ that such appeals are unnecessary, since all members of the first chamber of the HSYK are senior judges. They considered that an excessive procedure for transfers would disturb the smooth functioning of the judiciary. The ICJ nevertheless considers that the lack of appeal against transfers and other decisions of the HSYK apart from dismissals represents a significant gap in procedural safeguards for judges and prosecutors and a breach of their right to an effective remedy against violations of their rights.

The ICJ was told by many stakeholders, including lawyers, NGOs, and associations of judges, that, in practice, many judges who had not favoured the Government in their decisions, have been transferred against their will. This was seen by many with whom the ICJ met as one of the main means of Government control of the judiciary. The ICJ

⁹⁸ Yarsav, Open Letter, The last SOS call from free Turkish judges, 9 March 2016, <http://www.rechtersvoorrechters.nl/turkish-executives-last-attack-to-democratic-state-the-judicial-council-is-suspending-680-judges-and-prosecutors-and-will-put-them-on-trail/>.

⁹⁹ Venice Commission, Declaration on Interference with Judicial Independence in Turkey, 20 June 2015, <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>.

¹⁰⁰ IBA Minimum Standards of Judicial Independence, adopted 1982 by the International Bar Association, Standard A.12. The Singhvi Declaration, para. 13, provides that the assignment of a judge to a post “shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.” See also European Charter on the Statute for Judges, Principle 3.1.

¹⁰¹ International Association of Judges, Resolution on the Situation of the Judiciary in Turkey, 8 October 2015. Also see Venice Commission, Interim Opinion on the Draft Law on Judges and Prosecutors of Turkey, (CDL-AD(2011)004), 29 March 2011, para. 47–49.

¹⁰² European Commission, Turkey 2015 Report, *op. cit.*, pp. 15, 57. See the Turkish government’s analysis at, Comments received from Member States of the Council of Europe concerning the report prepared by the Bureaus of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) for the Secretary General of the Council of Europe on “Challenges for judicial independence and impartiality in the member states of the Council of Europe” (CCJE/CCPE(2016)1), CCJE/CCPE(2016)3rev1, 24 March 2016, p. 24, http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf_2016_3rev_comments%20by%20member%20states_rev1.pdf.

heard concerns that the status of districts (first, second or third grade) has been manipulated to allow for the transfer of judges to locations considered less desirable, as a punitive measure. Re-designation of the status of districts allows greater flexibility in transfers since according to the applicable rules, more senior or experienced judges can only be transferred to the higher status districts.

Figures for the number of involuntary transfers are unclear and disputed—estimates for recent transfers suggested to the ICJ during meetings in Turkey include from 7,000 to 3,500 forced transfers between the 2014 amendments.¹⁰³ However, the Turkish government and the HSYK maintain that the majority of transfers have been voluntary and that all transfers have been carried out as part of ordinary judicial administration. The HSYK provided the ICJ with statistics to this effect. According to HSYK statistics, between June 2014 and June 2015 there were 17 decrees on transfer of judges and prosecutors, with a total number of transfers (whether voluntary or involuntary) of more than 6,500.¹⁰⁴ In response to concerns raised by the Consultative Council of European Judges (CCJE), the Turkish government has estimated that there are about 6,000 applications by judges for transfers each year.¹⁰⁵

The ICJ remains concerned that transfers are being applied as a hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unresponsive of government interests or objectives. Although it cannot assess the current level of involuntary and punitive transfers, the ICJ considers that the lack of due process and effective remedy, in particular amid the competing political influences in the judiciary, leads to the abuse of the system for purposes of political and governmental influence. The ICJ emphasizes that forced transfers of judges, without fair hearing and due process safeguards that guard against arbitrary or discriminatory application of these measures represents a serious threat to judicial independence, as it is likely to have a severe chilling effect on independent judicial decision-making. Concerns as to the application of transfers of both judges and prosecutors in practice can best be dispelled by increased transparency in the process of transfers and by providing due process guarantees, including judicial review of such decisions by an independent and impartial tribunal. The ICJ considers that legislative provision for such judicial review should be introduced as a matter of priority.

The establishment of criminal judgeships of the peace

The courts of criminal judgeships of peace (criminal judges of peace) were established in June 2014¹⁰⁶ and replaced the previous category of criminal courts of peace without retaining all their prerogatives. Under the current structure, criminal trials are conducted before the criminal courts of general jurisdiction, but functions related to supervision of the investigation are transferred to the criminal judgeships of peace. According to the Law on Criminal Procedure, these courts have the power to issue search, arrest and detention warrants. They are also entitled to judicially review the decisions of public prosecutors on non-prosecution.¹⁰⁷ Furthermore, under article 10 of Law No. 5235, criminal judges of the peace can be accorded additional powers by law. For example, under Law No. 5651 (Law on the Regulation of the Publications on Internet and the Fight against Crimes Committed Through These Publications) they have the power to decide on censorship and to review administrative decisions to block websites.

There is widespread concern within the Turkish legal community about the lack of independence of criminal judges of the peace. Their appointments were made by the first chamber of the HSYK following the 2014 reforms of the HSYK, and therefore with a composition highly favourable to the Government. Criminal judges of the peace are perceived to be closely allied to the government. It is notable that shortly following

¹⁰³ These figures were estimates given in December 2015.

¹⁰⁴ Decrees on transfer of judges are available at: <http://www.hsyk.gov.tr/kararnameler.html>.

¹⁰⁵ Comments received from Member States of the Council of Europe concerning the report prepared by the Bureau of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) for the Secretary General of the Council of Europe on "Challenges for judicial independence and impartiality in the member states of the Council of Europe", *op. cit.*, http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf_2016_3rev_comments%20by%20member%20states_rev1.pdf.

¹⁰⁶ Article 48 of the Law No. 6545 amended article 10 of Law No. 5235 and established criminal judgeships of peace.

¹⁰⁷ Article 73 of the Law on Criminal Procedure. Before 2014, this power belonged to the assize courts.

their appointment, these judges authorized large-scale arrests of police officers allegedly involved in the Gülen movement.¹⁰⁸ The new judges have also played an important role in enforcing highly problematic laws restricting freedom of speech, in particular on internet censorship and in prosecutions for “insulting the president”.

Means of appeals from decisions of criminal judges of peace are very limited. Except in the highly exceptional circumstances in which a case can be referred to the Constitutional Court, the only appeal is to another criminal judge of peace of the same district.¹⁰⁹ Effectively, therefore, there is a closed system of appeals within the criminal judgeships of the peace, with minimal recourse to the wider courts system. This situation is particularly worrying given the allegations of lack of independence of judges of these courts.

The lack of appeal from the decisions of the criminal judges of peace calls into question the effectiveness of the remedies available within the national system for violations of human rights in the investigative process and puts in doubt the capacity of the legal system to provide the guarantees required by many of these rights, including the rights to liberty and to respect for the home and privacy.¹¹⁰

Executive influence on Associations of Judges

International standards

International standards recognize the vital role played by associations of judges in defending judicial independence. The UN Basic Principles stipulate that “judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.” The European Charter on the Statute for Judges notes that “professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.”

Situation in Turkey

At present there are three main associations of judges in Turkey: the Association of Judicial Unity, the Turkish Association of Judges and Prosecutors (YARSAV), and the Union of Judges. The ICJ met with all three associations during its visit to Turkey.

As noted above, the Association of Judicial Unity was first established as the Platform for Judicial Unity in 2014, in the run up to the October 2014 elections for members of the HSYK. Following the success of its candidates in these elections, it became the Association of Judicial Unity. It has been widely criticized as government-controlled, and is perceived by many commentators with whom the ICJ met as having been established for the purposes of strengthening government control of the judiciary. Representatives of the Association of Judicial Unity told the ICJ that, within eight months of their establishment they had registered 5,000 judges and prosecutors as members, making them, in record time, the judicial association with the highest number of members nationally. They emphasized that the aim of the association was to support judicial independence and the rule of law.

However, it is notable that the Association of Judicial Unity refrains from commenting on matters of professional interest that may be perceived as critical of government actions or policies, and most of its members appear to be supporters of the governing political party. Furthermore, various other sources reported to the ICJ that the process of admitting members to the Association of Judicial Unity is problematic. It is reported that judges are approached by the Association and asked to submit an application to join and that, given the connections of the Association with the government, it is difficult for them to decline without facing adverse consequences for their careers. It was also

¹⁰⁸ DW.com, More than 50 Turkish police arrested in corruption probe, 22 July 2014, <http://www.dw.com/en/more-than-50-turkish-police-arrested-in-corruption-probe/a-17799686>.

¹⁰⁹ Article 268 of the Law on Criminal Procedure.

¹¹⁰ The right to an effective remedy and reparations is widely recognized under international human rights law, including under article 13 ECHR, article 2 ICCPR; UN Basic Principles and Guidelines on Reparation and the Right to a Remedy for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

reported to the ICJ by several stakeholders that judges or prosecutors who apply or agree to join the Association of Judicial Unity are required to resign from other judicial associations as a condition of membership.

Before the establishment of the Association of Judicial Unity, the largest judicial association was YARSAV, which was established as an NGO in 2006, and which has been highly critical of government attempts to influence the judiciary. However its membership has recently declined, apparently due to the requirement for judges who join the Association of Judicial Unity to resign from other judicial associations.

Allegations of government control of the Association Judicial Unity, and pressure on individual judges to join it, raise concerns that this can provide a channel for government influence on the judicial process. Furthermore, barriers to membership of other judicial associations are also highly problematic, as they are likely to further weaken the capacity of the judiciary to defend its independence. At an individual level, they are also likely to lead to arbitrary interference with the freedom of association of judges.

Harassment and attacks against lawyers

International standards

Lawyers, along with judges and prosecutors, are one of the pillars on which protection of the rule of law and access to justice against human rights violations rests.¹¹¹ If the justice system is to be effective, then lawyers must be free to carry out their professional duties independently, without interference from the Executive or from other powerful interest groups, and must be protected, in law and in practice, from attack or harassment as they carry out their professional functions. International standards on the role of lawyers establish safeguards for the independence of individual lawyers and for the profession as a whole.¹¹² They stipulate, inter alia, that governments must ensure that "lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference", and that they must not be identified with their clients' causes and must not "suffer or be threatened with prosecution or administrative, economic, or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."¹¹³ Under Principle 17 of the UN Basic Principles on the Role of Lawyers, where the security of lawyers is threatened as a result of their professional duties, they must be adequately safeguarded by the authorities.

Situation in Turkey

The assassination of human rights lawyer Tahir Elçi, President of the Diyarbakır Bar Association, while he was speaking to media in Diyarbakır on 28 November 2015, has raised serious concerns about the security of lawyers and the responsibility of the State to respect and protect their safety. At the time of his killing, Tahir Elçi was the subject of a criminal investigation related to allegations of promoting a terrorist organization because of a statement made on television that he did not consider the PKK a terrorist organization. Furthermore, statements had been made about the case by members of the government suggesting that Tahir Elçi needed to justify himself against these charges.

The ICJ is concerned that insufficient steps were taken to protect the safety of Tahir Elçi, in a context where it was known that he was likely to be a target of violence and where his prosecution was likely to increase the danger to his life. It is also of concern that there appear to have been failings in the investigation into the killing which could compromise the effectiveness of the investigation and its capacity to bring the perpetrators of the killing to justice. In particular, it appears that there was no crime scene investigation for several days, and that insufficient steps were taken to secure the crime

¹¹¹ ICJ Practitioners Guide No. 1, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>, p. 63.

¹¹² UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, preamble, para. 9; Singhvi Declaration, Principles 74, 76.

¹¹³ UN Basic Principles on the Role of Lawyers, Principles 16 and 18.

scene, with the result that it was contaminated.¹¹⁴ Questions remain as to whether the branding of Mr Elçi with these accusations has contributed in some way to his identification as a target and, therefore, to his death.

Lawyers and NGOs in Turkey reported to the ICJ that other human rights defenders and lawyers, in particular those working in the south of the country, are also at risk of violence and receive threats to their lives, and that criticism of them by the government increases the danger they face.

A number of lawyers are currently facing criminal charges,¹¹⁵ connected with their professional duties. Notably, on 16 March 2016, lawyers Ramazan Demir, İrfan Arasan, Ayşe Acinikli, Hüseyin Boğatekin, Şefik Çelik, Adem Çalışçi, Ayşe Başar, Tamer Doğan and Mustafa Ruzgar were arrested, apparently on suspicion of links to a terrorist organization.¹¹⁶ Several of those arrested were providing legal representation to 46 lawyers arrested in 2011 on suspicion of "working for, or belonging to, a terrorist organization". The lawyers were initially held in pre-trial detention and then released on 19 March following an order of the Istanbul first criminal judgeship of the peace; however that order was quashed on 22 March by Istanbul second criminal judgeship of the peace, during a hearing in which it is reported that neither the lawyers nor their legal representatives had an opportunity to make representations.¹¹⁷

The ICJ is concerned that the independence and security of lawyers is under increasing threat in Turkey, with potentially serious consequences for the capacity of lawyers to play their proper role in the administration of justice, and the protection of the rule of law and human rights in the justice system. It urges the Turkish authorities, to promptly take all necessary steps to ensure that the killing of Tahir Elçi is independently and thoroughly investigated and that those responsible are brought to justice; to make a thorough assessment of the security risks to lawyers and to take appropriate measures to ensure their safety.

The ICJ is also concerned at the high numbers of prosecutions of lawyers, apparently connected with the exercise of their profession. The role of lawyers in supporting the right to a fair hearing and to effective remedies for violations of human rights, which is essential to the maintenance of the rule of law, must not be undermined by harassment or reprisals in the form of unfounded prosecutions or other punitive measures. The ICJ emphasizes that Turkish law enforcement and prosecution authorities must abide by the principle that lawyers must not be identified with their clients.

The ICJ urges Government representatives and public authorities to refrain from comments or actions that could endanger lawyers and other human rights defenders by pointing to them as a target for politically motivated violence and in particular from any comments that identify lawyers with their clients' interests.

¹¹⁴ Human Rights Foundation of Turkey, Daily Human Rights Report, 26–30 November 2015, <http://en.tihv.org.tr/26-30-november-2015-hrft-daily-human-rights-report/>; Daily Human Rights Report, 10 December 2015, <http://en.tihv.org.tr/10-december-2015-hrft-daily-human-rights-report/>. See also Amnesty International, Demand Justice for murdered human rights defender Tahir Elçi <https://www.amnesty.org/en/get-involved/take-action/justice-for-murdered-human-rights-defender-tahir-elci/>.

¹¹⁵ Lawyers for Lawyers, The Law Society of England and Wales, Lawyers' Rights Watch Canada and Fair Trial Watch Joint UPR Submission, Turkey, June 2014.

¹¹⁶ Lawyers for Lawyers, Turkey: Police raid on and arrest of 9 lawyers, 16 March 2016, <http://www.advocatenvooradvocaten.nl/11446/turkey-police-raid-on-and-arrest-of-9-lawyers/>.

¹¹⁷ Lawyers for Lawyers, Decision to release lawyers quashed, 23 March 2016, <http://www.advocatenvooradvocaten.nl/11479/turkey-decision-to-release-lawyers-quashed/>.

4. CONCLUSIONS AND RECOMMENDATIONS

The problem of undue influence by the executive or other political interests on the Turkish judiciary, while complex, deep-seated, and persisting over many decades, has recently reached new levels of gravity. Since 2014, legislative and practical measures further eroding the already compromised independence of judges, prosecutors and lawyers have made the rule of law increasingly fragile and unreliable.

Following its visit to Turkey of December 2015, the ICJ is concerned that key institutions of the justice system—the judiciary, prosecution and legal profession—face serious threats to their integrity and ability to carry out their functions fairly and effectively. The judiciary, weakened by increasing government control, now appears ill-equipped to provide a check on excessive executive power through proper judicial review of its laws and actions. There are indications that these developments are already having serious consequences in allowing violations of human rights to go unaddressed by the justice system.

At an institutional level, the independence of the HSYK, the governing body of the judiciary, from executive influence is now substantially diminished. The Ministry of Justice holds significant and improper power within the HSYK. This has serious consequences for judicial independence, including for the composition of the judiciary, the integrity of judicial disciplinary proceedings, and the organization of the courts, in particular through the system of transfers of judges. At an individual level, punitive measures against judges who act contrary to the putative interests of the executive chill the climate for independent exercise of the judicial function. Furthermore, prosecutions and dismissals of prosecutors, apparently related to their decisions in sensitive cases, have a damaging effect on autonomous decision making in the prosecution service. Attacks on and threats to lawyers, in particular those engaged in the defence of human rights, further compound the problems in the justice system.

In light of these conclusions, the ICJ recommends as follows.

1. The executive and legislative authorities should refrain from all actions and rhetoric contrary to the separation of powers. Legislation, administrative measures and public statements by representatives of the executive should respect the role and independence of the judiciary and the integrity of the composition and independent decision-making of the HSYK and should respect and enforce court decisions.
2. The system of judicial appointments should be revised with a view to establishing the independence of both the examination and the interview process from the Ministry of Justice and other executive bodies, as well as from undue influence from other quarters. The representation and role of the Ministry of Justice on interview boards as well as in the first chamber of the HSYK should be limited.
3. The HSYK should ensure that its consideration of disciplinary cases against judges and prosecutors are informed by applicable international law standards, including the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on Prosecutors. It should also ensure and that all disciplinary proceedings respect independent judicial decision making and apply due process standards. Disciplinary decisions against judges and prosecutors should be subject to appeal in the ordinary courts.
4. Administrative decisions on the transfer of judges and prosecutors should be transparent and subject to effective due process safeguards. Judicial review of such decisions on the application of the affected judge or prosecutor should be introduced as a matter of priority. The system, including laws and procedures, should be independently reviewed to ensure that transfers are not, in practice, used as a disguised disciplinary measure.
5. Decisions of criminal judgeships of the peace should be subject to appeal before the ordinary courts, subject to the same conditions as appeals from the ordinary courts.

6. The executive, as well as associations of judges, should refrain from any action that unduly impedes the freedom of association and freedom of expression of judges and prosecutors and in particular their right to form and join independent professional associations. No judge should be pressured or coerced into joining or resigning from a professional association.
7. The government and law enforcement authorities should take all measures within their powers to protect lawyers and other human rights defenders under threat from violence, harassment or persecution and should refrain from all statements or actions that compromise their safety or identify them with the causes of their clients.
8. They should ensure a prompt, thorough and independent investigation into the killing of the President of the Diyarbakır Bar Association, Tahir Elçi, with a view to ensuring effective accountability and bringing to justice persons responsible for his killing.

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