Introduction

Since the decision in 1999 on Turkey's candidate status for European Union membership, Turkey has, under difficult political and economic circumstances, adopted numerous important Constitutional and legal reforms intended to strengthen democracy, the rule of law and the protection of human rights. Many of these reforms have related directly to the functioning of the Turkish judicial system.

The determination of Turkey's political leaders to align the legal system further with the values and standards of the European Union is impressive.

In 2002 and 2003 Turkey adopted a total of 7 harmonisation laws. These laws have introduced several important reforms in Turkish legislation.

Of particular note, the harmonisation laws have narrowed the scope of various offences under the Turkish Penal Code and Anti-Terror Law that historically have criminalized freedom of thought and expression.

Persons who suffer a violation of the European Convention on Human Rights as a result of a court judgement in Turkey now have the right to a re-trial.

Criminal procedures in the State Security Courts have been harmonised with those applied in the ordinary courts.

And, the minimum age for being tried in ordinary criminal courts has been increased from 15 to 18 so that all persons under the age of 18 are now tried in juvenile courts.

Despite all the legal amendments, however, there is still a considerable amount of work that needs to be done if the functioning of the judicial system is to be brought into line with accepted international standards.

2 principle areas of concern remain:

(i) there is still a need for proper, timely and effective implementation of certain of the reforms that have been introduced to date;

(ii) there are important issues that the reform packages have yet to engage at all. In particular:

> The judiciary in Turkey remains, to an unacceptable degree, subject to the potential influence of the political will of the Ministry of Justice and therefore not truly independent;
>
> And, numerous obstacles continue to serve to seriously undermine the extent to which defence lawyers are able to perform their professional duties.

Implementation

The problem of implementation is demonstrated by Turkey's attempts to narrow the scope of various offences under the Turkish Penal Code and Anti-Terror Law that historically have been criticised as criminalizing freedom of thought and expression.

In a short period of time Turkey has amended Articles 159, 169 and 312 of the Turkish Penal Code, amended Article 7 of the Anti-Terror Law and abolished Article 8 of the Anti-Terror Law.

In one sense, implementation of these reforms has been effective. In cases where a charge has been preferred under the reformed articles but a trial has not yet commenced, case files are being reviewed in order to determine whether or not the prosecution should proceed in light of the legislative amendments.

Where a trial under the reformed articles is in progress, with the exception of prosecutions under the abolished Article 8 of the Anti-Terror Law, which have been stayed, the trials are continuing and the judges are applying the amended law when determining the guilt or innocence of the accused.

Those serving a custodial sentence following a conviction under one or more of the reformed articles are benefiting from a review of their convictions and sentences in light of the legislative amendments.

This active review in light of the legislative reforms has resulted in a large number of acquittals in cases that previously would have resulted in a conviction and a large number of prisoners being released from prison.

However, alongside this active review, there is also a widespread practice of alternative charging whereby public prosecutors who find themselves unable to secure a conviction under one amended article simply re-charge the person concerned under an alternative provision. Thus, for example, instead of bringing a prosecution under the now abolished Article 8 of the Anti-Terror Law, public prosecutors now instead initiate proceedings under Article 169 of the Turkish Penal Code or, to a lesser extent, Article 312 of the Turkish Penal Code. Alternatively, where the amendment to Article 169 of the Turkish Penal Code prevents a prosecution from being brought under that provision, indictments regularly charge an offence under Article 7 of the Anti-Terror Law or Article 312 of the Turkish Penal Code instead. In this way, despite an active review of files, the harmonisation laws have not brought about any real change in terms of what conduct is, and what is not, deemed to be criminal behaviour. Freedom of thought is still criminalised in post-reform Turkey, albeit under different provisions than before.

The problem lies, at least in part, in the fact that despite the amendments to date, the broad formulation of certain of the provisions still leaves them open to abuse. Article 159 of the Turkish Penal Code, for example, which creates an offence of "insulting State institutions", is still a generally restrictive article so far as freedom of expression is

concerned. That people can be even prosecuted, let alone imprisoned, for offences such as "insulting the state" betokens an authoritarian state with scant respect for free speech. Moreover, Article 7 of the Anti-Terror Law, as amended, continues to incorporate the notion of crimes of thought and despite the abolition of Article 8 of the Anti-Terror Law, the offence of propaganda against the integrity of the state is still covered by various other articles, including Article 312 of the Turkish Penal Code. Whilst the international community ought to welcome the efforts of the Turkish government to date then, what is required is a more thorough reform of law and practice in a way that fully guarantees the right to freedom of expression.

Issues not addressed in reform packages

Beyond the need for more effective implementation of certain of the reforms that have been introduced to date, however, of equal concern is the fact that Turkey's reform programme has so far failed to engage any of the concerns of the international community regarding the independence of the judiciary and the ability of lawyers to effectively discharge their professional functions.

Independence of the judiciary

An independent judiciary is a precondition for the protection of fundamental human rights and liberties and the rule of law. Such independence demands freedom from interference by both the executive and legislature with the exercise of the judicial function. Yet, in Turkey the Ministry of Justice, a clearly political entity, continues to exercise a profound influence over the entire process of selecting, training, appointing, promoting, transferring and disciplining of judges in a manner that is largely incompatible with internationals standards guaranteeing judicial independence.

Principle 10 of the UN Basic Principles provides: "Any method of judicial selection shall safeguard against judicial appointments for improper motives." Yet, in Turkey applicants for judicial office are required to attend for an oral interview with personnel from the

Ministry of Justice as part of the procedure for gaining entry into the judicial profession. Entrusting selection of candidate judges, at least in part, to a political entity, leaves open the clear potential for partiality and prejudice on political grounds in decisions relating to admission to the profession.

Principle 9 of the UN Basic Principles provides that judges should be free to promote their own professional training. Yet, in Turkey the curriculum for the pre-service and in-service training of judges is under the control of the Education Department of the Ministry of Justice and the training school is itself a subordinated institution of the Ministry. Therefore both the content of the training of candidate judges and the administration of the judicial training school remain strongly dependent upon the executive power.

Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges states: "The authority taking the decision on the selection and career of judges should be independent of the government and the administration". In Turkey, the professional careers of all qualified judges, in terms of appointment, promotion, transfer, discipline and expulsion, is determined by a body known as the High Council of Judges and Public Prosecutors. This body, which is comprised of 7 executive and judicial personnel, is presided over by the Minister of Justice, whilst his Under-Secretary is an ex-officio member. The result of this membership structure is that there is the potential for executive influence in all decisions relating to the professional future of all judges in Turkey.

Aside from its composition, the independence of the High Council of Judges and Public Prosecutors is further called into question in so far as:

- It does not have its own secretariat that it can rely upon for its administrative tasks, instead it is entirely dependent upon a personnel directorate of the Ministry of Justice for administrative support;

- Rather than making informed decisions on the professional careers of judges on the basis of reports provided by its own personnel, the High Council has to rely upon civil servants working within the central organisation of the Ministry of Justice to undertake the necessary appraisals. This raises concerns as to whether decisions on promotion of judges are based on objective factors, in particular ability, integrity and experience, in accordance with Principle 13 of the UN Basic Principles;
- The High Council does not have its own independent budget, instead it is entirely reliant upon the discretion of the Ministry of Justice for its financial resources;
- And, contrary to Principle 20 of the UN Basic Principles, there can be no appeal to any judicial body against a decision of the High Council concerning the professional career of members of the judiciary.

As an additional concern, judges in Turkey are still prohibited from organising and forming professional associations to represent their interests, promote their training and protect their judicial independence. This situation is in direct contravention of Principle 9 of the UN Basic Principles.

When one notes that paragraph 6 of Article 140 of the Turkish Constitution expressly provides that "Judges and public prosecutors shall be attached to the Ministry of Justice insofar as their administrative functions are concerned" then the full extent to which the Turkish judiciary remains besieged and controlled by the Ministry of Justice may be understood.

A judiciary that remains subject to the influence of political power loses its objectivity, its respectability and its ability to protect human rights and fundamental freedoms. If Turkish judges are to decide matters before them according to law, rather than according to the influence of political power, then whilst welcoming the efforts of the Turkish government in the harmonisation laws passed to date, the international community must continue to press for further reforms aimed at establishing an independent administration

of the judiciary by the judiciary, in line with Turkey's obligations under international law.

Impartiality of the judiciary

The international community should also press for reforms aimed at ensuring the impartiality of the Turkish judiciary because, from an objective viewpoint, there are various aspects of the functioning of judges and prosecutors in Turkey that serve to create the impression that the office of prosecutor, rather than being both separate and subordinate to the office of judge, is in fact attached to the office of judge.

From the earliest stage of their careers, judges and public prosecutors are treated as equals. They apply to, take the entrance examination for and then attend the same school for their pre-service training whilst defence lawyers are trained elsewhere. After graduation, the appointment, promotion and discipline of judges and public prosecutors is determined by the same body, the High Council for Judges and Public Prosecutors, whilst the professional career of defence lawyers is regulated by the Bar Associations. The in-service training provided by the Ministry of Justice is provided for judges and public prosecutors only. Defence lawyers receive their training from the Bar Associations. The salaries of judges and public prosecutors remain equal throughout their entire career, thus reinforcing the notion that they are to be regarded as equals. The prohibition on the establishment of professional associations applies to both judges and public prosecutors whilst there is no such prohibition for defence lawyers. Neither judges nor public prosecutors have a formal Code of Conduct whereas the defence bar does. Judges and public prosecutors both have offices within the courthouses in Turkey whilst the defence lawyers do not. Judges and public prosecutors even live together in the same quarters.

This institutional and functional inter-connection between the office of judge and prosecutor serves to create legitimate doubt regarding the impartiality of the judiciary. For both the public and parties to proceedings to be able to have confidence in the impartiality of the judiciary in Turkey, a clearer separation of tasks, responsibilities and

powers of judges and public prosecutors is needed. Reform is required in order to create, or secure the existence of, a system with the appearance and reality of two equal parties, prosecution and defence, acting before an independent and impartial court.

Functioning of Lawyers

Respect for the right to a fair trial depends not only upon the existence of an independent and impartial judiciary, but upon the ability of lawyers to provide effective legal representation to and on behalf of their clients. In Turkey, however, despite the reform packages adopted to date, numerous obstacles continue to serve to seriously undermine the extent to which members of the legal profession are able to perform their professional duties. This is true at every stage of criminal proceedings.

- Access to lawyers

Formally, the Turkish Code of Criminal Procedure now provides that all detainees have the right to access legal counsel immediately upon being deprived of their liberty. Detainees must be reminded of their right to counsel and, if they have insufficient means, counsel must be provided free of charge.

Notwithstanding these formal guarantees, however, there remains a significant disparity between law and practice in most of Turkey regarding respect for the right of access to free legal counsel upon deprivation of liberty.

Whilst in Ankara there appears to be a good level of implementation, outside of the capital city, Bar Associations, members of the Contemporary Lawyers Association and lawyers from the Human Rights Association all report that a large numbers of detainees continue to remain ignorant of their right to free legal counsel because they are routinely either not informed that they possess such a right or are lulled into unwittingly signing forms that waive their right to counsel. Those who are aware of their right to counsel are, on occasion, subjected to measures intended to dissuade them from exercising this right.

And, there are also continuing reports of instances where even those who do make a formal request for a lawyer are nevertheless interrogated in the absence of a legal representative or else their lawyer is obstructed in gaining access to them.

The scale of the problem is not easily quantified. But, according to the Diyarbakir Bar Association, in 2002 only 10% of all defendants over the age of 18 were represented by a lawyer at trial. The Izmir Human Rights Association reports that in August 2003 it visited a police station, asked to examine the police record of how many detainees had requested a lawyer during the course of their detention and discovered that not a single request had been made during the previous months. The Izmir Bar Association reports that in the period January-October 2003, a total of just 703 detained persons requested the services of a lawyer in its region, a low proportion of all cases given that on average a single Turkish judge handles 858 cases over the course of a year.

The right to prompt legal assistance upon arrest and detention is essential both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the detainee. The Turkish state authorities must take urgent steps to ensure that the guarantees set forth in the Turkish Code of Criminal Procedure in this regard are implemented in practice.

Of course, even in circumstances where a lawyer is afforded immediate access to a person deprived of their liberty, for the assistance of any lawyer to be effective, the lawyer must be afforded adequate time and facilities in which to communicate with their client during the pre-trial and trial period.

However, lawyers throughout Turkey continue to complain of facing obstructions when attempting to enter detention centres, particularly F-Type Prisons, for the purpose of visiting their clients. The most common complaint relates to the application of unnecessary searches upon entry to the detention facilities as a result of over-sensitive metal detectors. The lawyers characterise these searches as a form of official harassment or intimidation aimed at dissuading them from visiting their clients. When, according to

the Ankara Bar Association, such searches involve female lawyers being required to remove their underwear, which is then subjected to an examination, it is understandable why.

Although not universal, complaints also persist regarding the availability of facilities within certain detention centres for lawyers to consult and communicate with their clients in full confidentiality. Lawyers from both the Istanbul and Ankara Bar Associations report that, particularly in cases of a political nature, once inside certain detention centres there is no facility for confidential communication with their client. Instead, they are afforded a room, some 20 square metres in size, in which 5 or 6 guards stand within hearing distance of the lawyer and the detainee.

In addition to the inadequacy of the physical facilities for lawyer-client communication, lawyers in Istanbul and Izmir complain that in F-Type prisons they are not allowed to exchange any documents with their clients, thus effectively preventing detainees from submitting confidential instructions to their representatives.

And, as an additional obstacle, in criminal courts in Turkey, lawyers continue to be prohibited from consulting with their clients in the cells of the court either prior to the hearing, during any adjournment of the hearing or after the hearing.

- Equality of arms

However, difficulty in gaining access to their clients is not the only obstacle faced by lawyers in Turkey. From an objective viewpoint, neither the organisation of the courtrooms in Turkey nor the procedures adopted within them, presently affords a fair balance as between the prosecution and defence. The appearance, and in certain instances the reality, is that, inside the courtroom, the interests of the prosecution are promoted vis-à-vis the interests of the defence.

By way of illustration, at the start of every hearing, prosecutors and judges simultaneously enter the courtroom through the same door whilst defence lawyers are required to enter the courtroom from a side door along with the public. Whenever the judges rise, the prosecutor also retires with the judges through the same door, leaving the defence lawyers to exit along with members of the public.

During court hearings, the prosecutor sits on an elevated platform, on the same level as the judges and directly adjacent to them. Meanwhile, the defence lawyers sit at a table at ground floor level, the same level as the public and the defendants.

In some courtrooms in Turkey, the prosecutor, like the judges, is provided with a computer and a terminal that enables him to see the record of the proceedings as it is being entered by the court stenographer. Where such facilities exist, however, defence lawyers are not provided with any similar technology. Instead, they are required to listen and take their own notes if they wish to have a record of proceedings during the course of the hearing.

Whenever judges retire during the course of proceedings, for example to consider the merits of a defence application, the prosecutor invariably retires with the judges to the same ante-chamber. The defence lawyers meanwhile remain in court. When the judges return to court to deliver their ruling, the prosecutor returns to court alongside them.

In criminal courts in Turkey, if a defendant wishes to call a witness to give evidence on his behalf then, according to the procedure rules, before that witness can be heard, either the defendant or his lawyer must apply to the judge for permission to call the witness. Whether that witness is permitted to give testimony or not is entirely a matter within the discretion of the judge. In contrast, the prosecutor is entitled to call any witnesses that he wishes in order to give evidence on behalf of the prosecution case and there is no requirement that he seek the permission of the judge in order to do so.

Normal procedures in criminal trials in Turkey preclude the defence from examining witnesses directly. Instead, defence lawyers suggest questions to the Presiding Judge who then decides both whether to ask the questions suggested and if so, how the questions should be phrased. In this manner, the defence are restricted as to both the form and content of the questions that they may ask witnesses. However, when the public prosecutor examines a witness, although he too has to direct his questions through the Presiding Judge, the Presiding Judge invariably asks every question that the public prosecutor seeks an answer to. There is no restriction as to the form or content of the questions that the prosecutor is permitted to ask of witnesses.

Finally, defence lawyers are barred from dictating their submissions directly into the court record. Instead, they must rely upon the judge to summarise the testimony of witnesses, the statements of their clients and their own arguments and submissions. The court stenographer only records the summary that the judge dictates to her. In contrast, the court stenographer enters evidence and submissions on behalf of the prosecution directly into the court record, verbatim, without waiting for a summary from the judge.

The right to equality of arms in criminal proceedings forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution and the defence. Yet, in Turkey the appearance, and in certain instances the reality, is that when presenting its case to the court the defence is subjected to a procedurally inferior position vis-à-vis the prosecution.

- Criminal proceedings against lawyers

Not only is the right to defence undermined by a most apparent inequality of arms in criminal proceedings in Turkey, but it is further jeopardised by the fact that lawyers who repeatedly conduct defences in cases of a political nature or who comment on Turkeys human rights practices, continue to be subjected to prolonged and repeated criminal prosecutions for activities carried out in the exercise of their professional duties.

In 2003 four Turkish lawyers faced criminal prosecutions for seeking compensation on behalf of Kurdish citizens who had suffered the destruction of their homes. Another lawyer was prosecuted for speaking about Turkey's record on torture at a human rights symposium. A lawyer was subjected to criminal proceedings for an interview that he gave on a popular Kurdish television channel and another lawyer was prosecuted for comments that she made in a national newspaper regarding conditions in F-Type prisons.

That lawyers who conduct defences in cases of a political nature continue to be subject to criminal prosecutions, not for impeding the administration of justice, but for advocating Kurdish rights, commenting on Turkey's record on torture and making statements regarding conditions in F-type prisons, suggests that elements within the Turkish state remain intent upon prevailing upon lawyers to relinquish the defence of clients seeking to claim their rights and freedoms.

For these reasons the international community must continue to demand that the government of Turkey take urgent measures to ensure that accused persons are afforded their right of access to a lawyer immediately upon being detained, that accused persons are able to effectively consult and communicate with a lawyer in confidence, that the organisation of the courtrooms and procedures adopted within them guarantee an equality of arms between the prosecution and defence and that lawyers are not harassed or intimidated in the exercise of their professional duties

Conclusion

Turkey must understand that its duty to secure the independence of judges and lawyers is not necessarily fulfilled by passively allowing these professions to go about their business. The legal obligation to *ensure* their independence, means that Turkey must take positive actions to protect judges and lawyers against all forms of improper interference so as to enable them to perform all their professional functions effectively. In situations where Turkish judges and lawyers are either unwilling or unable fully to assume their responsibilities, the rule of law cannot be maintained and human rights

cannot be enforced. It is with these considerations in mind that, whilst welcoming the efforts of Turkey's political leaders to date, I urge the international community to press for further reforms in the functioning of the judicial system in Turkey.

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