

# The Turkish Criminal Peace Judgeships and International Law

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# The Turkish Criminal peace Judgeships and international law

Since their creation in 2014, the Turkish criminal peace judgeships have been the focus of much criticism with regard to violations of human rights, as they are at the forefront of the authorisation or judicial review of decisions restricting the right to liberty and other human rights.

This briefing paper assesses the institution of the criminal peace judgeships in Turkey, established in 2014, and its compliance with the obligations undertaken by Turkey under international human rights law.

Turkey is a party to the principal international human rights treaties, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

## 1. The right to liberty and judicial review under international law

Articles 5 ECHR and 9 ICCPR outline the right not to be arbitrarily deprived of one's liberty. Key to the assessment of the arbitrariness and to the guarantees aimed at protecting this right is the right to judicial review of detention.

Both these articles affirm that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."<sup>1</sup> With regard to any forms of deprivation of liberty, including but not limited to arrest on criminal charges, the ECHR states that everyone is "entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".<sup>2</sup> The ICCPR similarly provides that all persons are "entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."<sup>3</sup>

As the UN Human Rights Committee has affirmed, in its General Comment no. 35, that the right under article 9.3 ICCPR "is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control [and it] is inherent to the proper exercise of judicial power that it be exercised by an

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<sup>1</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 9.3. and Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 5.3..

<sup>2</sup> European Convention on Human Rights, Article 5.4.

<sup>3</sup> International Covenant on Civil and Political Rights, Article 9.4.

authority which is independent, objective and impartial in relation to the issues dealt with."<sup>4</sup> The Committee has stated the "court" specified in article 9.4 ICCPR "should ordinarily be a court within the judiciary" and must enjoy commensurate guarantees of judicial independence.<sup>5</sup>

The UN Working Group on Arbitrary Detention's Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings are clear that only "[a] court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful."<sup>6</sup>

Specifically, in its Guidance, the Working Group stressed that the "court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention"<sup>7</sup> and "[t]he competence, independence and impartiality of such a court cannot be undermined by procedures or rules pertaining to the selection and appointment of judges."<sup>8</sup> If a specialized tribunal is exceptionally set up, this "must be established by law affording all guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature."<sup>9</sup>

The European Court of Human Rights has affirmed that the guarantee under article 5.3 ECHR is "aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1 (c)",<sup>10</sup> i.e. when one is deprived of his or her liberty "on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."<sup>11</sup> It is "intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act."<sup>12</sup>

With regard to article 5.4 ECHR, the Court has stressed that "[b]efore a body can properly be regarded as a 'court', it must, inter alia, be independent of the executive and of the parties ..., but this also holds good for the 'officer' mentioned in paragraph 3 (art. 5-3): while the 'judicial power' he is to exercise, unlike the duties set out in paragraph 4 (art. 5-4), may not take the form of adjudicating on legal disputes ("un caractère juridictionnel"), nonetheless judicial

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<sup>4</sup> Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of persons), 16 December 2014, CCPR/C/GC/35, para. 32.

<sup>5</sup> *Ibid.*, para. 45.

<sup>6</sup> UN Working Group on Arbitrary Detention, *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings*, UN Doc. WGAD/CRP.1/2015 (hereinafter "WGAD Principles and Guidelines"), Principle 6.

<sup>7</sup> *Ibid.*, Guideline 4, para. 69.

<sup>8</sup> *Ibid.*, Guideline 4, para. 70.

<sup>9</sup> *Ibid.*, Guideline 4, para. 72.a.

<sup>10</sup> *De Jong, Baljet and Van der Brink v. the Netherlands*, ECtHR, Application nos. 8805/79, 8806/79, 9242/81, Judgment of 22 May 1984, para. 51.

<sup>11</sup> European Convention on Human Rights, Article 5.1.c..

<sup>12</sup> *Kurt v. Turkey*, ECtHR, Application No. 24276/94, Judgment of 25 May 1998, para. 123. See also, *Aquilina v. Malta*, ECtHR, Application No. 25642/94, Judgment of 29 April 1999, para. 49; *Niedbala v. Poland*, ECtHR, Application No. 27915/95, Judgment of 4 July 2000, para. 50.

power is likewise inconceivable if the person empowered does not enjoy independence".<sup>13</sup> If the "officer" under article 5.3 is subordinated to other judges or officers, these must "themselves enjoy similar independence"<sup>14</sup> to judges.

Under article 5.4, the term "court" serves to denote "bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case ..., but also the guarantees ... of judicial procedure."<sup>15</sup> The body must have a judicial character and, although article 5.4 does not compel the Contracting States to set up a second level of jurisdiction for the "examination of lawfulness of detention and for hearing applications for release[,] ... a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as in first instance."<sup>16</sup> Such a judicial character must embody the same qualities of independence and impartiality as the "tribunal" referred to in article 6 ECHR.<sup>17</sup>

The Venice Commission has stated that where the court deciding the appeal against judicial reviews of deprivation of liberty and other judicial "is "higher" it has the authority and experience to reverse the first decision. "Higher" does not necessarily mean "of a higher degree" but it means "of a higher authority": it may be a higher or specialised formation of a court, for example, but it cannot be a single judge of the same level."<sup>18</sup>

In order for a State to respect its obligations under articles 5.3 and 5.4 ECHR as well as 9.3 and 9.4 ICCPR, it is therefore essential that the body in charge of the judicial review of detention under these articles, be independent and impartial. Furthermore, if appeals are available, the body hearing the appeals must also meet this requirement.

## **2. What is independence of courts under international law?**

The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, has applied criteria of independence and impartiality that can be applied, *mutatis mutandis*, for the interpretation of the requirement of independence for the bodies under articles 5.3 and 5.4 ECHR; in particular, it 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."<sup>19</sup>

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<sup>13</sup> *Schiesser v. Switzerland*, ECtHR, Application No. 7710/76, Judgment of 4 December 1979, para. 29.; See also, *Neumeister v. Austria*, ECtHR, Application No. 1936/63, Judgment of 27 June 1968, p. 44, para. 24; *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, Application Nos. 2832/66; 2835/66; 2899/66., Judgment of 18 November 1970, para. 78

<sup>14</sup> *Schiesser v. Switzerland*, *op. cit.*, para. 31.

<sup>15</sup> *Weeks v. UK*, ECtHR, Application No. 9787/82, Judgment of 2 March 1987, para. 61.

<sup>16</sup> *Navarra v France*, ECtHR, Application no. 13190/87, para. 28, among others.

<sup>17</sup> *Ali Osman Özmen v. Turkey*, ECtHR, Application No. 42969/04, Judgment of 5 October 2016, para. 87.

<sup>18</sup> Venice Commission: *Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships*, adopted by the Venice Commission at its 110<sup>th</sup> Plenary Session, Venice, 10-11 March, 2017, para. 71.

<sup>19</sup> See, *Campbell and Fell v. the United Kingdom*, ECtHR, Application No. 7819/77, Judgment of 28 June 1984, para. 78.

The UN Human Rights Committee has also noted the relevance of criteria for independence and impartiality under article 14 ICCPR, to the specific judicial roles in articles 9.3 and 9.4.<sup>20</sup> It has affirmed that

*The requirement of competence, independence and impartiality of a tribunal ... is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.*<sup>21</sup>

It has stressed that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation."<sup>22</sup>

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 European Charter on the Statute for Judges and the Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to Member States on judges: independence, efficiency and responsibilities, also provide authoritative standards on the independence of the judiciary.

The UN Basic Principles affirm 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."<sup>23</sup>

Council of Europe Recommendation (2010)12 states that the "independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law."<sup>24</sup> Furthermore, "[t]he principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence."<sup>25</sup> Indeed, even

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<sup>20</sup> CCPR, *General Comment no. 35*, UN Doc. CCPR/C/GC/35, *op. cit.* para. 45, footnote 141, referring to *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), paras. 18-22.

<sup>21</sup> 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.

<sup>22</sup> *Ibid.*

<sup>23</sup> UN Basic Principles on the Independence of the Judiciary, adopted by Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985, Principle 2.

<sup>24</sup> Council of Europe, *Judges: independence, efficiency and responsibilities*, Recommendation CM/Rec(2010)12 and explanatory memorandum, 10 November 2010, para. 4.

<sup>25</sup> *Ibid.*, para. 22.

"councils for the judiciary should not interfere with the independence of individual judges."<sup>26</sup>

### **3. Independence of the judiciary in Turkey and the Council of Judges and Prosecutors**

The independence of the Turkish judiciary, already under threat before the attempted coup of 15 July 2016<sup>27</sup> and strained by the dismissal of a third of its members in the aftermath,<sup>28</sup> has been further imperilled following the constitutional amendments approved by referendum on 16 April 2017.

#### ***The institutional independence of the CJP***

One of the constitutional reforms introduced as a result of the April 2017 referendum modified the composition and appointment of the High Council of Judges and Prosecutors, also renaming it to simply "Council of Judges and Prosecutors". This reform entered into force before other amendments to the Constitution that were voted on at the same time. Provisional article 21 stated that the new members of the Council should be selected within 30 days from the entry into force of the amendment.

Based on the new constitutional provision, the Council of Judges and Prosecutors was reappointed. The new Council started its work in May 2017. Of the thirteen members, six are now effectively appointed by the President of the Republic, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. None of the members of the Council is appointed by judges or public prosecutors.

The ICJ notes that, before the Constitutional amendment, the President of the Council was required to be impartial, according to the Constitution. However, the new article 18.3 of the Law Amending the Constitution abolished the requirement of neutrality of the President. It entered into force on the date of the publication of the Amendment, at the same time as the amendment on the composition of the Council of Judges and Prosecutors.<sup>29</sup>

The remaining seven members of the Council are appointed by the National Assembly (Parliament). The selection process in the Parliament is complex. However, if a party or a de jure/de facto political coalition has 3/5 majority in the Parliament, members of the Council can be appointed by this qualified majority according to Article 159 of the Constitution.

In April and May 2017, the ruling party, AKP, and its supporter, the Nationalist Movement Party had more than 330 MPs in the Parliament, i.e. more than 3/5 of the Parliament. Since the opposition parties protested against the new provision

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<sup>26</sup> Ibid., para. 29.

<sup>27</sup> ICJ, *Turkey: the Judicial System in Peril - A Briefing Paper*, Geneva, June 2016, available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>.

<sup>28</sup> ICJ, *Justice Suspended: Access to Justice and the State of Emergency in Turkey*, Geneva, July 2018, available at <https://www.icj.org/wp-content/uploads/2018/07/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>

<sup>29</sup> See, Venice Commission, *Turkey Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, 110<sup>th</sup> Plenary Session, Venice, 10-11 March 2017, CDL-AD(2017)005, Opinion No. 875/2017.

and did not attend the final vote in the Parliament, seven members of the Council were elected by this majority.<sup>30</sup>

The Council of Europe's Commissioner for Human Rights found that the new composition of the Council "did not offer adequate safeguards for the independence of the judiciary and considerably increased the risk of it being subjected to political influence."<sup>31</sup> The Venice Commission echoed these concerns, noting that this "composition of the CJP is extremely problematic. [This] would place the independence of the judiciary in serious jeopardy ... . Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice."<sup>32</sup>

The UN Special Rapporteur on freedom of expression raised concerns "about structural changes to the judicial system which undermine the independence of the judiciary, even those that predate the emergency declared in 2016."<sup>33</sup> In this connection, the Office of the UN High Commissioner for Human Rights concluded that "the new appointment system for the members of the Council of Judges and Prosecutors ... does not abide by international standards, such as the Basic Principles on the Independence of the Judiciary. [Because] of the Council's key role of overseeing the appointment, promotion and dismissal of judges and public prosecutors, the President's control over it effectively extends to the whole judiciary branch."<sup>34</sup>

The European Commission, in its 2018 Progress Report found that:

*There has been further serious backsliding in the past year, in particular with regard to the independence of the judiciary. The Constitutional amendments governing the Council of Judges and Prosecutors (CJP) entered into force and further undermined its independence from the executive. The CJP continued to engage in large-scale suspensions and transfers of judges and prosecutors. No efforts were made to address concerns regarding the lack of objective, merit-based, uniform and pre-established criteria in the recruitment and promotion of judges and prosecutors.*<sup>35</sup>

Previously, in its report of June 2016, the ICJ had expressed concern that transfers of judges between judicial positions in different regions of Turkey were

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<sup>30</sup> Gulsen Solaker-Daren Butler, *Turkish MPs elect judicial board under new Erdogan constitution*, Reuters.com, 17 May 2017, available at: <https://www.reuters.com/article/us-turkey-politics/turkish-mps-elect-judicial-board-under-new-erdogan-constitution-idUSKCN18D0T9>

<sup>31</sup> Council of Europe Commissioner for Human Rights, Statement of 7 June 2017 available at [https://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset\\_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-monitoring%2Fturkey%3Fp\\_p\\_id%3D101\\_INSTANCE\\_IK6iqfNE1t0Z%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_pos%3D1%26p\\_p\\_col\\_count%3D2](https://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-monitoring%2Fturkey%3Fp_p_id%3D101_INSTANCE_IK6iqfNE1t0Z%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D1%26p_p_col_count%3D2) [accessed on 14 November 2018].

<sup>32</sup> Venice Commission, *Turkey Opinion on the Amendments to the Constitution*, *op. cit.*, para. 119.

<sup>33</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey*, 7 June 2017, UN Doc. A/HRC/35/22Add.3, para. 68.

<sup>34</sup> OHCHR, *Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East* ( hereinafter "*Second Report on Turkey*"), March 2018,, para. 34.

<sup>35</sup> European Commission, *Turkey 2018 Report*, Doc. No. SWD(2018) 153 final, 17 April 2018 (hereinafter "*European Commission 2018 Report*"), p. 6.



being applied as a hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives.<sup>36</sup> As the European Commission stated in April 2018 and as the ICJ heard from direct testimony, this practice has not ended in the last two years. Therefore, "there is a need for legal and constitutional guarantees to prevent judges and prosecutors from being transferred against their will, except where courts are being reorganised."<sup>37</sup>

Under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered fully structurally independent due to the excessive degree of political control of appointments. In particular, it does not comply with the Recommendation of the *Council of Europe on judges: independence, efficiency and responsibility* that "[n]ot less than half the members of [councils for the judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."<sup>38</sup>

The European Charter on the Statute of Judges affirms that "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."<sup>39</sup> In its Explanatory Memorandum, it is further clarified that this requirement is a minimum standard:

*... In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.*

*The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.*

*There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.*<sup>40</sup>

The UN Special Rapporteur on the independence of judges and lawyers has stated that having a majority of the members of a judicial governing body be judges, selected by judges or by other means free of political bias, may be important for ensuring the independence of the body (and thereby the

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<sup>36</sup> ICJ, *Turkey: the Judicial System in Peril - A Briefing Paper*, Geneva, June 2016, p.18, available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>.

<sup>37</sup> European Commission 2018 Report, *op. cit.*, p. 24.

<sup>38</sup> CoE, *Judges: independence, efficiency and responsibilities*, *op. cit.*, para.27.

<sup>39</sup> Council of Europe, *European Charter on the statute for judges and Explanatory Memorandum*, Strasbourg, 8-10 July 1998, DAJ/DOC(98)23, (hereinafter, "European Charter on the statute for judges") Article 1.3.

<sup>40</sup> European Charter on the statute for judges, *op. cit.*, Explanatory Memorandum, Article 1.3

independence of the judiciary).<sup>41</sup> The Special Rapporteur has further recommended, based on a recent global comparative study of judicial councils, that

*... In order to insulate judicial councils from external interference, politicization and undue pressure, international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process. The interference of the judicial hierarchies in the process should also be avoided.*<sup>42</sup>

*...As a general rule, non-judge members should not be appointed by the executive branch; it is also preferable that they are not appointed by the legislative branch. If elected by parliament, regional standards provide that non-judge members should be elected by a qualified majority, necessitating significant opposition support.*<sup>43</sup>

*Judicial councils should include judges among its members. ... The judge members of a council should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels. Certain members of a council, for example the President of the Supreme Court, can be selected ex officio.*<sup>44</sup>

*The election of lay members of a council should be entrusted to non-political authorities. When elected by parliament, lay members should be elected by a qualified majority, necessitating significant opposition support. In no case should they be selected or appointed by the executive branch.*<sup>45</sup>

The Universal Charter of the Judge, adopted by the International Association of Judges, provides that: "The Council for the Judiciary must be completely independent of other State powers. It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation."<sup>46</sup>

Recently, the Grand Chamber of the European Court of Human Rights, in the judgment of *Denisov v. Ukraine*, has restated the principles of *Volkov*, with regard to the requirement for independence of judicial councils:

*... it emphasised the need for substantial representation of judges within such a body, specifying that where at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality ....*

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<sup>41</sup> See e.g. UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy*, 24 March 2009, A/HRC/11/41 paras. 28 and 29; UN General Assembly, *Report of the Special Rapporteur on the independence of judges and lawyers*, 13 August 2012, A/67/305, para 113(k); See also, Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, 2 May 2018, A/HRC/38/38, paras. 76-77 and 107-108.

<sup>42</sup> HRC, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/38/38, *op.cit.* para. 76.

<sup>43</sup> *Ibid.*, para 78.

<sup>44</sup> *Ibid.*, para 107.

<sup>45</sup> *Ibid.*, para. 108.

<sup>46</sup> International Association of Judges, *Universal Charter of the Judge*, adopted 1999 and revised 2017, Article 2-3 (excerpt). (Hereinafter, "Universal Charter of the Judge").

*Second, in view of the importance of reducing the influence of political organs on the composition of the disciplinary body, it was relevant to assess the manner in which judges were appointed to that body, having regard to the authorities which delegated them and the role of the judicial community in that process ....*

*Third, it was relevant to establish whether the members of the disciplinary body worked on a full-time basis or continued to work and receive a salary outside; given that the latter case would inevitably involve their material, hierarchical and administrative dependence on their primary employers, this would endanger their independence and impartiality ....*

*Fourth, attention had to be paid to the participation of representatives of the prosecution authorities in the composition of the disciplinary body for judges; the inclusion of the Prosecutor General ex officio and the other members delegated by the prosecution authorities raised concerns as to the impartiality of the disciplinary body of judges in view of the functional role of prosecutors in domestic judicial proceedings ....*

*Fifth, where the members of the disciplinary body played a role in the preliminary inquiry in a disciplinary case and subsequently participated in the determination of the same case by the disciplinary body, such a duplication of functions could cast objective doubt on the impartiality of those members ....<sup>47</sup>*

In the *Denisov* case, one of the issues in Ukraine's HCJ that led to the finding of its lack of independence was that " the majority of the HCJ had consisted of non-judicial staff appointed directly by the executive and the legislative authorities, with the Minister of Justice and the Prosecutor General being ex officio members."<sup>48</sup>

The Grand Chamber further found that the High Administrative Court could not comply with the standards of independence and impartiality either because its judges "were subject to the disciplinary jurisdiction of the HCJ. [Indeed,] The question of compliance with the fundamental guarantees of independence and impartiality may arise, however, if the structure and functioning of the disciplinary body raises serious issues in this regard. ... the HCJ was not merely a disciplinary authority; it was in reality an authority with extensive powers with respect to the careers of judges."<sup>49</sup>

### ***The role of the CJP in practice***

Since the Council of Judges and Prosecutors is in charge of all appointments, career progress and termination of office of judges as well as all disciplinary proceedings, it has a significant impact on the independence of the judiciary.

During the state of emergency, 4279 judges and prosecutors were dismissed by the decisions of High Council of Judges and Prosecutors, issued under emergency legislation. Such decisions are in principle subject to review by the Council of

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<sup>47</sup> *Denisov v. Ukraine*, ECtHR, Application No. 76639/11, Judgment of 25 September 2018, para. 68.

<sup>48</sup> *Ibid.*, para. 69.

<sup>49</sup> *Ibid.*, para. 79.

State,<sup>50</sup> Turkey's apex administrative court; however, despite receiving requests for review not a single decision has been rendered by the Council of State since it was entrusted with this task in January 2017. Currently, therefore, Turkey has not demonstrated the availability in practice of any effective remedy against the dismissals of judges and prosecutors that occurred under emergency laws.<sup>51</sup>

The grounds for dismissal of judges and prosecutors, set out in the emergency decrees and subsequently extended by Law no. 7145 for a further three years after the end of the emergency, are those "who are considered to be a member of, or have relation, connection or contact with terrorist organisations or structure/entities, organizations or groups, established by the National Security Council as engaging in activities against the national security of the State".<sup>52</sup> The vague and overbroad nature of this language creates a very great potential for the arbitrary dismissal of judges in violation of guarantees of judicial independence. The likelihood of arbitrary application of the vague and overbroad language is only exacerbated by the fact that after almost two years the Council of State has not responded to any requests for review.

In addition to the situation of dismissals, the CJP also retains the power of disciplinary sanctions, suspension, promotion, and appointment.<sup>53</sup> These decisions are not subject to judicial review.<sup>54</sup> Neither can a judge or prosecutor who is sanctioned by the CJP bring a constitutional complaint to the Constitutional Court.<sup>55</sup> Indeed, the Constitutional Court has consistently found such applications inadmissible.<sup>56</sup>

There have been many reports of cases of pressure by the CJP on judges. For instance, on 03 April, 2017, the then HCJP suspended all three Judges of the İstanbul 25th Assize Court as well as the trial prosecutor for three months pending further investigations after they ordered the release of 21 journalists.<sup>57</sup> The HCJP initiated an investigation into all four judges and prosecutors and explained the suspension and investigation by stating that "these releases are intentional, contrary to the law, and don't comply with the facts."<sup>58</sup> In another case, the İstanbul 37<sup>th</sup> Assize Court released 17 lawyers after a one week long trial. However, it lifted its own decision after the public prosecutor objected to this decision. However even after the Court had taken this step, all three judges who had decided to release the lawyers were appointed to other posts.<sup>59</sup> In yet

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<sup>50</sup> Provisional Article 1, paragraph 3 of the Law no. 7075 establishing the State of Emergency Commission published in the Official Gazette on 23 January 2017.

<sup>51</sup> ICJ, Justice Suspended: Access to Justice and the State of Emergency in Turkey, *op. cit.*, para.

<sup>52</sup> Article 26, Law No. 7145 on the Amendment of Some Laws and Emergency Decrees. .

<sup>53</sup> Law no. 6078, article 4. Law. No. 7078 on Amending the Decree Law, Published in the Repeating Official Gazette numbered 30354 and dated 8 March 2018, Article 4.

<sup>54</sup> "The decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review." Article 159, para. 10, Law No. 2709, Constitution of the Republic of Turkey..

<sup>55</sup> Article 45 (3) of the Law No. 6216, Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey states that transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application.

<sup>56</sup> See for instance, Nesin Kayserilioğlu Application No. 2013/1581, 16.4.2013; Aziz Yıldırım Application No. 2013/3240, 8.5.2014. The status of the decisions of the HCJP has recently been asked to the Turkish government in Hüseyin Cahit Bilgen case (Hüseyin Cahit Bilgen v. Turkey, ECtHR, Application No. 1571/07, Communicated 3 October 2018.). The case is still pending.

<sup>57</sup> Council of Europe, Commissioner for Human Rights, *Third party intervention*, 10 October 2017, CommDH(2017)29, para. 40.

<sup>58</sup> Committee to Protect Journalists, *Turkey Crackdown Chronicle: Week of April 2, 2017*, 3 April 2017, available at: <https://cpj.org/blog/2017/04/turkey-crackdown-chronicle-week-of-april-2-2017.php>.

<sup>59</sup> "Türkiye'nin konuştuğu kararı veren hakimler sürüldü mü", 20 September 2018, available at: <https://odatv.com/turkiyenin-konustugu-karari-veren-hakimler-suruldu-mu-20091802.html>.

another case, the Chief Judge of the 8<sup>th</sup> Assize Court in Diyarbakır, who had released HDP MP İdris Baluken, was appointed as a bench judge to Ankara after this decision.<sup>60</sup>

### **Conclusions on the CJP**

Without an independent institution of self-governance and, therefore, without strong structural independence, it is difficult to see how judges and prosecutors in Turkey can carry out their duties independently in politically sensitive cases.

In Turkey, the lack of institutional independence of the judiciary, the chilling effect of the mass dismissals of judges that took place under the state of emergency and the diminished quality and experience of the new members of the judiciary appointed following these purges are serious threats to the rule of law and the structural independence of the judiciary.

As things stand, the Council of Judges and Prosecutors lacks the institutional guarantees that would allow it to withstand political influence and may act as a vehicle of executive and legislative interference in the work of individual judges.

### **4. The independence of judgeships of the peace**

The criminal judgeships of peace were established by Law n. 6545 which entered into force on 28 June 2014.<sup>61</sup> It replaced the previous 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 jurisdiction of the judges of the 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 not to prosecute. The power of the judgeships of peace had however been extended to removal of content and closing down of Internet websites;<sup>62</sup> protective measures (search and seizure warrants, arrest and detention warrants);<sup>63</sup> removal of the right for a lawyer to exercise advocacy according to Decree Law no. 667;<sup>64</sup> and decisions on the merits on traffic offences.

Avenues to appeal decisions of judges of the peace exercising their criminal jurisdiction are very limited. Apart from the highly exceptional circumstances in which a case can be referred to the Constitutional Court, the only appeal is to another criminal judge of the peace of the same district. Effectively, therefore, there is a closed system of appeals within the criminal procedural jurisdiction presided over by judges of the peace, with minimal recourse to the wider courts

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<sup>60</sup>“HDP’li İdris Baluken’i tahliye eden Mahkeme Başkanı, düz hakim yapıldı”, 6 April 2017, available at: [http://www.cumhuriyet.com.tr/haber/turkiye/714883/HDP\\_li\\_idris\\_Baluken\\_i\\_tahliye\\_eden\\_Mahkeme\\_Baskani\\_duz\\_hakim\\_yapildi.html](http://www.cumhuriyet.com.tr/haber/turkiye/714883/HDP_li_idris_Baluken_i_tahliye_eden_Mahkeme_Baskani_duz_hakim_yapildi.html).

<sup>61</sup> Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, *op. cit.*, para.16.

<sup>62</sup> *Ibid.*, para. 19.

<sup>63</sup> *Ibid.*, para. 17.

<sup>64</sup> *Ibid.*, para. 21.

system. This situation is particularly worrying given the allegations of lack of independence of judges of these courts.

Peace judges are appointed by the Council of Judges and Prosecutor (CJP) in the same way as any other judge in Turkey's judiciary.

Formerly criminal peace courts were empowered to carry out most of the duties now fulfilled by criminal peace judges. However, there were two main differences in the former system: they were responsible not only for pre-trial judicial measures, but were also dealing with petty offences; and their decisions could be appealed at an upper court, i.e. first-instance criminal courts (*asliye ceza mahkemesi*).

This appeal system had practical consequences for the independent review of the first judicial decision on detention or other pre-trial measures. For instance, in Ankara there were 40 criminal peace courts and 60 criminal courts. An arrest warrant produced by one of those 40 criminal peace courts could be appealed at one of those 60 criminal courts, randomly selected. The randomness of the choice of appeal body, as well as the high number of judges that could be entrusted with such an appeal, provided strong guarantees against possible influences by members of the executive or legislative powers.

The closed-circuit system of appeal by criminal peace judges abolished this guarantee. For example, while in the old system around 100 judges in Ankara were involved in decisions on pretrial measures, now only 10 are empowered to decide on them.

Concerns about the independence and impartiality of criminal peace judgeships were brought to the Constitutional Court in 2015.<sup>65</sup> The Constitutional Court declined to annul the relevant provisions, on the ground that peace judges are appointed by the HCJP in the same manner as the judges of general jurisdiction, and that they enjoy the same constitutional guarantees of independence. The Court held that establishing specialised judges for the investigation phase does not contradict the principle of the rule of law. It further ruled that the system of appeals against decisions of a peace judge to another peace judge is not contrary to the rule of law, nor to the right to a fair trial. However, five judges of the Constitutional Court dissented<sup>66</sup> pointing to the fact that, in provinces where there are only two criminal peace judges, appeals from one judge would always be entertained by the second judge. They considered that this structure would not meet the standards envisaged under Article 5.4 of the ECHR and the related jurisprudence of the European Court of Human Rights.

In a number of individual applications to the Constitutional Court, applicants also questioned the independence of the criminal peace judges.<sup>67</sup> All those arguments were summarily rejected by the Constitutional Court, which relied upon its decision in the annulment case.

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<sup>65</sup> See cases nos. E. 2014/164, K. 2015/12, 14.1.2015.

<sup>66</sup> Two of the dissenting voters, Alparslan Altan and Erdal Tercan, were dismissed and arrested after the coup attempt.

<sup>67</sup> See, *supra* note 53.

In contrast to the Constitutional Court's decisions, the Council of Europe's Venice Commission has concluded that the "system of horizontal appeals against decisions by the criminal peace judges does not offer sufficient prospects of an impartial, meaningful examination of the appeals."<sup>68</sup>

With regard to their independence, the Venice Commission noted that the Ankara peace judges they interviewed said that "they did not apply themselves to become peace judges, but they were asked by the HSYK [i.e. what is now the CJP] to take up this position. ... Further, in reply to the question of whether it had been possible to avoid the appointment of persons belonging to the 'parallel state' to the newly established peace judgeships in 2014, at a time when the existence of such a structure was already publicly discussed, the Venice Commission's delegation was informed that a screening had been performed and that following the failed coup, with one exception, peace judges were not among those dismissed. ... Taken together with the system of closed, horizontal appeals, the method of selecting the peace judges appears to be worrying."<sup>69</sup> Indeed, the ICJ notes that, while in the aftermath of the attempted coup of 15 July 2018 around a third of the judiciary was arbitrarily and summarily dismissed, only one of the 719 peace judges across the country was dismissed.<sup>70</sup> As the Venice Commission pointed out, the apparently political "screening" process in selection of these judges casts doubts on the objectivity of the method of selection, and consequently calls into question their impartiality.

Referring also to comparative experiences, the Venice Commission noted that other systems often referred to - incorrectly - as similar to that of the peace judges in Turkey, such as that of France, have "an external appeal system to a higher court".<sup>71</sup> Indeed, in France rulings of the judges of freedoms and detention may be appealed before the Investigation Division of the Court of Appeal.<sup>72</sup>

The Venice Commission found that:

*... the Turkish system of "opposition" to a single peace judge of the same level does not offer sufficient guarantees that the appeal will be impartially examined. Criminal peace judges are colleagues of equivalent experience and qualifications, sharing premises and examining each other's appeals; they form a closed circuit. It is not unreasonable to imagine that they trust each other and to expect that they tend to respect each other's decisions. They are indeed likely to naturally defend the reputation of competence of their own colleagues, their own and of their institution as a whole. This system does not offer sufficient prospects of an impartial, meaningful examination of the appeal against applications for review of the legality of detention. ...*  
*[Even if it] is not a general human right to litigate to an appeal court[, ...] the lack of an appeal to a superior court of general jurisdiction exacerbates the difficulties that were identified above regarding the dangers of a*

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<sup>68</sup> See, Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, *op. cit.*, para. 86.

<sup>69</sup> *Ibid.*, paras. 50-52.

<sup>70</sup> *Ibid.*, para. 22.

<sup>71</sup> *Ibid.*, para. 62

<sup>72</sup> Article 185 and following of the French Code of Criminal Procedure.

*specialist court; it also removes the common safety-net of an appeal to an independent superior court that is present in most European systems.*<sup>73</sup>

The Office of the UN High Commissioner for Human Rights has also found that "the jurisdiction and practice of the Peace Judgeship Courts, established by Law 6545 in June 2014, gives rise to numerous concerns. These courts have been using the emergency decrees to issue detention orders, including decisions to detain journalists and human rights defenders, to impose media bans, to appoint trustees for the takeover of media companies, or to block internet."<sup>74</sup>

The UN Special Rapporteur on freedom of opinion and expression, in his report on Turkey, found that "the system of horizontal appeal falls short of international standards and deprives individuals of due process and fair trial guarantees."<sup>75</sup>

The Council of Europe's Commissioner for Human Rights equally found that "decisions of these judges being at the origin of the majority of the most obvious violations of the right to freedom of expression. ... One of the main reasons for this development seems to have been the fact that the system of criminal judges of the peace works as a closed circuit, since the decisions of one judge of the peace can only be appealed to another such judge. [This] seems to have allowed the criminal judges of the peace to ignore or resist the positive developments in the case-law of Turkish courts, including the Constitutional Court, to better take account of Article 10 standards."<sup>76</sup>

In a recent report, PEN International has reported that "almost all appeals made against orders of pre-trial detention issued by Criminal Judgeships of Peace are rejected by another Criminal Judgeship of Peace."<sup>77</sup>

Although statistics about the decisions by criminal peace judges are not regularly published, some information about their working methods may be inferred from their decisions on matters other than deprivation of liberty. For instance, peace judges are entrusted with the authorization of requests for removal of content online by the Prime Minister or other Government's Ministers.<sup>78</sup>

Almost 212 such decisions were issued since July 2015 and almost all of them were requested by the Prime Ministry. They were all executed by TIB/BTK and approved by Criminal Judgeships of Peace in Ankara. 137 of these decisions were issued by a single Criminal Judgeship in Gölbaşı, Ankara blocking access to 575 websites, 482 news articles, 1759 Twitter accounts, 736 tweets, 505 YouTube videos, 116 Facebook pages and 195 other content totalling 4368 separate Internet addresses. All the appeals made against the blocking decisions were

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<sup>73</sup> Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, *op. cit.*, paras. 71-72.

<sup>74</sup> OHCHR, Second Report on Turkey, *op. cit.*, para. 52.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, paras. 69-70.

<sup>77</sup> Dr. Yaman Akdeniz-Dr. Kerem Altıparmak (PEN), Turkey: Freedom of Expression in Jeopardy Violations of the rights of authors, publishers and academics under the State of Emergency, p.11., available at: <https://www.englishpen.org/campaigns/turkey-freedom-of-expression-in-jeopardy/> (Hereinafter, "PEN report").

<sup>78</sup> Article 8A of Law no. 5651, entitled "Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication", which was added to Law No. 5651 in April 2015. According to it, access to content can be restricted for the protection of life and property, national security and public order, prevention of crime or for the protection of public health. The providers are required to remove or block content within 4 hours of notification.



rejected by other criminal peace judges.<sup>79</sup> In other words, with regard to about 4368 separate Internet addresses criminal peace judges accepted all requests from the Prime Ministry and rejected all appeals made by potential victims.

A similar pattern may be witnessed with regard to decisions by criminal peace judges on the pre-trial detention of arrested opposition MPs on the basis of standardized decisions. In all those cases, MPs' speeches, attending funerals, demonstrations, sharing of information on social media have been found sufficient to justify their detention. In all those cases, different criminal peace judges decided to prevent the suspect's access to the investigation file. Appeals against the decisions of criminal peace judges to other criminal peace judges were also systematically rejected on the basis of standardized reasoning.<sup>80</sup>

## **5. Conclusion**

**The system of the criminal peace judges in Turkey does not meet international standards for independent and impartial review of detention.**

**First, the body in charge of appointment and dismissal of the peace judges, the Council of Judges and Prosecutors, falls short of the international and regional standards pertaining to the independence of the judiciary, in particular in its structural dimension. This does not allow peace judges, who sit as single judges, to withstand influence or pressure from external powers.**

**Second, reliable reports, including from international organisations suggest that, in practice, the method of selection of and decisions by peace judges show a situation of lack of institutional independence and leave room for pressures from political branches of the State.**

**Finally, as identified by several international bodies, the closed appeal/opposition system in its structure and in its actual operation, does not mitigate this lack of independence but, rather, compounds it.**

**In the view of the ICJ, these factors call into question the independence and capacity of judges of the peace to judicially review restrictions on the right to liberty under articles 5.3 and 5.4 ECHR and 9.3 and 9.4 ICCPR.**

## **6. Recommendations**

**In order for Turkey to comply with its obligations under articles 5.3, 5.4 ECHR and 9.3 and 9.4 ICCPR, the ICJ recommends the following:**

### **1. With regard to the judiciary as a whole, in order to ensure the institutional independence of the judges tasked with judicial**

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<sup>79</sup> Yaman Akdeniz, Analysis of the Draft Provision on the "Presentation of media services via Internet" to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services, <https://www.osce.org/representative-on-freedom-of-media/373846?download=true>.

<sup>80</sup> See the details in the Constitutional Court's judgments in Ayhan Bilgen, Besime Konca, Ferhat Encu, Figen Yüksekdağ, Gülser Yıldırım, İdris Baluken, Leyla Birlik, Meral Daniş Beştaş, Nihat Akdoğan, Selahattin Demirtaş, Selma Irmak applications. All those cases are now pending before the ECtHR.

**review of detention, the constitutional provisions on the appointment of members of the Council of Judges and Prosecutors should be amended to ensure a majority presence on the Council of judges elected by their peers, and their sole presence in chambers dealing with appointment, career, transfer and dismissals of judges.**

- 2. Article 26 of Law no. 7145, which essentially extended the emergency powers over judges and prosecutors for a further three years, should be abolished.**
- 3. The Council of State should proceed promptly to acknowledge, and move expeditiously to process and decide, cases in which judges or prosecutors request review of their dismissal.**
- 4. All decisions of the CJP relating to discipline, suspension and removal of a judge or prosecutor should be subject to judicial review. Individual complaint to the Constitutional Court should also be available against the decisions of the CJP.**
- 5. The competence of the criminal judgeships of peace in relation to detention and other measures during the investigation phase should be removed, so that only ordinary judges are empowered to make such decisions during the investigation and prosecutorial phases;**
- 6. If criminal judgeships of peace are retained, there should be put in place a system of appeals against decisions of peace judges to higher courts other than those that may later hear the criminal case against the suspect.**
- 7. Judicial decisions and statistics about pre-trial measures should be accessible to the public.**
- 8. Judicial decisions relating to pre-trial measures must address the facts of individual cases, and decisions on appeals against these decisions must answer the main arguments of the objection.**

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