

Ablak v. Turkey

Application no. 28566/17

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS
(ICJ)

INTERVENER

*pursuant to the Section Registrar's notification dated 15 October 2018 that the President
of the Section had granted permission under Rule 44 § 3 of the Rules of the European
Court of Human Rights*

14 November 2018

1. Introduction

In this intervention, the International Commission of Jurists (ICJ) will address the following issues:

- the international legal and normative framework on the independence of the judiciary and the role of judges, in particular in implementation of obligations under articles 5.3 and 5.4 ECHR;
- the current situation of the independence, governance and administration of the judiciary in Turkey, with particular regard to the Council of Judges and Prosecutors and the role of the peace judges, and their conformity with State obligations under articles 5.3 and 5.4 ECHR. The situation will be assessed with reference to the findings of an ICJ mission undertaken in May 2018 and contained in the mission report (ATTM1).

2. Bodies responsible for judicial review of deprivation of liberty under international law

The European Court of Human Rights has affirmed that the guarantee under article 5.3 ECHR 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."¹

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 or she 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 power is likewise inconceivable if the person empowered does not enjoy independence".² If the "officer" under article 5.3 is subordinated to other judges or officers, these must "themselves enjoy similar independence"³ 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."⁴ 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."⁵ Such a judicial character must embody the same qualities of independence and impartiality as the "tribunal" referred to in article 6 ECHR.⁶

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 authority which is independent, objective and impartial in relation to the issues dealt with."⁷ The Committee has stated the "court" specified in article 9.4 ICCPR "should ordinarily be

¹ *Kurt v. Turkey*, Application no. 24276/94, para. 123. See also *Aquilina v. Malta*, Application no. 25642/94, para. 49; *Niedbala v. Poland*, Application no. 27915/95, para. 50.

²² *Schiesser v. Switzerland*, Application no. 7710/76, para. 29. See also, *Neumeister v. Austria*, Application no. 1936/63, p. 44, para. 24; *De Wilde, Ooms and Versyp*, Application no. 2832/66 and others, para. 78

³ *Ibid.*, para. 31.

⁴ *Weeks v. UK*, Application no. 9787/82, para. 61.

⁵ *Navarra v. France*, Application no. 13190/87, para. 28, among others.

⁶ *Ali Osman Özmen v. Turkey*, Application no. 42969/04, para. 87.

⁷ CCPR, *General Comment no. 35*, UN Doc. CCPR/C/GC/35, para. 32.

a court within the judiciary”, and that, even if exceptionally in respect of certain forms of detention, “legislation may provide for proceedings before a specialized tribunal”, in such cases the tribunal “must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.”⁸

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.”⁹

Specifically, 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”¹⁰ 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.”¹¹ 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.”¹²

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.”¹³

The ICJ submits that, in order for a State to respect its obligations under articles 5.3 and 5.4 ECHR, it is essential that the body conducting the judicial review of detention in accordance with these articles, be independent and impartial. Furthermore, any appeal must also meet this standard.

3. 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.”¹⁴

⁸ *Ibid.*, para. 45.

⁹ 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

¹⁰ *Ibid.*, Guideline 4, para. 69.

¹¹ *Ibid.*, para. 70.

¹² *Ibid.*, para. 72.a.

¹³ Venice Commission, *Opinion on the duties, competences and functioning of the criminal peace judgeships*, adopted at its 110th Plenary Session, 10-11 March 2017, Coe Doc. CDL-AD(2017)004, para. 71.

¹⁴ See, *Campbell and Fell v. the United Kingdom*, Application No. 7819/77, 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 9.4.¹⁵ 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.*¹⁶

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."¹⁷

The *UN Basic Principles on the Independence of the Judiciary* 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."¹⁸

The *Recommendation of the Committee of Ministers on judges: independence, efficiency and responsibilities* 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."¹⁹

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."²⁰ Indeed, even "councils for the judiciary should not interfere with the independence of individual judges."²¹

4. 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 2016²² and strained by the dismissal of a third of its members in the aftermath,²³ has been further imperilled following the constitutional amendments approved by referendum on 16 April 2017.

¹⁵ CCPR, *General Comment no. 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.

¹⁶ CCPR, *General Comment No. 32, op. cit.*, para. 19.

¹⁷ *Ibid.*, para. 19.

¹⁸ UN Basic Principles on the Independence of the Judiciary, Principle 2.

¹⁹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, para. 4.

²⁰ *Ibid.*, para. 22.

²¹ *Ibid.*, para. 29.

²² 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>.

²³ 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> and in ATTM1.

With regard to the judiciary in Turkey, the ICJ found, in its report *Justice Suspended - Access to Justice and the State of Emergency in Turkey* (ATTM1), that the lack of institutional independence of the judiciary, the chilling effect of the mass dismissals and the diminished quality and experience of the members of the judiciary that resulted from it are serious threats to the rule of law and the structural independence of the judiciary.²⁴

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 State,²⁵ Turkey's apex administrative court. However, despite receiving requests 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.²⁶

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 organizations or structure/entities, organizations or groups, established by the National Security Council as engaging in activities against the national security of the State".²⁷ 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.

Apart from the special emergency powers (as extended) described above, in respect of which the Council of State theoretically exercises jurisdiction to review, all other decisions of the Council of Judges and Prosecutors ("CJP", see below) relating to appointments, career progress or termination of office of a judge as well as all disciplinary proceedings are not subject to any judicial review, including before the Constitutional Court.²⁸

4.1. *The Council of Judges and Prosecutors*

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". 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 selected by judges or public prosecutors.

The ICJ notes that, before the Constitutional amendment, the President of the Council was subject to a Constitutional requirement of impartiality. However, the new article 18.3 of the Law Amending the Constitution abolished the requirement of neutrality of the President of the Council. Six members of the Council have now been appointed by President Erdogan and started work in May 2017.²⁹ The

²⁴ *Ibid.*, p. 21

²⁵ 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

²⁶ ICJ, *Justice Suspended*, *op. cit.*, p. 20.

²⁷ Article 26, Law no. 7145.

²⁸ See article 4 of Law 6087 and following.

²⁹ See, Venice Commission, *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*, adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e.

remaining seven members are appointed by the National Assembly. The selection process for these members is complex. However, if a party or a *de iure* or *de facto* political coalition has 3/5 majority in the Parliament, all members can be appointed by this qualified majority according to Article 159 of the Constitution. At the time of the appointment, in May 2017, this majority was held by the AKP and MHP parties. Since the opposition parties protested against the new provision and did not attend the final vote in the Parliament, all seven members were elected by this majority.³⁰

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."³¹ 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."³²

The UN Special Rapporteur on freedom of expression raised concern "about structural changes to the judicial system which undermine the independence of the judiciary, even those that predate the emergency declared in 2016."³³ 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."³⁴

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.*³⁵

The composition of the Council of Judges and Prosecutors 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]

³⁰ See. Reuters, "Turkish MPs elect judicial board under new Erdogan constitution". 17 May 2017, available at <https://www.reuters.com/article/us-turkey-politics/turkish-mps-elect-judicial-board-under-new-erdogan-constitution-idUSKCN18D0T9> [accessed on 14 November 2017].

³¹ 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 [accessed on 14 November 2018].

³² Venice Commission, *Opinion on the amendments to the Constitution*, op. cit., para. 119.

³³ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey*, UN Doc. A/HRC/35/22Add.3, 21 June 2017, 2017, para. 68.

³⁴ 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.

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

should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."³⁶

The *European Charter on the Statute of Judges* affirms that, "[i]n 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."³⁷

The UN Special Rapporteur on the independence of judges and lawyers has also concluded 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 independence of the judiciary).³⁸

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."³⁹

Recently, the Grand Chamber of this Court, in *Denisov v. Ukraine*, has restated the principles of *Volkov*, with regard to the 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

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

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*⁴⁰

In *Denisov*, one of the issues in the country's High Council of the Judiciary (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."⁴¹ The Grand Chamber further found that the High

³⁶ Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 27.

³⁷ European Charter on the Statute of Judges, article 1.3; Explanatory Memorandum, article 1.3. See also Consultative Council of European Judges, Opinion n°10 (2007) on "Council for the Judiciary in the service of society", paras 15 to 20, 25 to 31, 48 to 51.

³⁸ See e.g. UN Doc A/HRC/11/41 (2009), paras 28 and 29; UN Doc A/67/305 (2012), para 113(k); See also paras 76, 77, 107 and 108 of UN Doc A/HRC/38/38 (2018).

³⁹ International Association of Judges, *Universal Charter of the Judge*, adopted 1999 and revised 2017, article 2-3 (excerpt).

⁴⁰ *Denisov v. Ukraine*, Application no. 76639/11, para 68.

⁴¹ *Ibid.*, para 69.

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."⁴²

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 of its members. Furthermore, at present, the Council of Judges and Prosecutors has no institutional guarantees that allow it to withstand political influence and may act as a vehicle of executive and legislative interference in the work of individual judges.

5. 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 2014.⁴³ 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.

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 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 Prosecutors (CJP) in the same way as any other judge of 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*).

Concerns about the independence and impartiality of criminal peace judgeship were brought to the Constitutional Court in 2015.⁴⁴ The Constitutional Court did not 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 dissenting judges⁴⁵ pointed out that, since in provinces

⁴² *Ibid.*, para. 79.

⁴³ Venice Commission: *Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships*, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March, 2017, para. 16.

⁴⁴ See cases nos. E. 2014/164, K. 2015/12, 14.1.2015.

⁴⁵ Two of the dissenting judges, Alparslan Altan and Erdal Tercan, were dismissed and arrested after the coup attempt.

where there are only two criminal peace judges appeals from the decision of the first judge would always be entertained by the other judge, 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.

This Court has held that while no obligation exist to set up an appeal system, "[n]evertheless, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance."⁴⁶ 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."⁴⁷

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. the now 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."⁴⁸ 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 country⁴⁹ was dismissed. 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".⁵⁰ Indeed, in France rulings of the judges of freedoms and detention may be appealed before the Investigation Division of the Court of Appeal.⁵¹

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 specialist

⁴⁶ *Kucera v. Slovakia*, Application no. 48666/99, para. 107.

⁴⁷ See, Venice Commission, *Turkey - Opinion on the duties, competencies and functioning of the criminal peace judgeship*, adopted by the Venice Commission at its 110th Plenary Session, 10-11 March 2017, Doc. CDL-AD(2017)004-e, para 86.

⁴⁸ *Ibid.*, paras. 50-52

⁴⁹ *Ibid.*, para. 22.

⁵⁰ *Ibid.*, para. 62

⁵¹ Article 185 and following of the French Code of Criminal Procedure.

*court; it also removes the common safety-net of an appeal to an independent superior court that is present in most European systems.*⁵²

The Office of the UN High Commissioner for Human Rights has 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."⁵³

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."⁵⁴

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."⁵⁵

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."⁵⁶

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 of online by the Prime Minister or other Government's Ministers.⁵⁷ 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 totaling 4368 separate Internet addresses. All the appeals made against the blocking decisions were rejected by other criminal peace judges.⁵⁸ In other words, with regard to about 4368 separate Internet addresses, criminal peace judges accepted all requests of the Prime Ministry and rejected all appeals made by potential victims.

⁵² Venice Commission, *Turkey - Opinion on the duties, competencies and functioning of the criminal peace judgeship*, *op. cit.*, paras 71-72.

⁵³ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 52.

⁵⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey, *op. cit.*, para. 68.

⁵⁵ Commissioner for Human Rights of the Council of Europe, *Memorandum on freedom of expression and media freedom in Turkey*, Coe Doc. CommDH(2017)15, paras. 69-70

⁵⁶ English PEN, *Turkey: Freedom of Expression in Jeopardy - Violations of the rights of authors, publishers and academics under the State of Emergency*, 2018, available at <https://www.englishpen.org/campaigns/turkey-freedom-of-expression-in-jeopardy/> [Accessed on 14 November 2018], p. 11

⁵⁷ 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.

⁵⁸ 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>.

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, attendance at funerals, demonstrations, or sharing of information on social media have been found sufficient to justify their detention. In all such cases, different criminal peace judges decided to prevent the suspect's access to the investigation file. Appeals against such decisions of criminal peace judges to other criminal peace judges have also systematically been rejected with standardized reasoning.⁵⁹

The ICJ submits that 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 criminal 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 criminal 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 criminal peace judges to judicially review restrictions on the right to liberty under articles 5.3 and 5.4 ECHR.

⁵⁹ 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.