

Turkey's Judicial Reform Strategy and Judicial Independence

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In May 2019, the Ministry of Justice of Turkey released a Judicial Reform Strategy (the JRS).¹ The Strategy sets out nine objectives for reform of the justice system of Turkey, and lists a number of "activities" as specific measures to these ends. The stated purposes of the Strategy are:

*...strengthening the rule of law, protecting and promoting rights and freedoms more effectively, strengthening the independence of the judiciary and improving impartiality, increasing the transparency of the system, simplifying judicial processes, facilitating access to justice, strengthening the right of defence and efficiently protecting the right to trial in a reasonable time.*²

Reflecting international law obligations of Turkey, the Judicial Reform Strategy affirms that:

...[t]here is a structural link between the rule of law and the independence and impartiality of the judiciary. Ensuring the independence and impartiality of the judiciary in democracies is a prerequisite for rule of law. This is also a guarantee for the individual rights and freedoms.

This briefing paper aims to contribute to the realisation of these principles in Turkey and, in particular, of Aim 2, i.e. "Improving independence, impartiality and transparency of the Judiciary". In it, the International Commission of Jurists (ICJ) and the Human Rights Joint Platform (İnsan Hakları Ortak Platformu - İHOP) highlight current problems of the Turkish justice system in terms of the structural independence of the judiciary, address the priorities of the Strategy for reforms relating to Aim 2 and provide recommendations for its effective realisation.

1. International standards and jurisprudence on judicial independence

The separation of powers, particularly between the judiciary and political branches of government, is a core precept of the rule of law. Central to this principle is that the judiciary must be, structurally and in practice, independent. The Turkish government itself recognises this universally accepted principle, including as articulated in the UN Basic Principles on the Independence of the Judiciary: "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."³

A competent, independent and impartial judiciary is fundamental to the rule of law, particularly in respect of the fair administration of justice and for the effective legal protection of human rights.⁴ It is therefore essential both to the

¹Republic of Turkey Ministry of Justice, Judicial Reform Strategy, May 2019 (hereinafter referred to as JRS), available at http://www.sgb.adalet.gov.tr/ekler/pdf/YRS_ENG.pdf

² JRS, para. 6.

³ UN Basic Principles on the Independence of the Judiciary, Principle 1. See JRS, para. 25.

⁴ UN Basic Principles on the Independence of the Judiciary, at preamble. ICJ, "Justice Suspended: Access to Justice and the State of Emergency in Turkey", July 2018, pages 21 and 22, available at <https://www.icj.org/wp->

rule of law more generally, and specifically to the fulfilment of a State's international legal obligations on human rights, that the independence, impartiality, integrity and competence of its courts and judges are guaranteed in law and secured in practice.

Changes to the judiciary, prosecution and legal profession in Turkey must therefore be assessed within the framework of its obligations under international human rights law. The European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) both provide for the right to a fair hearing before a competent, independent and impartial tribunal established by law, and the right to an effective remedy for violations of human rights.

The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, has held that "[i]n determining whether a body can be considered to be 'independent' – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."⁵ The Human Rights Committee affirms 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.*⁶

International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors, also provide authoritative standards against which recent developments in the Turkish judicial system should be measured.⁷

2. Shortcomings in judicial independence unaddressed by the Strategy

While the International Commission of Jurists and the Human Rights Joint Platform welcome some positive proposals included in the Justice Reform Strategy as noted below, important structural shortcomings in the Turkish justice system will seriously undermine any effort of reform if left unaddressed. These shortcomings are not recognised by the current draft of the Strategy.

[content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf](https://www.venicecommission.europa.eu/content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf). Venice Commission, Opinion, Turkey, On the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017, Opinion No. 875/2017, CDL-AD(2017)005, Adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March 2017, para.44

⁵ See *Campbell and Fell v. the United Kingdom*, ECtHR, *op. cit.*, para. 78.

⁶ UN Human Rights Committee, General Comment No. 32, *op. cit.*, para. 19.

⁷ Also relevant are the Universal Charter of the Judge, adopted by the International Association of Judges, the Implementation Measures for the Bangalore Principles, adopted by the Judicial Integrity Group, reports of the UN Special Rapporteur on the Independence of Judges and Lawyers, and best practices and regional standards from bodies such as the Consultative Council of European Judges.

a) The Council of Judges and Prosecutors

The proposed JRS is not the first initiative of judicial reform in recent years. The judiciary was already restructured numerous times between 2010 and 2019. Constitutional amendments enacted in 2010 introduced a partly electoral system within the High Council of Judges and Prosecutors (HCJP), the body responsible for the self-government of judges and prosecutors.⁸ The ICJ already expressed concern in its 2016 report *Justice in Peril* that the then High Council was prone to undue influence by the executive and legislative powers.⁹

The structure, composition, and methods of appointment of the previous judicial council were changed by a constitutional amendment in April 2017, which also renamed the body as the Council of Judges and Prosecutors (CJP).¹⁰ Of the thirteen members, four are now appointed by the President of the Republic. The Minister of Justice, who presides over CJP, and his or her deputy are *ex officio* members. The remaining seven members are appointed by the National Assembly. All members appointed by the Parliament are to be elected by a qualified majority, and the ruling Justice and Development Party (*Adalet ve Kalkınma Partisi* - AKP and the Nationalist Movement Party (*Milliyetçi Hareket Partisi* - MHP) presently have enough members to constitute this majority. Consequently, the appointment of all members of the Council is, in one way or another, presently controlled by the government. None of the members of the CJP are elected by judges or public prosecutors.

In accordance with international law and standards on the independence of the judiciary, the governing bodies of the judiciary must be independent of the executive and legislative powers. This is implicit in the general obligation to ensure an independent and impartial judiciary, pursuant to international treaties to which Turkey is a party such as the ICCPR and ECHR. It is explicit in many other international standards.

The European Charter on the Statute for Judges, for instance, envisages an authority "independent of the executive and legislative powers" for every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".¹¹ The Council of Europe's European Commission for Democracy through Law (Venice Commission), which is mandated to provide legal advice to its Member States, has stressed the importance of establishing "a politically neutral High Council of Justice or an equivalent body."¹² International standards indicate that a majority of the members of such a body should be judges elected by their peers¹³ in order to avoid their becoming "merely formal

⁸ The Council of Judges and Prosecutors is the centralized body responsible for the organization of the judiciary, with power to decide on admission, appointment, transfer, promotion, disciplinary measures, dismissal, and supervision of judges and public prosecutors.

⁹ ICJ, Turkey: the Judicial System in Peril, June 2016, p.19. Available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf> .

¹⁰ Law no.6771, available at <https://bit.ly/2IIIfuK>

¹¹ European Charter on the Statute for Judges, 1998, Principle 1.3.

¹² Venice Commission, *Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania*, CDL-INF(1998)009, para. 5.

¹³ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CoM Recommendation (2010)12, para. 27. See also the European Charter on the Statute for Judges, Principle 1.3 ("at least one half of those who sit are judges elected by their peers"), and other sources cited below.

or legal rubber-stamping organs behind which the Government exerts its influence indirectly".¹⁴

The Universal Charter of the Judge, in the current version adopted by the International Association of Judges in 2017, provides in part:

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.

The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.

*The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.*¹⁵

Similarly, the Implementation Measures for the Bangalore Principles of Judicial Conduct, adopted by the Judicial Integrity Group in 2010, provide in part:

*The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.*¹⁶

The Istanbul Declaration on Transparency in the Judicial Process provides in part as follows:¹⁷

...While there is a diversity of methods by which judges assume office, recent international and regional initiatives are unanimous in their view that it is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are not made by the legislature or the executive, but by an independent body such as a Council for the Judiciary, with the formal intervention of the Head of State in respect of higher appointments. Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office. Its non-judge members may be selected from among outstanding jurists or citizens of

¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28. See also, Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

¹⁵ Article 2-3.

¹⁶ Article 15.4.

¹⁷ The Declaration was prepared by chief justices and senior justices of 37 countries over a period of six years, at the invitation of the Chief Justice of the Court of Cassation of Turkey and UNDP, and presented to the UN by the Government of Turkey in April 2019 (<https://undocs.org/A/73/831>), eventually being noted and referred to States' attention by the UN Economic and Social Council (ECOSOC) in its resolution 2019/22 adopted 23 July 2019

acknowledged reputation and experience chosen by an appropriate appointment mechanism. ...¹⁸

...The power to discipline or remove a judge from office should be vested in an independent body (or in the Council for the Judiciary responsible for the appointment of judges), which is composed of serving or retired judges but which should include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.¹⁹

The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended among other things that:²⁰

The responsibility for disciplinary proceedings against judges should be vested in an independent authority composed primarily of judges, such as a judicial council or a court. ...

These authorities may include members from outside the judicial profession (lawyers, academics, members of civil society), but in no case should such persons be members of the legislative or executive branches. ...

All the appointment processes for the councils should be transparent and participative so to avoid and prevent corporatism and appropriation of the process by the de facto powers.

Judicial councils should include judges among its members. To avoid the risk of corporatism and self-interest, the councils may also include lay members, for example lawyers, law professors, jurists, Bar members, as well as citizens of acknowledged reputation and experience. Active politicians and members of the legislative or executive branches of power cannot simultaneously serve on a judicial council. 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.

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. ...

The Venice Commission, in its report concerning the constitutional amendments that changed the composition of the CJP, raised concerns about the new structure of the CJP:

¹⁸ Paragraph 13.

¹⁹ Paragraph 15.

²⁰ Special Rapporteur on the Independence of Judges and Lawyers, Report on Judicial Councils, UN Doc A/HRC/38/38 (2 May 2018), paras. 103 - 110.

*That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. 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.*²¹

As highlighted in the ICJ report *Justice suspended*, the ICJ and IHOP consider that, under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered structurally independent due to the excessive degree of political control of appointments to the Council. In particular, the composition and procedures of the Council do 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."²²

b) The criminal judgements of peace

With amendments made in 2014, criminal judgements of peace²³ replaced the previous criminal courts of peace, and have the power to issue search, arrest and detention warrants; judicially review the decisions of public prosecutors not to prosecute; removing content and closing down of Internet websites; and decisions on the merits on traffic offences.²⁴ With these amendments, review of the decisions of criminal peace courts by criminal courts was abolished. In exchange, a closed-circuit system of "appeal" within the criminal peace judgements system was introduced, whereby the judgment of a criminal judgement of peace can only be reviewed by another criminal judgement of peace, all of which are hierarchically equal. The Venice Commission 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."²⁵

The ICJ and IHOP have already concluded in a briefing paper *The Turkish Criminal Peace Judgements and International Law*²⁶ that the system of the peace judges in Turkey is currently unable to ensure an independent and impartial review of detention in Turkey.

This is, first of all, because the very body in charge of appointment and dismissal of the peace judges, the Council of Judges and Prosecutors, is clearly not in line with the international standards pertaining to the independence of the judiciary,

²¹ Venice Commission, Opinion, Turkey, On the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017, Opinion No. 875/2017, CDL-AD(2017)005, Adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March 2017, para. 119.

²² Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 27. See similarly the Universal Charter of the Judge provisions cited above.

²³ These judgements have the power to issue search, arrest and detention warrants, removal of content and closing down of Internet websites, search and seizure warrants, arrest and detention warrants, removal of the right for a lawyer to exercise advocacy.

²⁴ See, Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgements, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March, 2017, para.16.

²⁵ Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgements, op. cit., para. 86.

²⁶ Available at <https://www.icj.org/wp-content/uploads/2019/02/Turkey-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf>

in particular in its structural dimension.²⁷ Secondly, because reports from the ground and from international organisations reveal that practices of appointments to, and decisions by, peace judges appear not to disclose an independent environment for work and to the contrary, suggest possible pressures from political branches of the State. And finally, the closed appeal/opposition system, as identified by several international bodies, does not compensate for this lack of independence but, rather, strengthens it.

The ICJ and IHOP welcome that, according to Objective 7.3, “[i]t will be ensured that criminal judgeships of peace are specialized with respect to the objections to the decision of administrative sanctions, and an effective remedy will be introduced with respect to the decisions.” This however means that the highly problematic criminal peace judgeship system will be retained. Furthermore, the Judicial Reform Strategy provides no clarity as to their powers to review detention and ensuring an appropriate character, scope and effectiveness of the remedy against their decision.

c) Executive influence on the judiciary

The Turkish supreme courts (the Court of Cassation and the Council of State) have undergone four structural reforms of their composition and functioning between 2011 and 2017. The number of the members of the both Court of Cassation and the Council of State and their structure were substantially changed in 2011²⁸, 2014²⁹, 2016³⁰ and 2017³¹.

The number of members of the Court of Cassation was increased from 250 to 516, and the number of members of the Council of State increased from 95 to 195, by amendments in 2011 and 2014. In 2016, the number of members of the Court of Cassation was reduced to 200 and the number of members of the Council of State was reduced to 90.³²

Furthermore, following the amendments to the composition of the CJP, the number of judges and prosecutors subjected to involuntary transfers increased substantially. While 190 judges and prosecutors were transferred in 2010, by the decisions held on 9 May 2017³³ and 3 July 2017³⁴, the CJP transferred 1,815 judges and prosecutors in less than two months. On 25 July 2018, the CJP transferred 3,320 judges and prosecutors.³⁵ By its 31 May 2019 decision³⁶, the CJP transferred 3,722 judges and prosecutors.³⁷ Transfer of judges on a mass scale against their will has negatively impacted the independence of judiciary.

²⁷ See, inter alia, 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.

²⁸ See news report at <http://www.hurriyet.com.tr/gundem/yargitay-ve-danistayda-daire-sayilarini-attiran-tasari-yasalasti-16982030>

²⁹ See news report at <http://www.aljazeera.com.tr/haber/yuksekk-yargida-cemaate-fren>

³⁰ See news report at https://www.ntv.com.tr/turkiye/yargitay-ve-danistay-uyeleriyeni-yargi-paketini-protosto-etti,OQGgmDIUVEyiXe-AR39izQ?_ref=infinite, <https://www.bloomberght.com/haberler/haber/1899437-cumhurbaskani-erdogan-yargitay-ve-danistay-kanunununu-onayladi>

³¹ Emergency Decree Law no.696, <http://www.diken.com.tr/ne-yeni-yargi-ne-de-yargiya-son-darbe/>

³² Amendments on Legislation n.2575 and Legislation n.2797 by Legislation n.6110, and articles 12 and 22 of legislation n. 6723, adopted on 01.07.2016, <http://www.hurriyet.com.tr/gundem/yargitay-ve-danistayda-daire-ve-uye-sayisi-artti-17017953>

³³ CJP statement available at: <https://www.hsk.gov.tr/Eklentiler/files/Ek-1-09-05-2017.pdf>

³⁴ CJP statement available at: <https://www.hsk.gov.tr/Eklentiler/files/EK%201-%202017%20Y%4%b1%4%b1%20Adl%3%ae%20Yarg%4%b1%20Kararname%20Listesi.pdf>

³⁵ CJP statement available at: <https://www.hsk.gov.tr/Kararnameler/2018.aspx>

³⁶ CJP statement available at: <https://www.hsk.gov.tr/Kararnameler/2019.aspx>

³⁷ News report at <https://www.aa.com.tr/tr/turkiye/3-bin-722-hakim-ve-savcinin-gorev-yeri-degisti/1494318>

The JRS effectively admits that the absence of protection against arbitrary and involuntary transfers is a problem.³⁸

The executive's influence over the judiciary has further increased following the failed coup attempt on 15 July 2016. One third of the existing judges and prosecutors were dismissed without any individual investigation or an opportunity for defence.³⁹ In order to justify the dismissal of a judge, the law only requires a mere "connection" or "affiliation" with an "structure, formation or group" that the National Security Council has "determined to operate against the national security of the State".⁴⁰ The vague and overbroad nature of this language creates very great potential for the arbitrary dismissal of judges in violation of guarantees of judicial independence. Although many of the dismissed judges and prosecutors challenged the dismissal decisions before the Council of State, only a single decision has been delivered by the Council of State in those cases, in which it rejected the applicant's request.⁴¹ Therefore, no dismissed judge has been reinstated so far following the judicial review. While the state of emergency lapsed in July 2018, the power of the Council of Judges and Prosecutors to dismiss judges and prosecutors under the same criteria as under emergency legislation was maintained for a further three years under Law no. 7145 in July 2018. Since then at least 17 further judges and prosecutors have been dismissed via this procedure in a way that was tainted by arbitrariness. However, only one of the 719 criminal peace judges across the country was dismissed.⁴² In the words of the Commissioner for Human Rights of the Council of Europe, mass dismissals created "an atmosphere of fear among the remaining judges and prosecutors."⁴³

Furthermore, the need to recruit large numbers of new judges following the mass dismissals, and the relative inexperience of many such new recruits, as well as the additional caseload generated by state of emergency measures, even after the state of emergency itself ended, has had a significant adverse impact on the overall effectiveness, competence and fairness of the justice system. More than 8,000 judges and prosecutors have been appointed since the beginning of the state of emergency and the requirements of appointment were eased in order to allow for the appointment of judicial interns before the end of their internship and to make it easier for lawyers to become judges.

³⁸ JRS, p. 33.

³⁹ 4236 members of the judiciary in total, <http://bianet.org/bianet/siyaset/182400-ohal-de-yargi-kurumlarindan-ihraclar>

⁴⁰ Article 3 of State of Emergency Decree n.667 relating to Precautions against members of the judiciary: "In case of their membership, affiliation or a connection to a structure, formation or group that is determined by the National Security Council to operate against the national security of the state or terrorist organizations, it is decided that it is not appropriate for members of the Constitutional Court, Chamber Presidents and members of the Court of Cassation, Chamber Presidents and members of the Council of State, members of the Turkish Court of Accounts, judges and prosecutors to remain in the profession and that they should be removed from the profession. Deciding authority for members of the Constitutional Court is the General Assembly of the Constitutional Court, for Chamber Presidents and members of the Court of Cassation, deciding authority is the First Presidency Council of the Court of Cassation, for Chamber Presidents and members of the Council of State, deciding authority is the Presidency Council of the Council of State, for members of the Court of Accounts deciding authority is the commission consisting of the vice-presidents and the head of a department and a member to be determined by the president of the Court of Accounts under the chairmanship of the president of the Court of Accounts."

⁴¹ See. Council of State, Fifth Chamber, 2016/58016E, 2019/4157K, accessible at https://www.memurlar.net/common/news/documents/853047/04_09_2019_033248.pdf

⁴² Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, op. cit., para. 51.

⁴³ Abdullah Zeydan a.o v. Turkey, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH (2017)33, 2 November 2017, para. 35

d) Interim conclusion on unaddressed shortcomings

The lack of institutional independence of the judiciary, and 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. These factors clearly undermine the capacity of the judiciary as a whole to provide an effective remedy for human rights violations, both in regard to measures taken under the state of emergency, and in general.

The new Judicial Reform Strategy should be read against this background. Considering that problems relating to the independence of judiciary in Turkey are structural and that the situation has even further deteriorated due to recent amendments, the ICJ considers that the new Strategy will not be able to achieve its stated objectives unless it is amended or supplemented to address these structural problems.

3. Transfers of judges and prosecutors

Under the stated aim of improving independence, impartiality and transparency of the judiciary, the JRS at Activity 2.1.a states that judges and public prosecutors at higher ranks will not be transferred without their consent in consideration of their professional achievements.⁴⁴ Activity 2.1.g of the JRS states that the power of the Minister of Justice to assign judges to another jurisdiction in case of urgency is to be revoked.

According to Article 159 of the Constitution “the decisions of the Council (CJP), other than dismissal from the profession, shall not be subject to judicial review.” Such decisions include the transfer of judges and prosecutors.

International standards establish that decisions on conditions of tenure, including the assignment and transfer of judges, should be the responsibility of judicial authorities, in order to protect against improper motives in such decisions, and ensure that transfers are not applied as disguised sanctions.

Amongst other instruments, the International Bar Association’s Minimum Standards of Judicial Independence provide: “[t]he power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent, such consent not to be unreasonably withheld.”⁴⁵

Article 2-2 of the Universal Charter of the Judge provides in part:

No judge can be assigned to another post or promoted without his/her agreement.

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only as the effect of disciplinary

⁴⁴ ICJ, Turkey: the Judicial System in Peril, June 2016, p.19. available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

⁴⁵ IBA Minimum Standards of Judicial Independence, adopted 1982 by the International Bar Association, Standard A.12. The Singhvi Declaration, para. 13, provides that the assignment of a judge to a post “shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.” See also European Charter on the Statute for Judges, Principle 3.1.

proceedings, under the respect of the rights of defence and of the principle of contradiction.

The Implementation Measures for the Bangalore Principles of Judicial Conduct provide that:

Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not be transferred from one jurisdiction, function or location to another without his or her consent.⁴⁶

The ICJ concluded in its report *Justice in Peril* that the lack of appeal against transfers and other decisions of the CJP, apart from dismissals, represents a significant gap in procedural safeguards for judges and prosecutors and a breach of their right to an effective remedy.

The ICJ and IHOP emphasize that forced transfers of judges, without fair hearing and due process safeguards that guard against arbitrary or discriminatory application of these measures, represent a serious threat to judicial independence, as the resulting potential for arbitrary decisions or abuse is likely to have a severe chilling effect on the independence, impartiality and integrity of judicial decision-making. Concerns as to the application of transfers of both judges and prosecutors in practice can best be dispelled by increased transparency in the process of transfers and by providing due process guarantees, including judicial review of such decisions by an independent and impartial tribunal. The ICJ and IHOP consider that legislative provision for such judicial review should be introduced as a matter of priority.

The ICJ and IHOP recommend that administrative decisions on the transfer of judges and prosecutors be transparent and subject to effective due process safeguards. Judicial review of such decisions on the application of the affected judge or prosecutor should be introduced as a matter of priority. The system, including laws and procedures, should be independently reviewed to ensure that transfers are not, in practice, used as a disguised disciplinary measure.

Although the ICJ and IHOP welcome the geographical guarantee, proposing an end to the forced transfer of higher-ranking judges noted at 2.1.a of the JRS, we are also concerned about the exclusion of judges at lower ranks from this guarantee. The ICJ and IHOP welcome the Activity at 2.1.g of the JRS that states the power of the Minister of Justice to assign judges to another jurisdiction in case of urgency shall be revoked.

4. Appointment and promotion of judges and prosecutors

The JRS at Activity 2.1.b states that the interview examination during the admission of judges and public prosecutors shall be conducted by a committee with diverse participation. Activity 2.1.d states that promotion system of the

⁴⁶ Paragraph 13.5. The Measures further notes that, "The transfer of judges has been addressed in several international instruments since transfer can be used to punish an independent and courageous judge, and to deter others from following his or her example."

judges and public prosecutors is to be restructured taking account of qualifications and performance.

International standards on judicial independence stipulate that judges must be appointed through objective selection criteria through a fair and transparent process, which must be effective in safeguarding against appointments for improper motives.⁴⁷ Furthermore, the authorities ultimately in charge of selection and appointment of judges should be “independent of the executive and legislative powers”.⁴⁸ The Venice Commission, in its Judicial Appointments Opinion, concluded that an “appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy”⁴⁹ and that “[s]uch a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.”⁵⁰

International standards set forth principles governing any appointment procedure that is adopted. They require, first, that appointments should be according to clear criteria based in the first instance on merit,⁵¹ among other criteria, and second, that the process and the institutions involved in the process should be sufficiently independent to protect against control of judicial appointments by the executive or legislative powers.⁵²

The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended:⁵³

Decisions on the appointment and promotion of judges should be taken through a transparent process by a judicial council or an equivalent body independent of the legislative and executive branches of powers.

The procedure for the selection and appointment of judges should be based on objective criteria previously established by law or by the competent authority. Decisions concerning the selection and careers of judges should be based on merit, having regard to the qualifications, skills and capacities of the candidates, as well as to their integrity, sense of independence and impartiality. Competitive examinations conducted, at least partly, in a written and anonymous manner can serve as an important tool in the selection process.

The Special Rapporteur considers that the involvement of the legislative or executive branches of power in judicial appointments may lead to the politicization of judicial appointments. In cases in which judges are

⁴⁷ UN Basic Principles on the Independence of the Judiciary, op cit, Principle 10.

⁴⁸ European Charter on the Statute for Judges, Principle 1.3. See also, the Universal Charter of the Judge, article 5-1, the Implementation Measures for the Bangalore Principles, paragraphs 12.4-12.5, reports of the UN Special Rapporteur on the Independence of Judges and Lawyers, Report on Judicial Councils (2018), para. 97.

⁴⁹ *Judicial Appointment*, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), para. 48.

⁵⁰ *Ibid*, para. 49.

⁵¹ UN Basic Principles on the Independence of the Judiciary, Principle 10; Universal Charter of the Judge article 5(1); European Charter on the Statute for Judges, para. 2.1; Council of Europe, Recommendation No. (2010) 12 Principle 44.

⁵² Council of Europe, Recommendation No. (2010) 12, Principles 46-48. The *Council of Europe's Recommendation on judges* affirms that the “authority taking decisions on the selection ... of judges should be independent of the executive and legislative powers” (para. 46); the *Universal Charter of the Judge* (article 5(1)), the *European Charter on the Statute of Judges* (paras. 2.1. and 3.1); the *Magna Charta of Judges* (para. 5) and the Consultative Council of European Judges (*Opinion no. 10, op. cit.*, para. 48-49) affirm that it should be entrusted fully to the Councils for the Judiciary.

⁵³ Special Rapporteur on the Independence of Judges and Lawyers, Report on Judicial Councils (2018), paras. 97-99.

formally appointed by the Head of State, the Government or the legislative branch, the appointment should be made on the basis of the recommendation of the judicial council that the relevant appointing authorities follow in practice.

In Turkey, the selection process for judges and prosecutors involves a written examination, and an oral interview by a board consisting of seven members, five of them representatives of the Ministry of Justice.

The ICJ and IHOP note the commitment to ensure a large participation in the committee in charge of admitting judges and prosecutors.⁵⁴ However, enlarging participation does not necessarily contribute to ensuring the independence of this committee from the executive.

According to the current system under Law no. 2802⁵⁵ and Law no. 6087⁵⁶, the promotion of judges and prosecutors is decided by the CJP based on certain criteria about the experience and performance of judges.⁵⁷ In order to be promoted, judges are required to complete two years of service in their current rank without being subject to any adverse court ruling or disciplinary sanction that prevents a promotion. Their professional knowledge, performance in work, evaluation results and trainings are some of the criteria to be considered in promotion by the CJP. The ICJ and IHOP note the commitment to restructure the promotion system. However, we note that executive influence over the promotion of judges and prosecutors takes place through CJP. Such executive influence could not be eliminated with a methodological change in the promotion system.

International standards on the judiciary are clear that any procedure of evaluation in the judiciary must have the exclusive purpose of improve the performance of judges and do not undermine their independence.⁵⁸ The Council of Europe's Consultative Council of European Judges has pointed out that "[a]n unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard."⁵⁹

The ICJ has already recommended that the system of judicial appointments should be revised with a view to establishing the independence of both the

⁵⁴ The JRS at Activity 2.1.b states that the interview exam during the admission of judges and public prosecutors shall be conducted by a committee with a large participation

⁵⁵ Article 29 of Law n.2802

⁵⁶ Article 9 of the Law. 6087

⁵⁷ Article 21 of Law.2802

⁵⁸ *Commentary to Bangalore Principles, op. cit.*, paras. 41-42; *Council of Europe Recommendation on judges*, paras. 42 and 58; *European Charter on the Statute of Judges*, para. 4.1. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 71; CCJE, *Opinion no. 10, op. cit.*, para. 53-54: "[q]uality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work."

⁵⁹ CCJE, *Opinion no. 17 on the evaluation of judges' work, the quality of justice and respect for judicial independence*, CoE Doc. CCJE(2014)2, 24 October 2014, para. 49.12. See also Universal Charter of the Judge, article 5(3).

examination and the interview process from the Ministry of Justice and other executive bodies, as well as from undue influence from other quarters. Currently the interview board consists of five members serving under the Ministry of Justice. The First Chamber of the CJP, which is the body in charge of transfers of judges and prosecutors, includes the deputy minister of the Ministry of Justice as member.⁶⁰ The representation and role of the Ministry of Justice on interview boards as well as in the First Chamber of the CJP should be limited.⁶¹

5. Disciplinary procedures

The JRS, at activities under 2.2, commits to provide additional rights to judges and public prosecutors during disciplinary processes, and that disciplinary penalties will be redefined with more objective criteria. The JRS also states that the judicial review of a CJP decision – currently possible only against dismissal decisions – should be extended to all disciplinary decisions. Activity 2.2.d states that it shall be ensured that disciplinary decisions of the CJP shall be disclosed to the public on condition that personal data is protected.

As noted above, Article 159 of the Constitution does not allow the decisions of the CJP, other than dismissal from the profession, to be subject to judicial review.

International standards on judicial independence require that judicial administration and disciplinary action must be carried out in accordance with established standards of judicial conduct by independent bodies that include substantial judicial representation.⁶² Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁶³ As noted earlier, Principle 15 of the Istanbul Declaration provides in part as follows:⁶⁴

The power to discipline or remove a judge from office should be vested in an independent body (or in the Council for the Judiciary responsible for the appointment of judges), which is composed of serving or retired judges but which should include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive. Where the Head of State or the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of this independent body. The final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in camera or in public, should be published. The

⁶⁰ According to Article 9 of Law n.6087, duties of the first chamber of CJP includes the appointment and transfer of judges and prosecutors. And according to Article 8 (a) of Law n.6087, first chamber of the CJP consists of the relevant Deputy Minister of the Ministry of justice, one member from the members of the Court of Cassation, two from judges and prosecutors, one from the Administrative Judiciary, and one from Law faculties or lawyers. Members of the Chambers are elected by the Plenary Assembly of the CJP.

⁶¹ Influence of Ministry of Justice on interview boards continues. According to Art.9/A of Law n. 2802, each interview board consists of 5 members: the deputy minister appointed by the Minister of Justice, who presides the board; chairman of the inspectorate; Criminal Affairs Manager; Legal Affairs Manager; and General Manager of Personnel. All of these members serve under the Ministry of Justice.

⁶² The Universal Charter of the Judge, art. 7-1; CoE Recommendation (2010)12, principle 46; Istanbul Declaration, Principle 15; Special Rapporteur on the Independence of Judges and Lawyers, Report on Judicial Councils (2018), paras. 101-105; Report on Judicial Accountability (A/HRC/26*32), para. 123.

⁶³ UN Basic Principles on the Independence of the Judiciary, Principle 18

⁶⁴ See similarly Universal Charter of the Judge, article 7-1 ; Implementation Measures for the Bangalore Principles, sections 15 and 16.

complainant, if any, should be informed of the outcome of the investigation into his complaint.

The UN Special Rapporteur on the Independence of Judges and Lawyers has similarly recommended:⁶⁵

The responsibility for disciplinary proceedings against judges should be vested in an independent authority composed primarily of judges, such as a judicial council or a court.

The competence to receive disciplinary complaints and conduct disciplinary investigations and the competence to adjudicate cases of judicial discipline should be vested in separate branches of the judicial council or in different authorities.

These authorities may include members from outside the judicial profession (lawyers, academics, members of civil society), but in no case should such persons be members of the legislative or executive branches.

Disciplinary proceedings should provide the accused judges with all the procedural guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right to defend themselves in person or with the assistance of a legal counsel of their choice.

Decisions of the disciplinary body should be reasoned and subject to appeal before a competent court.

It is widely accepted in both European and universal standards on judicial independence, including the UN Basic Principles, that disciplinary, suspension or removal proceedings decisions should be subject to an independent review.⁶⁶ The Council of Europe Committee of Ministers has stipulated that such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate to the misfeasance.⁶⁷ The CCJE adds that “a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.”⁶⁸

The UN Basic Principles on the Independence of the Judiciary provide that complaints against judges should be processed expeditiously and fairly under an appropriate procedure in which a judge enjoys the right to a fair hearing.⁶⁹ Council of Europe standards stipulate that disciplinary proceedings should be conducted “with all the guarantees of a fair trial”, providing the judge with the right to challenge the decision and the sanction.⁷⁰ In matters of judicial

⁶⁵ Special Rapporteur on the Independence of Judges and Lawyers, Report on Judicial Councils (2018), paras. 101-105.

⁶⁶ The UN Basic Principles on the Independence of the Judiciary, principle 20.

⁶⁷ Council of Europe Committee of Ministers Recommendation No R (2010) 12 to Member States on judges: independence, efficiency and responsibilities, article 69.

⁶⁸ CCJE, *Opinion no. 10, op. cit.*, para. 63.

⁶⁹ The UN Basic Principles on the Independence of the Judiciary, principle 17.

⁷⁰ The Council of Europe recommendation R(2010)12 on judges, art. 69; See also the European Charter on the statute for judges, which refers to the need for “proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation.” The UN Human Rights Committee has stated that “judges should be removed only in accordance with an objective, independent procedure prescribed by law.”: Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc CCPR/CO/75/MDA, para.12.

discipline, particular importance is attached to procedures guaranteeing full rights of defence.⁷¹

As regards prosecutors, the UN Guidelines on the Role of Prosecutors provide that disciplinary action against prosecutors must be processed expeditiously and fairly under appropriate procedures, in accordance with the right to a fair hearing and subject to independent review.⁷² Disciplinary proceedings against prosecutors must guarantee an objective evaluation and decision and must be determined in accordance with the law, the code of professional conduct and other established standards and ethics.⁷³

The ICJ has already recommended that the CJP should ensure that its consideration of disciplinary cases against judges and prosecutors is informed by applicable international law standards, including the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on Prosecutors. It should also ensure and that all disciplinary proceedings respect independent judicial decision making. Disciplinary decisions against judges and prosecutors should be subject to appeal in the ordinary courts.

The ICJ and IHOP urge that judicial review be provided against all decisions of the CJP relating to discipline and suspension.⁷⁴ However, the ICJ and IHOP consider that, as Article 159 of the Constitution does not allow the decisions of the CJP, other than dismissal from the profession, to be subject to judicial review, a constitutional amendment is needed.

The ICJ and IHOP note the commitment to extend the rights of the judges and prosecutors during disciplinary procedures and highlight the importance of a judicial review of the disciplinary measures. Disclosure of disciplinary decisions may allow a degree of public scrutiny; however, it is not a substitute for an independent judicial review.

6. Principles of Ethics

The JRS in Activity 2.3 states that judicial ethics and good conduct should be defined and extended. The JRS says that a document should be approved “regarding the principles of ethics to be observed by members of the judiciary. This study shall be completed in accordance with the United Nations and Council of Europe standards and a structure shall be formed within the CJP to offer counselling on principles of ethics.”

Certain international and regional standards recommend that ethical principles should be distinguished from disciplinary rules.⁷⁵ In particular, such “principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the

⁷¹ Opinion No. 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, para. 60(b).

⁷² UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 principle 21

⁷³ UN Guidelines on the Role of Prosecutors, principle 22.

⁷⁴ ICJ, Submission of the International Commission of Jurists to the Universal Periodic Review of Turkey, 18 July 2019, available at <https://www.icj.org/wp-content/uploads/2019/07/Turkey-UPR-Advocacy-non-legal-submissions-2019-ENG.pdf>

⁷⁵ Magna Charta of Judges, CCJE, para. 18; Council of Europe Recommendation no. (2010)12, para. 72.

development of such codes. ... Judges should be able to seek advice on ethics from a body within the judiciary."⁷⁶

The ICJ and IHOP welcome the plan to establish a code of ethics and a consultation commission. It is however essential that this be done in full separation from the disciplinary system and be entrusted to an independent body.

7. Conclusions and recommendations

The ICJ and IHOP welcome all sincere and effective efforts by Turkey to reform the Turkish justice system in light of the principles of independence and impartiality of the judiciary, in full respect of the rule of law and in accordance with international standards. The aims of the Justice Reform Strategy correspond to the mission of the ICJ and IHOP to uphold the rule of law and human rights and the two organisations stand ready to provide feedback and recommendations to the authorities of Turkey and to all stakeholders involved to effectively reach these goals.

The ICJ and IHOP welcome the commitment of the Turkish authorities to reform the systems of discipline, transfer, accession, promotion and ethics of judges and prosecutors in line with international standards.

However, along with these measures, it is also essential that further reforms be implemented before any amendment to the disciplinary, transfer, accession and promotion system may be envisaged, in order to ensure that these latter reforms can bear fruit. Essential measures include, in line with the above:

- reform of the Council of Judges and Prosecutors,
- reform of the Criminal Peace Judgeships system and
- repeal of Law no. 7145 that still allows for arbitrary dismissals of judges and prosecutors, among other civil servants
- introduction of judicial review for all decisions of the CJP
- introduction of a transparent and fair process of selection and appointment of judges and prosecutors ensuring the independence of the committee and process from the executive.

The ICJ and IHOP are pleased to contribute to the work of the Judicial Reform Strategy with the following recommendations related to Aim no. 2:

- 1. Article 26 of Law no. 7145, which essentially extended the emergency powers over judges and prosecutors for a further three years, should be abolished.**
- 2. The constitutional amendments on the appointment of members of the Council of Judges and Prosecutors should be amended to ensure that a majority of the board are judges and prosecutors elected by their peers, and that chambers dealing with appointment, career, transfer and dismissals of judges and**

⁷⁶ Council of Europe Recommendation no. (2010)12, para. 73-74. See similarly Implementation Measures for the Bangalore Principles, Article 2; Universal Charter of the Judge, Article 6; Istanbul Declaration, Article 14.

prosecutors are made up only of judges and prosecutors elected by their peers.

- 3. The Council of Judges and Prosecutors should make it a priority to elaborate and implement professional standards for judges and prosecutors, especially with regard to the implementation of international human rights and constitutional law, by giving priority to the training in these fields of law.**
- 4. The system of transfer of judges, including laws and procedures, should be independently reviewed to ensure that transfers are not, in practice, used as a disguised disciplinary measure. Administrative decisions on the transfer of judges and prosecutors should be transparent and subject to effective due process safeguards. Judicial review of such decisions on the application of the affected judge or prosecutor should be introduced as a matter of priority.**
- 5. All decisions of the CJP relating to discipline, suspension and removal of a judge or prosecutor should be subject to judicial review. Article 159 of the Constitution should be amended in order to enable judicial review for decisions of the CJP. Individual complaint to the Constitutional Court should also be available against decisions of the CJP.**
- 6. 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;**
- 7. 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.**

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