BEFORE THE SECOND SECTION
EUROPEAN COURT ON HUMAN RIGHTS

Kurtoğlu Karacık v Türkiye and seven other applications

Application no. 62622/15

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

INTERVENER

pursuant to the Registrar's notifications that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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7 September 2022

1. ***Introduction***

Pursuant to the letter by the Registry of 15 July 2022, in this intervention the International Commission of Jurists (ICJ) presents its observations concerning (a) international standards related to the transfer of judges, including their right to appeal against involuntary transfers, in light of obligations of under article 6.1 ECHR and relevant jurisprudence; and (b) the current state of judicial independence and the system of transfer of judges in Türkiye within the context of systemic deficiencies in respect of judicial independence in the Turkish judicial system.

2. ***International standards on transfer of judges***

As a general matter, an independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law and a necessary condition for the effective protection of human rights.[1] The right to a fair trial or hearing by an independent and impartial tribunal established by law is contained in the ECHR and numerous international treaties and non-treaty instruments.[2]

The Court has stressed the importance of the principle of irremovability of judges.[3] The importance of security of tenure of judges, as an element of the right to a fair trial by an independent and impartial tribunal, has been affirmed by this Court,[4] as well as by the UN Human Rights Committee,[5] and the UN Human Rights Council.[6] This principle is enshrined in the UN Basic Principles on the Independence of the Judiciary,[7] the Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)[8] and the Committee of Ministers Recommendation 2010/12.[9]

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[1] UN Basic Principles on the Independence of the Judiciary (adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, and endorsed by General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985); UN Human Rights Council, Resolution 35/12 on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. A/HRC/35/12 (adopted 22 June 2017); Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, adopted by UN General Assembly Res 67/1 of 24 September 2012, para. 13; ICJ, Declaration of Delhi, 10 January 1959; *Stafford v. UK* [GC], Application no. 46295/99, Judgment of 28 May 2002, para. 78: "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court"; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), articles 4 and 74; Bangalore Principles, Value 1. See also, UN Human Rights Council, Resolution 19/36, 2012.

[2] This right is enshrined in the Universal Declaration of Human Rights, Article 10, the International Covenant on Civil and Political Rights, Article 14.1, the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(a), the Convention on the Rights of the Child, Articles 37(d) and 40.2, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers. Among those to be found at regional level are the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6.1; Recommendation No. R (94) 12 on the independence, efficiency and role of judges, adopted on 13 October 1994 by the Committee of Ministers of the Council of Europe; the Guidelines on Human Rights and the Fight against Terrorism drawn up by the Committee of Ministers of the Council of Europe and adopted on 11 July 2002, Guideline IX; the Charter of Fundamental Rights of the European Union, Article 47; the American Declaration of the Rights and Duties of Man, Article XXVI; the American Convention on Human Rights, Article 8.1; the African Charter on Human and Peoples' Rights, Articles 7 and 26; the African Charter on the Rights and Welfare of the Child, Article 17 and the Arab Charter on Human Rights, Article 13.

[3] *Gudmundur Andri Astradsson v. Iceland,* Application No. 26374/18, GC, para. 240.

[4] *Ibid.*

[5] UN Human Rights Committee General Comment 32, Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 19.

[6] UN Human Rights Council, Resolution 35/12, U.N. Doc. No. A/HRC/35/12 (22 June 2017), operative para. 3: "*Stresses* that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement should be adequately secured by law, that the security of tenure of judges is an essential guarantee of the independence of the judiciary and that grounds for their removal must be explicit, with well-defined circumstances provided by law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions, and that procedures upon which the discipline, suspension or removal of a judge are based should comply with due process".

[7] UN Basic Principles on the Independence of the Judiciary, op cit, Principle 12.

[8] Singhvi Declaration, article 16(a). Furthermore, it stresses that "[r]etirement age shall not be altered for judges in office without their consent" (Singhvi Declaration, article 18(c)).

[9] Recommendation CM/Rec (2010)12 on Judges: independence, efficiency and responsibilities, Chapter VI.49. See further international and regional standards: Universal Charter of the Judge, article 8: "A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered"; International Bar Association's (IBA) Minimum Standards of Judicial Independence, article 1(b): "Personal independence means that the terms and conditions of judicial service are adequately

Security of tenure, expressed in the principle of the irremovability of judges, requires not only protection against dismissal or other termination of the office of a judge,[10] but also independence and due process in decision-making affecting the career of judges, including transfer between judicial positions.[11] This is particularly the case where a transfer is imposed against the will of a judge, when it may constitute a disguised disciplinary measure, or a means of reprisal or interference with judicial decision making. In such cases, in order to be compliant with the requirement of judicial independence eld, the State must protect against transfers which would constitute "restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect" against judges.[12]

As this Court has previously emphasized,[13] international standards on the judiciary are relevant to the application of Article 6 ECHR in such cases and "the Court can observe that the right of a member of the judiciary to protection against an arbitrary transfer or appointment is supported by international norms as a corollary of judicial independence."

Notably, the UN Human Rights Committee has acknowledged the importance of a fair system of transfer of judges for the independence of the judiciary, finding that the system of transfers of judges is essential to an assessment of the independence of the judiciary as part of the right to a fair trial:

> *"[t]he 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."*[351]

The potential for arbitrary or improper transfers of judges to undermine judicial independence is also reflected in the provisions of a number of international, including European, standards on the judiciary. The European Charter on the Statute for Judges states that "[a] judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the

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secured so as to ensure that individual judges are not subject to executive control" and article 22; Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle B.3(c); Burgh House Principles on the Independence of the International Judiciary, principle 3.1; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, principles A(4)(n)(2) and A(4)(p); Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, principle IV; Latimer House Guidelines for the Commonwealth, 19 June 1998 (Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles). section II, para. 1; Magna Carta of Judges, principles 4 and 19; European Charter on the Statute for Judges, principle 3.4. Within the jurisprudence of the ECtHR, see, among others, *Campbell and Fell v. UK*, Application nos. 7819/77 and 7878/77, Judgment of 28 June 1984, para. 80; *Incal v. Turkey* [GC], Application no. 22678/93, Judgment of 9 June 1998, para. 65. C.f. Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Annual Report to the Human Rights Council, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Venice Commission, Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para. 38; CCJE Opinion No 1 (2001) On Independence of Judges,23 November 2001, para. 57.

[10] *Eminagaoglu v Turkey*, Application no.76521/12

[11] *Bilgin v Turkey*, op cit.

[12] UN Basic Principles on the Independence of the Judiciary, *op cit* principle 2

[13] *Bilgen v Turkey*, op cit, para.63

case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute".[14]

The Committee of Ministers' Recommendation to member States on judges' independence, efficiency and responsibilities (CM Rec (2010)12) contains an appendix providing that "[a] judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system".[15]

The International Bar Association's Minimum Standards of Judicial Independence provide that the power to transfer a judge from one court to another shall be held by a judicial authority.[16] The International Association of Judges' Universal Charter of the Judge stresses that judges may not be transferred unless such procedures are provided for by law[17]. The International Bar Association's Minimum Standards of Judicial Independence further states that transfers should preferably occur with the consent of the judges in question[18]. The Universal Charter of the Judge reiterates this principle in stronger terms, stating that "[n]o judge can be assigned to another post or promoted without his/her agreement".

Furthermore, with specific reference to the situation in Türkiye, the Council of Europe's Venice Commission, in its opinion on the Draft Law on Judges and Prosecutors of Türkiye, underscored that "procedural safeguards for any judge or prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the judge or prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer."[19]

Also of relevance is the finding of the Court of Justice of the European Union (CJEU), in the case of *W.Ż.*, that the transfer of judges to another court against their will is "potentially capable of undermining the principles of the irremovability of judges and judicial independence"[20]. The CJEU further held that "[s]uch transfers may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on the life and career of those persons and, thus, to have effects similar to those of a disciplinary sanction."[21] The Court stressed the importance of adequate and effective safeguards, to secure independence of the judiciary from external control by the executive or legislative powers.

Where a transfer is expressly imposed as a disciplinary sanction, then both the jurisprudence of this Court[22] and international standards on the independence of the

[14] Adopted on 8-10 July 1998, § 3.4.

[15] CM Rec (2010)12, Appendix, § 52

[16] International Bar Association, Minimum standards of judicial independence (1982), para 12.

[17] International Association of Judges, Universal Charter of the Judge (2017), article 2.2.

[18] International Bar Association, Minimum standards of judicial independence (1982), para 12.

[19] CDL-AD(2011)004, 29 March 2011, § 48

[20] CJEU, Case C-487/19, W.Ż. (6 October 2021), para 114.

[21] CJEU, Case C-487/19, W.Ż. (6 October 2021), para 115.

[22] *Eminagaoglu v Turkey*, Application no. 76521/12

judiciary, require procedural safeguards to ensure the right to a fair hearing.[23] When transfer of judges are made outside of disciplinary proceedings, the transfer may nonetheless be punitive in nature or be deployed as a disguised punishment, thus evading the more onerous procedures involved in disciplinary measures, as discussed below.

In *Bilgen v Turkey*, the European Court of Human Rights decided on the case of a judge who had been transferred to a court in a lower judicial district against his consent, without the possibility to obtain judicial review of the decision. This Court recalled that it must remain particularly attentive to the protection of judges against measures affecting their status or career, to safeguard the independence of the judiciary, as such measures can threaten judicial independence.[24] The Court further observed that "the right of a member of the judiciary to protection against an arbitrary transfer or appointment is supported by international norms as a corollary of judicial independence,"[25] underlining the crucial importance of protecting members of the judiciary from arbitrary transfers to enable them to conduct their activities independently, without fearing repercussions. The Court, citing international standards and applying principles set out in its previous jurisprudence on the appointment of judges,[26] affirmed that, in order to protect the irremovability of judges, transfers of judges should be based on objective criteria and a transparent process set out in national law in unequivocal terms to the extent possible.[27]

Assessing the applicability of Article 6.1 ECHR to the transfer of judges, the Court made a distinction between public servants, hierarchically attached to the executive branch of the State, and judicial officers. According to the Court, reasons justifying the exclusion of the dispute from the guarantees of Article 6 in cases concerning the former, namely the special bond of trust and loyalty existing between public servants and the State, cannot apply in the case of latter. The Court stated that:

> *While the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrong-doing and abuse of power. Their employment relationship with the State must therefore be understood in the light of the specific guarantees essential for judicial independence.*[28]

The Court held that the special role of the judiciary and the essential importance of separation of powers meant that judges seeking judicial review of their forced transfers could not be excluded from the scope of Article 6.1 of the ECHR.[29]

Applying Article 6.1, and in light of the importance of safeguarding the independence of the judiciary and maintaining public confidence in it, and of the role of judges in securing the Convention rights, the Court held that in transfers and other matters concerning the

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[23] UN Basic Principles on the Independence of the Judiciary, *op cit* principle 17

[24] *Bilgen v Turkey, op cit*, para 58.

[25] *Bilgen v Turkey*, *op c*it, para 63.

[26] *Bilgen v Turkey*, *op cit*, para.63; *Guðmundur Andri Ástráðsson v. Iceland* [GC], *op cit.*

[27] *Bilgen v Turkey, op cit,* para. 63

[28] *Bilgen v Turkey*, *op cit*, para 79.

[29] *Bilgen v Turkey*, *op cit*, para 79.

career of judges, "there should be weighty reasons exceptionally justifying the absence of a judicial review" of such decisions by an independent court.[30]

In sum, the international standards therefore require that decisions on conditions of tenure, including the assignment and transfer of judges, should be the responsibility of independent judicial authorities, in order to protect against improper motives in such decisions, and ensure that transfers are not applied as disguised sanctions. When transfers are applied without the consent of the judge, the process should be subject to due process guarantees set out in law, including the possibility to access judicial review of the transfer decision.

3. Transfer of Judges in Türkiye

a. The domestic law

The Turkish Constitution and Laws concerning the administration of justice have been amended several times in recent years. As a consequence, the applicable law with regards to the transfer of judges and prosecutors has changed in the last 10 years.

The Turkish Constitution was adopted in 1982. Provisions of the Constitution concerning the judiciary did not change until the Constitutional reform was accepted in 2010. The structure of the "High Council of Judges and Prosecutors" (HSYK) was first changed on 12 September 2010 by Law no. 5982. Another constitutional reform was made on 27 April 2017 by which HSYK was replaced by "Council of Judges and Prosecutors" (HSK). As all the applicants of the present case lodged their application with the Court before 2017, it is assumed that the applicable domestic law to the case was prior to the 2017 Constitutional amendments. However, as will be seen below, problems regarding transfer of judges continued after the constitutional amendment entered into force on April 2017. Article 140, paragraph 3 of the Constitution, which was not amended in the 2017 Reform, provides:

> *The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their posts or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.*

The Law on Judges and Prosecutors (no. 2802) includes rules concerning the transfer of judges, along with other issues stipulated in article 140 of the Constitution. Article 35 of the Law stipulates that

> *[j]udges and prosecutors are appointed to judicial office in a court of the same level at an equal or higher position [whether] in the same or a different location without prejudice to their salary scale and seniority status.*

[30] *Bilgen v Turkey, op cit,* para.96

In determining the classification of judicial district, a number of factors are to be taken into account. These include, among others, geographical location, economic conditions, opportunities for social and cultural activities and health facilities, the transport system. The term of office to be served in each judicial district is to be determined by regulation.
Failure in the exercise of professional duties may result in a transfer to a different judicial district, regardless of term of office or seniority. Personal, family-related or other reasons that are set out in appointment and transfer regulations may be taken into account in a request for transfer.

Two separate HSYK regulations deal with the appointment and transfer of civil and criminal judges and prosecutors and administrative court judges and prosecutors. Both regulations include provisions concerning categorisation of judicial districts, term of office in a judicial district, special situations of transfer on justified grounds such as health, marital situation, education and natural disasters.

The HSK publishes annual performance reports. In recent years, the HSK has provided information about the total number of transfers. According to its 2020 report,[31] 8,005 judges and prosecutors were transferred in 2018 and the transfer of 5,400 judges and prosecutors were planned for 2019.

There does not appear to be any information publicly available as to how many of these transfers were carried out without the consent of the judges or prosecutors involved, nor is there such information as to the number of successful challenges.

b. Judicial Review of the Decisions of HSYK (or HSK)

The composition of the HSK is prescribed under Article 159 of the Constitution. Prior to the 2010 reform, the HSYK had been composed of seven members, none of whom were to be elected by their peers. According to Article 159 of the Constitution, decisions of the Council are not subject to judicial review.

Following the 2010 Reform, the composition of the HSYK was changed. The new article 159 stated that "The High Council of Judges and Prosecutors shall have a total of twenty-two full members and twelve substitute members; it shall comprise three chambers". The new provision also allowed for judicial review the dismissal decisions of the HSYK. However, all other decisions of HSYK remained outside of the scope of judicial review.

The composition of the Board once again changed in the 2017 Reform. Of the thirteen members, four are now appointed by the President of the Republic. The Minister of Justice, who presides over the HSK, 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.

The Venice Commission, foreseeing the impact of this amendment on the transfer of judges, noted that "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

[31] Available at: https://www.hsk.gov.tr/Eklentiler/Dosyalar/d914b55c-cda8-45f8-95ac-7acd9afa12a3.pdf

where the dismissal of judges has become frequent and **where transfers of judges are a common practice**."[32]

These concerns were subsequently shown to be well founded by the first appointments to the HSK. The first HSK was composed of six members appointed directly by the President and seven members appointed effective by the ruling political parties (AKP and MHP), as they had a sufficient number of members in the Parliament to meet qualified majority to appoint members to the HSK. In other words, the ruling parties effectively had full control over HSK for four years. In these years tens of thousands of judges and prosecutors were transferred without judicial review.

In May 2019, the Ministry of Justice of Türkiye released a Judicial Reform Strategy (the JRS).[33] 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. 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.

However, this target of the JRS has not been realised. All judges, including those reserved-for-first grade, and first grade can be subject to transfers. Decisions of the HSK cannot be judicially reviewed.

In the period relevant to the present case, decisions of the Chambers of HSYK were subject to challenge by way of an appeal lodged with the HSYK Plenary Assembly. However, as the Court observed in *Eminağoğlu v. Turkey*, neither the chambers nor the Plenary Assembly of the HSYK can be characterised as a "tribunal" within the meaning of Article 6 § 1 of the Convention.[34]

c. Deficiencies in respect for the independence of the judiciary in Türkiye, including in relation to the transfer of judges

Clearly, for effective judicial review of transfer of judges to take place, it must be conducted by an independent judiciary. However, as the analyses and commentary of a wide range of international organizations and institutions show, there has been a systematic dismantling of the independence of the Turkish judiciary and of its institutions over the past six years.

The independence of the Turkish judiciary had already been under threat at the time of the attempted coup of 15 July 2016.[35]

The former Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, in her report following her mission to Türkiye, noted that:

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[32] 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 207, adopted at its plenary session, 10- 11 March 2017, Doc. CDL-AD(2017)005-e, para. 119.

[33] Republic 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. For ICJ's assessment of the strategy see Turkey's Judicial Reform Strategy and Judicial Independence (2019).

[34] *Eminağaoğlu v. Turkey*, Application no. 76521/12, 05.07.2021, para. 102

[35] Turkey: the Judicial System in Peril, A Briefing Paper, ICJ, 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 .

> *There is also the perception that the appointment and transfer system can be used, depending on the case, as a punishment or reward mechanism. The Special Rapporteur has been informed that during an eight-month period beginning 25 October 2010—the date the new members of the High Council of Judges and Prosecutors took office—a total of 3,049 judges and prosecutors changed duty stations, constituting one third of the judges on duty. It was reported that many were transferred ex officio. In this process, judges and prosecutors who were members of judicial professional organizations seem to have been particularly penalized, with little attention being paid to very important issues, such as the right to family integrity.*[36]

The ICJ's 2018 assessment, published in a report entitled *Justice Suspended - Access to Justice and the State of Emergency in Turkey*, was that the lack of institutional independence of the judiciary, the chilling effect of the mass dismissals and the resulting diminished quality and experience of the members of the judiciary constituted serious threats to the rule of law and the structural independence of the judiciary.[37]

In the coup's aftermath, there were major degradations to that independence when one-third of the judiciary in the country were arbitrarily dismissed.[38]Systemic challenges to the independence of the judiciary were crystallized by Law No. 6771 Amending the Constitution, approved by referendum on 16 April 2017, that gave Parliament, the executive and the President exclusive powers to appoint the members of the HSK.[39]

During the state of emergency, 4,279 judges and prosecutors were arbitrarily dismissed by the decisions of High Council of Judges and Prosecutors, under emergency legislation.[40] Because of the sudden and unforeseen dismissal of around 30 percent of judges in Türkiye, there was an immediate need to recruit a mass number of judges to replace those position, The recruitment of new judges was subsequently carried out in a hasty and ill-conceived manner. The minimum score requirement (70%) in written exams was removed by a decree, creating doubts about the quality and competency of the new recruitments. The following testimony reported by the Parliamentary Assembly of the Council of Europe (PACE) rapporteur, Raphaël Compte, paints a particularly troubling picture suggesting that political factors were being prized over professional competency:

> *The President of the Union of Turkish Bar Associations, whom I met, mentioned the lack of a minimum score in the entrance exam and the preponderant weight given to performance in subsequent unrecorded oral interviews involving politically biased questions: as a result, candidates with the "right" political profile who performed badly in the written tests were nevertheless recruited. Judges are also being appointed directly from the justice academy, without completing their training. 5 000 of 15 000 first instance judges have less than one year's experience, and another 5 000 have less than five years.*[41]

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[36] UN Human Rights Council A/HRC/20/19/Add.3, May 4, 2012, para. 41.

[37] *Ibid.*, p. 21

[38] *Justice Suspended - Access to Justice and the State of Emergency in Turkey,* ICJ, 2018, available at https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf .

[39] Law 6771, article 14.

[40] Article 3.1, Decree Law no. 667. Article 3.2 allowed the High Council of Judges and Prosecutors to appoint as judges and prosecutors candidates for these positions "regardless of the duration of their candidacies", upon proposal of the Ministry of Justice.

[41] State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights, PACE report, Doc. No. 14506, 27 February 2018, para. 98.

The Venice Commission noted that if the 2017 proposed amendments to the Turkish Constitution were adopted as they were, "the President's control over the Council would extend to all the judiciary", since the Council had the "important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors"[42]. In such a context, it could not be ensured that judges will be afforded an independent and impartial judicial review, even where one is provided for by law.

These concerns were echoed by the then Council of Europe's Commissioner for Human Rights, Nils Muižnieks, who stated that the widespread dismissals of judges and prosecutors following the failed coup in Türkiye had altered the structure of the judiciary and created "an atmosphere of fear among the remaining judges and prosecutors"[43]. The European Commission, noting the Council of Judges and Prosecutors' continued large-scale suspensions and transfers of judges and prosecutors,[44] concluded that there was a serious risk of "widespread self-censorship among judges and prosecutors."[45]

The European Court's Grand Chamber recently found, in the case of *Selahattin Demirtas (No. 2)*, that the detention of the opposition leader Selahattin Demirtas in Türkiye had been ordered by national courts for "ulterior motives" in breach of article 18 ECHR. To assess the influence of the executive authorities on the judiciary, the Court referred to the findings of the Venice Commission on the lack of independence of the Council of Judges and Prosecutors. The Grand Chamber observed:

> *The reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicate that the tense political climate in Türkiye during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters.*[46]

As far back as 2016, the ICJ expressed concerns at Türkiye's reliance on transfers of judges as a "hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives."[47] In this context, the ICJ stressed that forced transfers of judges, applied without the aforementioned safeguards, represent "a serious threat to judicial independence" and are "likely to have a severe chilling effect on independent judicial decision-making."[48] The ICJ called for increased transparency, and judicial review of transfer decisions by an independent and impartial tribunal.[49] Expressing similar concerns in a 2015 Declaration on Interference with Judicial Independence in Türkiye, the Venice Commission called on

[42] European Commission for Democracy through Law (Venice Commission), Opinion No. 875/2017 on Turkey and 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 (2017), para 128.

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

[44] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final (17 April 2018), p. 5.

[45] *ibid*, p. 23.

[46] *Selahattin Demirtas v. Turkey (No. 2)*, GC, Application No. 14305/17, Judgment of 22 December 2020, para. 434.

[47] International Commission of Jurists, 'Turkey: the Judicial System in Peril – a briefing paper' (2016), p. 18.

[48] *ibid*, p. 18.

[49] *ibid*, p. 18.

Turkish authorities to "provide judges with legal and constitutional guarantees against transfer against their will, except in cases of reorganisation of the courts."[50]

4. Conclusions

In light of the foregoing, ICJ concludes that neither the 2010 nor the 2017 reform has produced solutions to the problems in the Turkish judicial system observed by the Court in the *Bilgen* and *Eminağoğlu* judgments, and in particular have not addressed the problems with transfer of judges.

Every year thousands of judges and prosecutors of all ranks are being transferred to different regional posts. The HSYK (now the HSK) does not provide accessible data about the results of challenges made against these decisions. Neither is the legal reasoning grounding successful challenges, if there are any, available.

The Judicial Reform Strategy which aimed to provide immovability to judges at higher ranks has also not been realised.

Therefore, the ICJ considers that both the Turkish law on transfers of judges and the limitations on judicial review of the decisions of HSK concerning transfers of judges remain contrary to international standards on the independence and irremovability of judges, and to the rights of judges to access to justice and a fair hearing in accordance with Article 6 ECHR, as previously interpreted and applied by this Court.

[50] European Commission for Democracy through Law (Venice Commission), Venice Commission Declaration on Interference with Judicial Independence in Turkey (20 June 2015).