



**THE WRITTEN SUBMISSIONS ON THE CURRENT SITUATION OF THE
INDEPENDENCE OF THE JUDICIARY IN TURKEY**

BY VOLUNTEER JURISTS ASSOCIATION¹

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Republic of Turkey**

¹ The Volunteer Jurists is a professional, non-political, non-profit, and international association, aiming to disseminate, promote and defend democracy, human rights, the rule of law and the independence of the judiciary; and to combat human rights violations against lawyers.

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I- INTRODUCTION

The Volunteer Jurists Association presents its suggestions on matters relating to the independence of the judiciary of Republic of Turkey to the Human Rights Committee before the adoption of the list of issues prior to reporting. The Volunteer Jurists Association (here in after the association) is a Geneva based non-profit organisation founded in 2020. Its main mandate is to safeguard the independence of the judiciary and to protect the rights of jurists from all across the world. By exercising this mandate, among other ways, the association drafts report to provide the international mechanisms with vital information including the Human Rights Committee (here in after the Committee) on issues pertaining to the human rights. By doing this, we incline to the view that the violations of human rights would be addressed efficiently and quickly by international mechanisms which have been fed with a vast and proper knowledge.

Turkey is one of the countries in the centre of our attention that we consider the independence of the judiciary is not respected by the authorities in terms of both internal and external means. Turkey is a country where thousands of judges have been dismissed from judgeship profession and detained under the pretext of fighting against terrorism. Those who wield the power, has eradicated the independence of the judiciary, and has made the judiciary an instrument with which they have been silencing all dissent voices. As an organisation committed to fight with the human rights violations against judges and prosecutors, we have decided to transmit our suggestions regarding the independence of the judiciary to the Committee from which we sincerely request to deliver the report and annexed questions to the Republic of Turkey to be answered and to urge the government of Turkey to ensure the full implementation of the International Covenant on Civil and Political Rights.

Among other serious concerns on the current situation of human rights in Turkey, this report is just focused to demonstrate example by example the dissolution of the independence of the judiciary in Turkey and subsequently to provide a Committee with suggestions of the questions which we consider help the full realisation of the human rights problem in Turkey. All sub-sections of this article are related to the enjoyment of the right to a fair trial which is introduced by article 14 of the International Covenant on Civil and Political Rights.

II- 17/25 CORRUPTION AND BRIBERY INVESTIGATIONS

In the first days of December 2013, Turkish police arrested the sons of three cabinet ministers and at least 34 others. The detentions went to the core of the Erdoğan administration and included leading businessmen known to be close to the Government and officials said to be engaged in suspected corruption, bribery and tender rigging. The sons of the interior minister, the economics minister and the environment and city planning minister were among those detained. Other detainees included the head of the state-controlled Halkbank, the mayor of an Istanbul district considered to be a stronghold of the ruling AK party as well as the three construction sector tycoons, Ali Ağaoğlu, Osman Ağca and Emrullah Turanlı.² In an environment which the rule of law prevails, the government would respect the investigations, however in Turkey the government reacted with an outburst to the investigations in an unlawful manner in which it targeted the prosecutors, police chiefs and police officers who have just fulfilled their job. 'December 2013 signs the start of the race to the bottom for the rule of law in Turkey.'³ The Erdoğan administration has changed the by law on judicial police on 21st December 2013 and has ordered the police forces to report all judicial instances to their superiors prior to the prosecutors.⁴ This was a move to prevent other possible operations in advance to the inner circle of Erdoğan including his son Bilal Erdoğan.

In February 2014 an Omnibus Law (Law n° 6526 amending the Anti-terror Law, the criminal procedure code and various laws) abolished the special courts set up under the umbrella of art. 10 of the Anti-terror Law, the so called "liberty judges", and the special prosecutors, without further prorogations of their operations. These changes occurred while investigations and trials on high profile cases were going on.⁵ The public prosecutors and the judges had started the operations were assigned to new courts and they were rendered unable to continue what they had started before. 65 judges, including 13 president of courts, 26 member of courts and 26 liberty judges, 80 prosecutors including 11 deputy prosecutors were reallocated by the General Assembly of the High

² The Guardian, 17 Dec 2013, 'Turkish ministers' sons arrested in corruption and bribery investigation', <https://www.theguardian.com/world/2013/dec/17/turkish-ministers-sons-arrested-corruption-investigation>.

³ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

⁴ <https://cigm.adalet.gov.tr/Resimler/SayfaDokuman/232020111159Adli%20Kolluk%20Y%C3%B6netmeli%C4%9Fi.pdf>

⁵ See Luca Perilli, Report on the *findings and recommendations of the Peer Review Mission on criminal justice*, cit. p. 3.

Council of Judges and Prosecutors. (here in after CJP)⁶ Only a small number of judges were allowed to continue working at assize courts which had replaced the special courts. This determination was made by the General Assembly of the High Council of Judges and Prosecutors after 6 days the law number 6526 had entered into force. The appointment of judges and prosecutors were made on basis of demands of the government rather than the facts and objective criteria. Even though the investigations were of a great public importance, the General Assembly of the Council of Judges and Prosecutors collaboratively undermined the independence of the judiciary with the government of which three ministers were under the bribery and corruption investigation. Furthermore, the leaked documents from the investigations indicated that even the Prime Minister Erdogan actively involved and operated all those unlawful conducts which unprecedentedly shook Turkey. It is undoubtedly that the Council of Judges and Prosecutors fell short to protect the integrity of the judgeship profession. It substantiated the allegations of the interference of the executive power with the judiciary. 'External independence protects judges from external political pressure. Judiciary must not be subject to any hierarchical constraint or subordinated to any other body. Independence is, therefore, guaranteed primarily vis-à-vis the other State's powers, especially the Executive.'⁷ The CJP had opted to abide by the unlawful demands of the government, whereas it has a responsibility to protect the judges and prosecutors from external pressure of other branches of the state. As the law suggests, the CJP is entrusted with a mandate to conduct disciplinary proceedings against judges and prosecutors who are accused of wrongdoing. Some of the judges of the investigations were made subject to disciplinary proceedings.⁸ Moreover they had not been notified about the commencement of the proceedings and subsequently they had been sanctioned without being given the possibility to defend themselves.⁹ The Recommendation CM/Rec (2010) of the Council of Europe explicitly states that the 'appointment of judges should be based on objective criteria pre-established by law or by the competent authorities, and on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the

⁶ On 16th April 2017, the name of the council was changed from High Council of judges and Prosecutors to the Council of Judges and Prosecutors by the amendments in the Turkish Constitution.

⁷ ECtHR, judgment of 24 November 1994, application no 15287/89, *Beaumartin v. France*, paragraph 38; CJEU, Grand Chamber, judgment of 24 June 2019, C.573/17, *Popławski* paragraph 96.

⁸ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

⁹ *ibid*

law while respecting human dignity.¹⁰ Contrary to the expectations on preserving the rule of law and the independence of the judiciary, the CJP chose to be an instrument in the hands of a regime which is infamous in eroding the democratic achievements of a country. In more precise words, The CJP was seized by the government intervention and accordingly it should not be considered as an independent institution primarily positioned to protect the independence of the judiciary.

III- THE ELECTION OF THE (HIGH) COUNCIL OF JUDGES AND PROSECUTORS

On 12 October 2014, the elections were held for the Council of Judges and Prosecutors. After 17/25 investigations, the government had influenced the CJP and had achieved to replace the Chief Prosecutors and the head of Judicial Commissions with judges and prosecutors pledging full compliance to the executive authority. This was for ensuring to face no more bribery and fraud investigations and for getting prepared for the upcoming elections with which the government aspired an absolute control over the judiciary. Apparently, the government was still in fear and without the full control of the judiciary, it would have had to live in a constant fear with a possibility of the reopening of the investigations. Hence, the government initiated an election campaign by supporting (creating) a platform in order to have full authority on the judiciary. The government backed candidates from different social and political groups formed a platform¹¹ and pronounced their candidacies with promises to provide unity in the judiciary and to fight against the parallel state within the judiciary. The 17/25 December investigations were deemed by those as an attempt to overthrow the government and the so-called “parallel state” was deemed responsible for this conduct, therefore they should have been held accountable. The government had explicitly declared its support to the platform and had allocated the public resources to launch a strong campaign. The candidates of the platform were presented as legitimate and respected members while other judges had been accused of being member of the parallel state. The chief prosecutors and the head of judicial commissions had backed the platform with all the power they have had. It had been reportedly told by many judges and

¹⁰ Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe, on judges: independence, efficiency and responsibilities, para 44.

¹¹ ‘The Judicial Unity Platform’. The status of the platform was subsequently changed to an association.

prosecutors be discriminated because of the preference not to support the platform. The pervasive pressure on the judges and prosecutors had continued during the election time. Some of them had been threatened, others had been requested with incentives. As a result of the long campaign, the government backed platform gained the full control of the High Council of Judges and Prosecutors, it acquired 10 over 11 seats allocated for first instance judges and prosecutors in the Council. With other members coming from the Council of State, the Court of Cassation, the Judicial Academy of Turkey the government achieved to secure the majority in all three chambers of the Council of Judges and Prosecutors. The president has a right to directly choose 4 members of the Council from academicians and lawyers and the minister of justice and the undersecretary of the ministry of justice are the natural members of the Council. In other words, the government is overrepresented in the Council where it should not have been by virtue of the independence of the judiciary. This stark reality has caused lots of repercussions on the independence of the judiciary.

IV- THE REALLOCATION OF JUDGES AND PROSECUTORS AT A MASS SCALE WITHOUT THEIR WILL

After the grand success in the elections, The Council of Judges and Prosecutors have acquired enormous power to reshape the judiciary in accordance with the wishes of the government. Between the years 2014 and 2016, the Council of Judges and Prosecutors continued to transfer judges and prosecutors between judicial positions in different regions without a valid reason and justification. These decisions have been taken under the pressure of the government.¹² The CJP performed an important role in the marginalisation of judges and prosecutors who have been made subject to hidden disciplinary punishments.¹³

Accredited sources of information report significant cases of forced transfers such as in the cases of Murat Aydın, a judge in Karşıyaka and Vice-President of the Judges and Prosecutors' Association (YARSAV); the Chief Judge of the Istanbul Regional Appeal Court, Sadık Özhan, was reassigned after he decided to reverse the CHP Deputy Enis Berberoğlu's conviction; judges İbrahim Lorasdağı, Barış Cömert and Necla Yeşilyurt Gülbiçim from the Istanbul Court, who released

¹² <https://turkeytribunal.com/judicial-independence-access-to-justice/>

¹³ ICJ, Turkey: the Judicial System in Peril, 2 June 2016, available at <https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/>

twenty-one detained journalists after eight months of pre-trial detention, were suspended by the HYSK ; judges of the Istanbul 37th Heavy Penal Court were removed by the Council after the Court released seventeen detained lawyers; Ankara 20th Regional Appeal Court was dismantled a day after the Court acquitted a military officer charged of coup attempt: the three Judges of the Court were unseated and subjected to a disciplinary investigation; President Erdoğan accused them of being members of the terrorist organisation (so called “FETO”, during a press conference.¹⁴

According to The Arrested Lawyers Initiative, in the year 2014¹⁵, hundreds of judges and prosecutors have been reassigned because of their decisions “which somehow displeased to the Government”. A similar trend has been reported in 2015¹⁶.

¹⁴ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

¹⁵ The Arrested Lawyers Initiative (The Judiciary in Turkey: inefficient and under political control) reports that: Judges Hülya Tıraş, Seyhan Aksar, Hasan Çavaç, Bahadır Çoşlu, Yavuz Kökten, Orhan Yalmançı, Deniz Gül, Faruk Kırmacı, were the first Criminal Peace judges to be appointed to the Ankara Courthouse by the HSYK decree of 16 July 2014. In just a year, between 16 July 2014 and 28 July 2017, seven of the eight Criminal Peace judges were dismissed. Judges Yavuz Kökten and Süleyman Köksaldı were removed from office because of their decisions to acquit some police officers. Judge Orhan Yalmançı was dismissed from the bench because of his refusal, on 1 March 2015, to arrest certain police officers. Hasan Çavaç, who dismissed an indictment against judge Orhan Yalmançı's was also dismissed on 9 March 2015. The Judge of the 8th Criminal Court of Peace, Hülya Tıraş who released 110 officers who had been detained for 110 days, was relieved of her duty two weeks after her decision. Judges Yaşar Sezikli and Ramazan Kanmaz were dismissed for the same reasons on 23 July 2015. Judge Osman Doğan, who did not arrest 18 officers who were detained for alleged illegal wiretapping investigation, was also relieved of his duty.

¹⁶ The Arrested Lawyers Initiative (The Judiciary in Turkey: inefficient and under political control) reports that: - Kemal Karanfil, the former Criminal Justice of the Peace of Eskişehir, who questioned independence and impartiality of Criminal Peace Judgeships and raised the issue before the Turkish Constitutional Court for consideration, was moved to a court in Zonguldak on 15 January 2015, only 6 months after he took office in Eskişehir. - The 7th Assize Court Judges, İsmail Bulun and Numan Kılınç, who had dismissed a case about the wiretapping of the Prime Minister's office were removed from their posts shortly after their decision on 25th July 2015 by the HSYK. - Nilgün Güldalı, a judge in the Bakırköy 2nd Assize Court, who decided the release of the arrested judges, Mustafa Başer and Metin Özçelik, on 24 July 2015, was appointed to a Labour Court only a day later, by an HSYK resolution. - The 4th Administrative Court Chief Judge, Cihangir Cengiz, who granted a motion for a stay of execution regarding the TIB's (Turkey's Presidency of Telecommunication and Communication) decision to ban access to YouTube, was transferred to Konya Administrative Court before the end of his tenure. - The chief of the 4th Istanbul Administrative Court and two of its members were transferred to other cities for holding a motion for the stay of execution, which concerned the environmental impact assessment report for Istanbul's Third Airport, and the demolition of the 16/9 towers that spoil the Istanbul skyline. - The Chief Judge of the Istanbul 10th Administrative Court, Rabia Başer, and an associate judge, Ali Kurt, who repealed the Gezi Park & Taksim Square Projects, were moved to different courts and different cities after their decisions, and before the end of their tenure. -The chief of the 4th Istanbul Administrative Court and two of its members were transferred to other cities for holding a motion for the stay of execution, which concerned the environmental impact assessment report for Istanbul's Third Airport, and the demolition of the 16/9 towers that spoil the Istanbul skyline. - Shortly before the general elections that were held on the 1st November 2015, certain TV channels were arbitrarily removed from Digiturk, a digital TV platform. The Judge of the 1st Consumer Court of

V- THE NEW PHASE IN THE CRACKDOWN ON THE JUDICIARY: ARRESTS OF JUDGES AND PROSECUTORS

‘Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law.’ As stated by the article 138 of the Turkish Constitution. However, judges Metin Özçelik and Mustafa Başer were arrested on grounds of their decisions in which they had ordered the release of Hidayet Karaca who is a former director of Samanyolu Media Group. They have been accused of being a member of the terrorist organisation and subsequently dismissed from judgeship profession.¹⁷

Another striking example have taken place after two separate incidents in Adana and Hatay cities. In the course of their duties, former Adana Chief Public Prosecutor Süleyman Bağrıyanık, former Adana Deputy Chief Public Prosecutor Ahmet Karaca, Adana prosecutors Aziz Takçı and Özcan Şişman ordered the stop of trucks after they had taken information that the trucks were illegally carrying weapons to some regions of Syria which was effectively under the control of some extremist groups at the time. They have been accused with “attempting to topple or incapacitate the Turkish Government through the use of force or coercion and obtaining and exposing information regarding the security and political activities of the state.” As stated above, they had been already transferred to other places by the CJP.¹⁸ The case has captivated the public attention and it has been discussed among different parts of the society. The images of the weapons in the trucks were published in the Cumhuriyet newspaper by Can Dündar. Erdogan, the head of the government whom he was accused with illegal trade of weapons to the extremist groups, threatened the journalist to make him pay for the documentations published in the newspaper.¹⁹ Accordingly, Can Dündar was made subject to an investigation by ‘independent prosecutors of the Republic of Turkey’. He was taken into police custody, detained and charged with complicity in crimes of espionage in favour

Mersin Province, Mustafa Çolaker, who upheld the claim of channels STV and Bugün TV against the Digiturk platform, was transferred to the Çorum Province and was subject to a disciplinary procedure. - The Court of Cassation prosecutor, Mazlum Bozkurt, who upheld the first instance criminal conviction of Colonel Hüseyin Kurtoğlu and five other military officers, was suspended by the HSYK on 1 December 2015.

¹⁷ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

¹⁸ ibid

¹⁹ <http://www.aljazeera.com.tr/haber/erdogan-bedelini-agir-odeyecek>

of foreign countries. He had no option but to leave country not to be constantly targeted by Erdogan government.

It is apparent that the CJP acted in conformity with the wishes of Erdogan and it disregarded the freedom of press which is one of the significant pillars of the democracy. Consequently, while the real criminals got away from their wrongdoings, the prosecutors, the judges and the journalists had to pay for the jobs that they have done. This result implies the fact that Erdogan and his inner circle cannot be prosecuted for any crime by any prosecutor unless the risks of detention and suspension are ventured.

VI- THE TENTATIVE COUP D'ÉTAT, THE EXECUTIVE DECREES AND THE MASS DISMISSALS AND DETENTIONS OF JUDGES AND PROSECUTORS

On 15th July 2016, following the attempted tentative coup d'état, the mass persecution has been launched against the judges and prosecutors in the form of a witch hunt. The government declared a state of emergency and derogated from some of the obligations under the European Convention on Human Rights. Furthermore, the state of emergency was pronounced to protect the national security against 'unprecedented attacks' to the democracy and the rule of law. Arrest warrants were issued for 140 members of the Court of Cassation as well as 40 Members of the State Council. 2 members of the Constitutional Court were taken into police custody. 2745 judges and prosecutors of first instance courts were suspended from judgeship profession by the Second Chamber of the Council of judges and Prosecutors. At the same time the dismissals were taking place, Ankara Chief Prosecution Office initiated an investigation for those whose names were on the lists of CJP. The tentative attempt of the coup d'état has been used as a perfect pretext in order to turn around the protections entitled to all judges and prosecutors by the article 88 of the law number 2802 which bans the arrest of judges and prosecutors except in cases such as caught redhandedly. Even though there was no involvement in the tentative coup for any judges and prosecutors, they all have been charged with it. The Chief Prosecution Offices were instructed by Ankara Chief Prosecution Office to issue the search and seizure and arrest warrants. Those orders were delivered at the time of the soldiers were still on the streets. There still remains unanswered questions how the Second Chamber of the CJP could be able to identify 2745 judges and prosecutors who later were suspended. The illegal profiling of the

judges and prosecutors is presumably the only explanation unless the CJP delivers the `facts` which invalidates the allegations that the CJP had conducted unlawful and dirty campaign to collect information about the social, private and professional life of the judges and prosecutors. The National Intelligence Service, other intelligence services of police and gendarme, the judges and prosecutors in close affiliation with the CJP had allegedly worked together to get and to store lots of information which has been obtained through illegal profiling. It is an undeniable fact that the CJP has yet been unable to demonstrate legal disciplinary proceedings initiated before the commencement of the coup d'état. Among others, the inclusion of the names of some judges who died before the tentative coup d'état has been one of the indicators that those lists had been prepared in advance of the incidents.²⁰

Following the arrest orders, the judges and prosecutors were detained, their homes, offices and cars were searched, their personal belongings including electronic devices were seized. Thousands of them were detained while some others were released on remand. They have been instructed with travel bans and with some other judicial controls such as an obligation to appear before police stations and to sign the relevant papers in a defined time period. At later stages, they have been indicted with overthrowing the constitutional order and being a member of the armed terrorist organisation.

Between the period of pre-trial detentions and deliverance of the indictments The CJP actively involved with the investigation procedures, despite it has no statutory function in the functioning of criminal investigations. It had helped judicial authorities to find the "evidence which can constitute the terrorism crimes". The vice president of the Council, Mehmet Yilmaz actively took part in these procedures. He had promised the detainees with incentives such as a release from prison and a readmission to the judgeship profession in exchange of pleading guilty and giving incriminating statements against their colleagues. He even publicly made announcements to exert pressure on judges and prosecutors to give statements against their colleagues. He later pronounced that he had made these statements to deceive judges and prosecutors and to

²⁰ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

convince them to confess.²¹ He talked about ‘a special team’ as well to work on the statements of judges and prosecutors to identify other members within the judiciary.²²

Before continuing the explication on the criminal investigations and adjudications, the dismissals of the judges and prosecutors which is an issue highly interconnected, needs to be clarified to fully comprehend how the crackdown on the judiciary was done despite the absence of any credible evidence. The CJP is an institution which has the final say in the dismissals of judges and prosecutors. By the enactment of emergency decree number 667, the new system on the evaluation of the evidence has been presented to the Turkish legal system. According to this article, the CJP can decide on the dismissals of judges and prosecutors whose names appeared in the lists appended to the decree-laws, or those who were considered to be the members of, affiliated with or have cohesion or connection with “terrorist organisation”. It has not been under an obligation no more to seek the credible evidence. In the absence of a tangible evidence, the CJP and the general assemblies of supreme courts may rely on the rumours, opinions, affiliations as “evidence” to issue a dismissal order. When the General Assembly of the Constitutional Court decided on the dismissals of two members of the court, it made a reference to the article 3 and told that the opinion of the court constituted over the course of time suffices to dismiss rather than having hard evidence.²³ The judges and prosecutors and other members of the Supreme Courts have been banned forever to undertake official duties, they have been evicted from the public housings, their passports have been cancelled and they have been sanctioned with abroad travel bans. The principles of the right to a fair trial, the principle of the proportionality have been infringed by those who should have been the guardians of democratic achievements. In other words, the CJP and other supreme courts have failed to implement the internationally adopted principles on the right to a fair trial under the regime of emergency decrees dictated by the executive power. Accordingly, they should not be regarded as independent courts which can ensure the full enjoyment of the right to a fair trial enshrined

²¹ <https://www.haberturk.com/gundem/haber/1342282-hsyk-baskanvekili-mehmet-yilmaz-itirafci-hkim-savcilar-meslege-donemeyecek>

²² <https://www.sabah.com.tr/gundem/2016/11/22/itirafcilar-icin-ozel-ekip-kurduk>

²³ <https://www.anayasa.gov.tr/tr/duyurular/anayasa-mahkemesi-uyeleri-alparslan-altan-ve-erdal-tercan-in-meslekten-cikarilmasina-iliskin-gerekceli-kararin-basin-duyurusu/>

in the article 14 of the ICCPR. On 8th December 2016, European Network of Councils for the Judiciary (ENCJ) decided that `the actions and decisions of the HSYK, and therefore the HSYK as an institution cannot be seen to be in compliance with European Standards for Councils for the Judiciary. Therefore, the HSYK does not currently comply with the ENCJ Statutes and is no longer an institution which is independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice.`²⁴ Four years later ENCJ reaffirmed its findings regarding the dependency of the Turkish judiciary and it has even indicated the deterioration of the situation compared to the times shortly afterwards of the coup d'état.²⁵

After the completion of indictments, the judges and prosecutors have been put on trial on grounds of the terrorism law number 3713 and the relevant provisions of the Turkish Criminal Code number 5237. In the Turkish legal system Assize Courts have authority to try the terrorism crimes. The Criminal Sections of the Regional Justice Courts have been entrusted to hear the cases which have already been decided by the Assize Courts and the Court of Cassation is the supreme authority to decide on the matter in case of a referral from a defendant or a prosecutor of the Regional Justice Courts.

One of the crucial components of the right to a fair trial under the Article 14 of the ICCPR is the independence and impartiality of the judges and courts. Defining the judicial independence and presenting the current situation of Turkish judiciary are of utmost importance to be able to make comparison between internationally applied principles and the maintenance of Turkish judiciary. Judicial independence is characterised in two main components, namely internal and external independence which provides that the judges has to be protected against the interferences from outside and from within the judiciary.²⁶

'External independence protects judges from external political pressure. Judiciary must not be subject to any hierarchical constraint or subordinated to

²⁴ <https://www.encj.eu/node/449>, 8 December 2016.

²⁵ <https://www.encj.eu/node/578>, 8 December 2020.

²⁶ European Court of Human Rights ,judgment of 22.12.2009, application no. 24810/06, *Parlov-Tkalcic vs. Croatia*, para 86; *Agrokompleks vs. Ukraine*, judgment of 6 October 2011, No. 23465/03, para 137.

any other body. Independence is, therefore, guaranteed primarily vis-à-vis the other State's powers, especially the Executive'.²⁷

'Internal independence encompasses the independence of individual members of the judiciary and requires that judges designated to decide a case be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court or the Judicial Council.

According to Recommendation CM/Rec (2010) of the Committee of Ministers of the Council of Europe (chapter III), the principle of internal independence implies four different aspects:

a) in their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary.

b) A hierarchical judicial organisation should not undermine individual independence.

c) The allocation of cases within a court should follow objective pre-established criteria to safeguard the right to an independent and impartial judge.

d) Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law'.²⁸

Internal independence is linked to impartiality.²⁹ Judges should maintain equal distance from the parties to the proceedings and their respective interests with respect to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.³⁰ It also has two components.

²⁷ ECtHR, judgment of 24 November 1994, application no 15287/89, *Beaumartin v. France*, paragraph 38; CJEU, Grand Chamber, judgment of 24 June 2019, C.573/17, *Popławski* paragraph 96.

²⁸ Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, on Judge's independence, efficiency and responsibilities (hereinafter referred as CM/Rec(2010)12), para 4.

²⁹ The ECtHR has long recognised that the concepts of independence and impartiality are closely related and may sometimes require joint examination (see, for example, ECtHR, Grand Chamber judgment of 6 November 2018, applications nos. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal*, paras 150 and 152).

³⁰ See, for example, ECtHR, judgment of 9 January 2018, application no. 63246/10, *Nicholas v. Cyprus*, paragraph 49.

First, members of judicial bodies should be subjectively impartial, which means that they must not show any bias or personal prejudice in the case. Second, the judicial body must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect.³¹

In addition to the information stated above The Council of Judges and Prosecutors leads the crackdown on the independence of the judiciary despite the preservation of the rights of judges and prosecutors is entailed in its mandates.

The mass dismissals of judges and prosecutors constitute a heavy burden on other judges and prosecutors who are still on duty. This situation undoubtedly creates a chilling effect on them because they are being held in constant fear of being sacked and/or detained. Accordingly they should not no more be considered as independent judges.³² Under the new regime of Turkey operated by the executive decrees, no one is safe from being accused with any crime which may result in imprisonment and dismissal. They have been under constant pressure of the government therefore they somehow have had to follow the instructions on the maintenance of the judicial proceedings.

VII- THE DISSOLUTION OF YARSAV

YARSAV used to be an association of thousands of judges and prosecutors where they had a chance to discuss range of issues which are related to the judgeship profession from seeking solutions to the problems of judges and prosecutors to the improvement of the independence of the judiciary. YARSAV was considered to be a prominent organisation by international organisations in terms of its role in preserving the independence of judges and prosecutors before it had been dissolved right after the attempt of coup by the executive decree number 667. The president of YARSAV Murat Arslan was subsequently detained on terrorism related charges and he was sentenced to 10 years prison time. At the time of the coup d'état YARSAV had more than 1800 members and it was an institution which was a member of EAJ, MEDEL and IAJ. In an interview with Arrested Lawyers Initiative, Filipe Marques, president of MEDEL has made the following

³¹ ECtHR, judgment of 25 September 2018, application no. 76639/11, *Denisov v. Ukraine*, paragraph 63.

³² Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary about the situation of the Turkish Judiciary, cit;Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu).

remarks which depicts the current human rights situation in Turkey and the unfairness towards YARSAV and its president.

“The situation in Turkey is probably the most dramatic MEDEL had to face in its history. Our member association, YARSAV, was administratively disbanded immediately after the attempted Coup d’état of July 2016 and many of its members were arrested, dismissed, and deprived of freedom or property without any solid pieces of evidence, basic guarantees or procedural rights. Murat Arslan, the President of YARSAV, is in jail since October 2016 and was sentenced on January 18th, 2019 to 10 years imprisonment, after a trial that did not meet any basic principles of a due process of law. MEDEL does not recognize the legitimacy of the dismantlement of YARSAV and still considers it a full member and its board members as its rightful representatives³³”.

Turkey is a country where contradictions and disparities take place. At the same time of dissolution of YARSAV, the association of unity in the judiciary has been supported by the government at taxpayers` expense. The membership of the association is automatically proposed to all newly recruited judges and prosecutors. The association considered to be ally to the government, has more than 9000 members in the judiciary.³⁴ The closure of YARSAV and the encouragement of the association of unity in the judiciary sends a clear message to all judges and prosecutors that the only way not to be dismissed or imprisoned is showing the full compliance of the policies of the government in a way that costs their independence. In such an environment where judges and prosecutors are being kept under the pressure of the executive branch, the full enjoyment of the right to a fair trial is unattainable.

In the meantime of persecution on independent judges and prosecutors is on process, the recruitment of new judges and prosecutors have been continuing at a large scale and on a basis of politically adopted criteria rather than professional competence and personal abilities. As of 15 July 2016, the day of the abortive coup, there were around 14,500 judges/prosecutors in Turkey. 4,560 of them were dismissed in a few months following 15 July. According to the EC 2020 report, as of December 2019, judges and prosecutors were 20,632

³³ Interview with Filipe Marques, President of MEDEL by the “arrested lawyers initiative” on 21 august 2020.

³⁴ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

in total³⁵. These numbers illustrate that more than ten thousand judges and prosecutors were appointed and it is apparent that the composition of the judiciary has been redesigned in favour of the government which considers the coup d'état a grace from the God. Vacancies in the judiciary continued to be filled by allowing most candidates to enter the system through a fast-track procedure and non-transparent selection process. The Council of Judges and Prosecutors is not independent of the executive and the Ministry of Justice runs the selection boards for new judges and prosecutors and manages their yearly appraisal.³⁶ The lack of objective, merit-based, uniform and pre-established criteria³⁷ for recruiting and promoting judges and prosecutors has opened wide the door to the politicisation of the judiciary. This severely affects not only the independence but also the appearance of impartiality of judges.

The judges and prosecutors have been segregated according to their political opinions. It has been demonstrated that more than a hundred people who were in the management boards of the Justice and Development Party have been accepted to the judgeship profession.³⁸ In addition to those who have obvious links with the government, the other judges and prosecutors have been predominantly selected by their close affiliation with political parties ruling the country. Defining such a precondition for the selection of judges and prosecutors is proving detrimental to the independence of the judiciary and to the separation of powers which is one of the pillars of democratic systems.

VIII- THE AMENDMENT OF THE CONSTITUTION AND THE RECOMPOSITION OF COUNCIL OF JUDGES AND PROSECUTORS

After the tentative attempt of coup d'état, Erdogan has achieved immeasurably political control over Turkish politics, and he has undoubtedly consolidated his power over all branches of the state including judiciary. Despite all political achievements, he has stepped further to be `one man` in order to have absolute authority on any matter within the state. Accordingly, the constitutional

³⁵ https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf, page 26.

³⁶ *ibid*, page 25.

³⁷ CM/Rec(2010)12, par 44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

³⁸ <https://www.cumhuriyet.com.tr/haber/hakim-ve-savci-olarak-atanan-akplilerin-listesi-ortaya-cikti-1254227>

amendments have been brought and have been put on a referendum on 16th April 2017. These changes introduced significant changes to the judiciary that would pave the way to much more dependency of the judiciary to the legislature and executive. As regards the Council of Judges and Prosecutors, under the previous constitutional framework, the President only appointed 3 out of 22 members of the Council. Pursuant to the amendments, the President now has the power to appoint 4 members, that is almost a third of the members of the Council of Judges and Prosecutors, whose number is also decreased, from 22 regular (+ 12 substitutes) to 13 regular members. Two other members of the CJP, the minister of justice and his/her undersecretary, are also appointed by the President (minister and undersecretary as a high official). The President, therefore, is now entitled to appoint almost half of the members of the Council.³⁹ The Venice Commission has stressed that the President is no more a “pouvoir neuter” but is engaged in party politics: his choice of the members of the Council is not politically neutral. The remaining members are appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it is able to fill all positions in the Council.⁴⁰ According to the US Department of State, the executive branch exerts a strong influence over the Council of Judges and Prosecutors. The ruling party controlled both the Executive and the Parliament when the current members were appointed in 2017.⁴¹ The changes in the constitution endangers the independence of the judiciary because they have deprived the judges and prosecutors of choosing half of the members of the Council of Judges and Prosecutors⁴². They were stripped of their rights to democratically participate in the elections of the judiciary and to have a say in any matter that they think is important, relevant etc. In this regard, the amendments in the constitution fell short to satisfy the requirements of the independence of the judiciary.

³⁹ <https://turkeytribunal.com/judicial-independence-access-to-justice/>

⁴⁰ European Commission for Democracy through Law (Venice Commission). Turkey's opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), pages 26-27.

⁴¹ US Department of State, 2019, Country Reports on Human Rights Practices: Turkey

⁴² Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe, on Judge's independence, efficiency and responsibilities, para 27 and 46.

IX- QUESTIONS TO THE MEMBER STATE

The “Volunteer Jurists” is pleased to contribute to the work of The Committee by proposing the following questions to the Turkish Government:

- What is the procedure and what are the judicial grounds for the removal of judges, prosecutors and police officers from an ongoing case? Are there any restrictions on the initiation of a serious crime investigation against ministers and their family members? What was the legal basis for the decision not to continue the 17/25 corruption and bribery investigations?
- What should be the response to the decision of the European Network of Judges and Prosecutors (ENCJ) which considered the Council of Judges and Prosecutors as dependent on the executive branch of the state? Is there any evidence for the international community to invalidate the allegations of addiction?
- Is the status of the Council of Judges and Prosecutors, which is controlled by an association supported by the government, consistent with the principle of separation of powers?
- Were the interests of justice taken into account in deciding on the reassignment of judges and prosecutors?
- For many, the reallocations were seen as unpredictable and unjustified. Have steps been taken to justify these decisions to protect the integrity of the judiciary in the eyes of the public and the international community?
- Is there a policy of deterrence for judges and prosecutors in the performance of their duties? If the answer to the first question is “no”, how can we justify the detention of Mustafa Baser and Metin Özçelik, which are a clear example of government pressure on judges and prosecutors?
- What were the reasons that prevented the investigations into the alleged illegal arms trade conducted by the National Intelligence Agency trucks from going further and accusing prosecutors and judges of espionage and coup d'état at the cost of damaging the country's image abroad? If no crime was committed with the complicity of the National Intelligence

Agency and the government, why were the results of the investigations not expected?

- In the early hours of the coup attempt, 2,745 judges and prosecutors were removed from their posts. How was it possible to instantly detect thousands of judges and prosecutors who have been members of an "armed terrorist organization?"
- How and on what basis can a government call the attempted coup d'état as "a gift from God⁴³" and use it as a pretext for the detention and dismissal of thousands of judges?
- Why did the Member State choose to disband YARSAV instead of investigating only those members accused of terrorist offences? Is it fair to close down one of the most important associations of judges and prosecutors by decree without the possibility of challenging the decision in court? Was this decision taken in an emergency, in the conditions of exploitation of the coup d'état?
- What were the reasons for the departure from internationally agreed principles for the recruitment of new judges and prosecutors? How do you see the allegation that close affiliation with the government is seen as a deciding factor rather than a professional and personal ability?
- Does the mandate of the executive branch imply the creation of a platform/association (the Judicial Unity Association) within the judiciary? If the answer is yes, how can this action be justified in a country where the separation of powers applies?
- In recent years, Turkey has experienced a sharp decline in the global rule of law index⁴⁴. Does the government plan to take steps to raise the level of the rule of law in Turkey and improve its human rights record in the eyes of the international community?

⁴³ <https://www.euractiv.com/section/global-europe/news/erdogan-says-coup-was-gift-from-god-to-re-shape-country-punish-enemies/>

⁴⁴ <https://worldjusticeproject.org/rule-of-law-index/country/Turkey>