TURKEY'S CRIMINAL PEACE JUDGESHIPS

A Judicial Anomaly or Executive Arm

Universal Periodic Review Submission on Turkey by Platform for Peace and Justice (PPJ)

Platform for Peace and Justice (PPJ) is a Brussels based platform that monitors and reports

the developments in the fields of peace, justice, democracy, the rule of law and human rights, with a special focus on Turkey.

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Universal Periodic Review Submission

Turkey

Executive Summary

1- Recent developments clearly indicate that judicial authorities in Turkey can no longer operate with independence and impartiality. This situation has also been declared in credible reports published by many international civil society organizations[1]. Not only but also for this reason, the European Parliament recommended suspending EU accession negotiations with Turkey[2] and adopted a pertinent resolution[3].

2- Since President Erdogan and his regime no longer tolerate opposition and concentrate all powers, contrary to the constitutional separation of powers, the rule of law in Turkey has broken down. Government policy responds to the goal of covering-up both the 17/25 December corruption and bribe investigations and also of controlling the judiciary, appointments and detention of members of the judiciary involved in the corruption probe of 2013.

3- Following the disclosure of the December 2013 probes, which underlined the alleged role of the government ministers and the son of the then Prime Minister Mr. Recep Tayyip Erdogan, a number of devastating developments have been observed resulting with the collapse of the rule of law and judicial system in Turkey[4]. One of the key element of this collapse is the Peace Judgeships.

4- The pressure on the judiciary reached its peak following the coup attempt on 15 July 2016, with the arrests of thousands of judges and prosecutors who were illegally targeted for failing to support Erdogan's political ambitions. Politically oriented Peace Judgeship concept also had a key role in this scope.

Establishment of Criminal Peace Judgeships

5- The sweeping legislative and institutional changes to control the judicial system by the government began in 2014 with the amendments to the Turkish Criminal Code and Code of Criminal Procedure as well as the restructuring of the High Council of

1 Ex. 1: https://www.icj.org/wp-content/uploads/2019/02/Turkey-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf
Ex. 2: https://www.hrw.org/tr/world-report/2018/country-chapters/313667

2 http://www.europarl.europa.eu/news/pt/press-room/20190307IPR30746/parliament-wants-to-suspend-eu-accession-negotiations-with-turkey

3 http://www.europarl.europa.eu/doceo/document/A-8-2019-0091_EN.html?redirect

4 For the Parliamentary Assembly of the Council of Europe (PACE), Report on the Functioning of the Democratic Institutions in Turkey, 06 June 2016, Do. No. 14078, paragraph 5 (see https://www.ecoi.net/file_upload/1226_1465286865_document.pdf

Judges and Prosecutors (HSYK). The Turkish High Council Law No. 6087 was changed, which allowed more executive control over the functioning of the HSYK. The unconstitutionality of the bill was raised by all the opposition parties as well as by a great majority of lawyers and jurists.[5] The executive also succeeded in terminating the position of all the staff at the HSYK through legislative action.

6- The reshuffling of the HSYK on 15 January 2014[6] and the new appointments to the clerical positions following the unconstitutional amendments, the government inserted more control over the formation and functioning of the HSYK. Thus, the Turkish judiciary had been systematically forged mainly through a change in the formation and functioning of the HSYK in the days up to the creation of the criminal peace judgeships, which was depicted by Erdogan as a project.[7]

7- On 22 June 2014, to the question *"will there be an operation to the parallel structure"*, Erdogan responded that *"the parallel judiciary is thwarting the executive's steps. Some legislative regulations we have just made are before the President. Swift steps shall be taken as soon as he approves them."*[8] In the same speech, he stated, signalling the operations to be started on 22 July 2014 against the police officers who conducted the corruption investigations in December 2013, that *"We are developing a project. We are making the groundwork for this"*.[9] The legislative regulation which Erdogan named as a *'project'* was the Law No. 6545 on the establishment of the "Criminal Peace Judgeships" (CPJ) which came into force on 28 June 2014.[10]

8- The CPJs began their duties on 21 July 2014 against this background. The chronology of events and public statements made by Erdogan clearly evidence that the criminal peace judgeships had been created, structured, staffed and instructed by the executive specifically in order to fight against what Erdogan and his government called in those days the 'parallel state structure' allegedly linked to the Gulen group.[11] The CPJs were specifically created to take all the precautionary judicial measures necessitated by the existing and future investigations against the police officers and judges involved in the corruption investigations of December 2013 as well as to fight against the persons allegedly linked to the Gulen group. Thus, most of the allegedly committed crimes precedes the creation of the CPJs which would raise the issue of violation of the principle of 'natural judges'.

<u>Anomalies of Criminal Peace Judgeships:</u>

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[5] On the objections raised for instance see http://www.radikal.com.tr/yazarlar/omer-sahin/12-eylul-benzetmesi-abartili-olmaz-1177048/ .

[6] See http://www.sondakika.com/haber/haber-hsyk-da-gorev-degisikligi-5546914/

[7] For a timeline of the graft investigation and the government response, see http://isdp.eu/content/uploads/publications/2014-muller-turkeys-december-17-process-a-timeline.pdf .

[8] See http://www.aksam.com.tr/siyaset/paralel-yargi-c2turkiyeyi-bitirir/haber-318147 .

[9] See http://www.aktifhaber.com/erdogan-daha-bitmedi-bu-baslangic-1021469h.htm .

[10] See http://www.resmigazete.gov.tr/eskiler/2014/06/20140628-9.htm .

[11] There is ample evidence and consensus that criminal peace judgeships were set up to eliminate the Parallel Structure, see for instance https://www.youtube.com/watch?v=Vh4TBPAAB-o .

9- The creation of the CPJs is incompatible with the principle of 'natural judge' enshrined under Article 37 of the Constitution. This provision prohibits the creation of courts with a competence to try cases relating to the events which took place before their creation. The legislature may of course have competence to reorganize the judicial system by setting up new courts and abolishing certain courts. Nevertheless, this should not be carried out with a view to violating the principle of 'natural judge'. The creation of the CPJs sets a clear sample as to how a court or judgeship can be created with a specific political motivation and thus the principle of natural judge can be violated.

10- The principle of 'natural judge' guarantees that an individual may not be tried by a court or judgeship which was created before the crimes were allegedly committed and prohibits the establishment of a court specific to an event. There is ample evidence that the criminal peace judgeships were intentionally created against a specific societal section i.e. the so-called Gulen group. The creation of the CPJs in order to try specifically the events that allegedly took place prior to its establishment violates the principle upheld by Article 5(3) of the ECHR.

11- Various international bodies believe that CPJs are perceived as being close to the executive following the reshuffling of the judicial institutions after the December 2013 corruption investigations, and the politically motivated appointments and transfers of judges and prosecutors continued since then. Amnesty International for instance observes that criminal peace judgeships with jurisdiction over the conduct of criminal investigations, such as pre-charge detention and pre-trial detention decisions, seizure of property and appeals against these decisions, came increasingly under government control.[12] Venice Commission has more recently criticised the formation and functioning of the CPJs and put forward a number of recommendations for its reform.[13]

12- The CPJs were given the sole authority for taking decisions in relation to the investigations and appeals against decisions, especially on issues concerning custody, arrests, property seizures and search warrants. They combine the function of investigative judges and 'judges of the liberties', deciding on arrests, seizures, wiretaps and searches, pre-trial detention and release from pre-trial detention. The CPJs basically take the most drastic measures up until the trial stage of a judicial prosecution, which depending on the case may last from one to two years or perhaps more. The executive intention for rushing to create these judgeships appears to take under immediate control of the investigation stage through the CPJs.

13- The decisions of a criminal peace judgeship (CPJ) can only be appealed to another CPJ, which raises question about fair process. Under the Code of Criminal Procedure, the decisions of a judgeship can only be appealed to the next number of judgeship that follows in row. Thus, these courts clearly act as 'closed circuit' courts, which may be considered going back to the old 'courts of special jurisdiction' after Turkey

[12] See https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/
[13] See http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)004-e

abolished the problematic special courts in 2014.

14- Under the old rules of the Code of Criminal Procedure, the decisions of 'criminal courts of peace' during the pre-trial stage could be appealed to the 'criminal court of first instance' through an automated file distribution system. As there was no specific assigned criminal court for deciding on such appeals, an objection file could be distributed to any 'criminal court of first instance' available by an automated system. As no one could predict and direct which 'criminal court of first instance' would decide on the appeal, the courts would be relatively free in principle from any influence. Whilst, the decision of a 'criminal court of peace' was reviewed by a 'criminal court of first instance' standing higher in the hierarchy through the random distribution of files among so many courts, the new system of CPJ allows the review of a CPJ's decision only by another CPJ.

15- Article 19(8) of the Turkish Constitution and Article 5(4) of the ECHR contain similar provisions as regards 'the right to liberty and security'. Article 19(8) of the Constitution reads as follows: *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."* Article 5(4) of the ECHR provides that: *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."* The aim of both regulations is to provide the individuals detained with an effective legal remedy by which they can defend their freedoms, which may be accessible, allowing reasonable degree of success and creating the feeling of justice and thus preventing public authorities from arbitrarily restricting the right to liberty and security.

16- This aim will not be effectively realized when there are for instance two criminal peace judgeships, each of which is reviewing the other's decisions. This will create a vicious circle among the criminal peace judgeships which will consider the appeals of one another's decisions. This closed-circuit appeal mechanism will result in the objection procedure becoming *'ineffective and control in appearance'*. This appeal system removes the possibility of effective control over serious measures such as arrest and detention by a higher judicial authority. The previous system had provided the possibility of review of arrest and detention orders from 'a different viewpoint by higher courts.' The new functioning of the CPJs further increases the problem of 'internal institutional blindness' when it operates as a closed-circuit appeal system. Thus, the close-circuit appeal system among the CPJ is far from satisfying the legal guarantees enshrined under the Constitution and the ECHR.

17- Further, the decision given following an appeal to the CPJ is final. An appeal to this decision must be normally reviewed by a higher court in the hierarchy of the court structure whenever this is available. Article 2(1) of Protocol No. 7 of the ECHR (Turkey is not yet a party) provides that anyone receiving a criminal punishment shall be entitled to request the review of his conviction or punishment by a higher court. It is also a universal principle of criminal law and an inherent nature of the appeal

institution that the review of a conviction shall be undertaken by an impartial higher court. It cannot be argued that the same logic and the same characteristics deriving from the nature of review institution may not be valid for the appeal (objection) institution as a legal remedy.

18- The independence and impartiality is the founding elements of a court or judgeship within the context of Article 5 of the ECHR. An organ which is not independent and impartial may not be regarded as a court in the understanding of the ECtHR, even if it is named as such (Beaumartin v. France). According to the Court, appearing before a judge who is not independent and impartial will not be considered to '*be brought promptly before a judge or other officer authorised by law to exercise judicial power*' and will not end the custody period and thus Article 5(3) of the ECHR is violated (Assenov and Others v. Bulgaria, para. 146-150, Nikolova v. Bulgaria, para. 51-52).

19- The ECtHR assesses the independence of the judiciary on the basis of three criteria: the manner and period of appointment of the members of the court, the availability of guarantees against external influences and the appearance of the independence of the court (Findlay v. UK, para. 73). One of the most important determinations of a court's independence is the guarantee that the judges cannot be discharged from their existing duty without their request before the expiry of their terms, saved for appointment to a higher court (Campbell and Fell v. UK, para. 80; Lauko v. Slovakia, para. 63). There are scores of examples of the violation of this guarantee by the HSYK following its new formation especially following the judicial election in October 2014.[14] The intense circulation among the CPJs is also another sign of arbitrary reassignment of the judges when they did not satisfy the executive with their decisions and 'expected' performance. The main reason behind the removals of these judges was that they either did not issue detention orders for some suspects or released the suspects in investigations.

Criminal Peace Judgeships under Emergency Regime

20- Following the attempted coup of July 2016, a wave of prosecutions was initiated by the government seemingly as a response to the failed coup. It has nevertheless quickly turned out that most of the prosecutions have nothing to do with the actual coup attempt but on the basis of allegations of membership, relationship or affiliation to the Gulen group (the government claims it to be a 'terrorist' group). The figures of dismissals, closures, seizures, prosecutions, arrests, bans etc. have greatly expanded since the failed coup and have now reached a tremendous scale, already undermining the state structure.[15] The CPJs have become all the more important and functional for the executive and its functionaries in the judiciary for the wave of massive arrests and other dramatic following the attempted coup of 15 July 2016. The criticisms outlined above in relation to the CPJs had a far too devastating impact not only due to the very high numbers of persons involved but also as a result of extraordinary powers given to the CPJs under the emergency decree laws.

[14] http://www.platformpj.org/3552-2/
[15] https://turkeypurge.com/

21- The measures taken on the judiciary is the most striking one, as it involves a large number of the judiciary including senior members of the judiciary. The dismissals and prosecutions also included two (2) members of the Constitutional Court, five (5) present and ten (10) previous members of the High Council as well as fourteen (14) election candidates to the High Council. Around 4.250 judges and prosecutors have been dismissed by the High Council without any individualised procedure and without a right of defence. Nearly 3,000 judges and prosecutors, 170 of which are members of the supreme courts have also been subject to criminal procedure. The Constitutional Court, the Turkish High Judicial Council, the Court of Cessation and the Council of State put their signature under the dismissal of their members, relying on the emergency decree law without any concrete evidence, any right of defence and any individualisation of alleged actions.[16] The CPJs have been the most exploited instruments especially in the resulting high number of arrests and detention orders amidst the failed coup. The most striking example of the types of measures taken by the CPJs is the arrest and detention of 2745 judges and prosecutors at one go just within a single day on 16 July 2016 following the attempted coup.

22- It is not disputed that the CPJs were designed, structured, staffed and instructed by the executive specifically in order to rage a war against the persons allegedly linked to the Gulen group which Mr. Erdogan and his government called 'parallel state structure' or as 'a terror organisation'. This expressed intention behind the creation of CPJs, the politically motivated appointment, an appeal system operating as closed circuit, the image of partiality and working under the executive's instructions have all cast clear doubts as to the independence and impartiality of these judgeships. The CPJs basing their orders and decisions on the executive policy documents such as the National Security Policy Document (NSPD) is a flagrant example of the executive's involvement in the judicial process, thus a sheer example of creating crimes through the executive's action.[17]

23- After the attempted coup of July 2016, the extensive scale of crack down coupled with the curtailment of defence and other basic rights not required by the exigencies of the situation have given rise to the fact that the CPJs have become an indispensable convenient instrument for the executive under the states of emergency regime continuously applied since mid-July 2016. The CPJs have also become a judicial tool with a wider range to crack down all the opposition groups in Turkey including the liberals, the left, the Kurds or whoever considered to be a threat by the ruling regime. The CPJs which were specifically created by the executive for its decisive fight against the parallel structure has thus become an important "executive arm" against any threats and opposition under the pretext of terror charges.

24- The public referendum of 16 April 2017 has left the country with a strong presidential system with no checks and balances. A tight control by the president over the

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[16] See http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e s. 29-33.

[17] See http://www.takvim.com.tr/guncel/2016/05/30/hukumetten-onemli-feto-karari

judiciary through the newly structured Judicial Council (HSYK) has further deteriorated the checks and balances and the separation of powers to the detriment of the rule of law and independence of the judiciary. The defects and anomalies of the criminal peace judgeships will continue to constitute series threats to the functioning of the rule of law, independence of the judiciary and protection of human rights for the larger sections of the country.

Recommendations:

25- As it was also reflected by the Venice Commission and the International Commission of Jurists,

- Article 26 of Law no. 7145, which essentially extended the emergency powers over judges and prosecutors for a further three years, should be abolished.

- All decisions of the CJP relating to discipline, suspension and removal of a judge or prosecutor should be subject to judicial review. Individual complaint to the Constitutional Court should also be available against the decisions of the CJP.

- 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;

- 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.

- Judicial decisions and statistics about pre-trial measures should be accessible to the public.

- Judicial decisions relating to pre-trial measures must address the facts of individual cases, and decisions on appeals against these decisions must answer the main arguments of the objection.