Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
OL TUR 15/2020

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

I would like to bring to the attention of your Excellency's Government information I have received concerning the adverse impact that the amendments to article 159 of the Constitution, introduced by Act No. 6771, have on the independence of the judiciary and the separation of powers.

I already expressed concerns in relation to the composition and functioning of the Council of Judges and Prosecutors (hereinafter, "the Council" or "CJP") in OL TUR 5/2017, which focused on the dismissal, arrest and detention of judges, prosecutors and lawyers following the failed coup d'état of July 2016. I thank once again your Excellency's Government for its reply to this communication, and in particular for the information provided in relation to the Council. However, I continue to remain extremely concerned at the adverse effects that the reform of the CJP have had, and continues to have, on the independence of the judiciary and the separation of powers.

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Act No. 6771 of 11 February 2017 introduces various amendments to the Constitution of Turkey.[1] Its 18 articles modified almost 50 constitutional provisions and repealed 21 other provisions, with the effect of "changing the Turkish polity to what the Turkish authorities have described as a 'Turkish-style' Presidential system".[2] In particular, article 14 of the law modifies the composition and functions of the High Council of Judges and Prosecutors, now renamed 'Council of Judges and Prosecutors', which has general responsibilities with regard to the organisation and functioning of the judiciary and the prosecution service and all aspects of the career of judges and prosecutors (e.g. appointment, transfer, promotion, discipline and dismissal).

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Before explaining my concerns on the content of the above-mentioned act, I wish to remind your Excellency's Government of its obligations to protect and promote the independence of the judiciary and the prosecution service.

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[1] Act No. 6771 dated 11 February 2017 to amend the Constitution of the Republic of Turkey (*Turkiye Cumhuriyeti Anayasasinda degisiklik yapilmasina dair kanun*). Resmi Gazette, 2017-02-11, No. 29976, available at https://www.resmigazete.gov.tr/eskiler/2017/02/20170211-1.htm

[2] European Commission for Democracy Through Law (Venice Commission), Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13 March 2017, para. 17.

The independence of the judiciary is an essential requirement of the democratic principle of separation of powers, which stipulates that the executive, the legislature and the judiciary constitute three separate and independent branches of Government. The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities.

The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Turkey is a party, including the International Covenant on Civil and Political Rights, ratified by Turkey on 23 September 2003, and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ratified on 18 May 1954. Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

In General Comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stressed that the requirement of independence of a tribunal is "an absolute right that is not subject to any exception." The requirement of independence "refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." The Human Rights Committee clearly stated that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal" (para. 19).

The principle of the independence of the judiciary has also been enshrined in the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985. The Principles provide, inter alia, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (…) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

The Basic Principles also provide guidance on a series of further requirements, including qualifications and selection of judges (principle 10), conditions of service (principle 11), security of tenure (principle 12) and disciplinary, suspension or removal

proceedings (principles 17−20). With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

At the regional level, the obligations of States in relation to the safeguard of judicial independence are spelled out in a number of instruments, including the European Charter on the Statute for Judges and the Council of Europe Recommendation on judicial independence.[3]

The main instrument specifically aimed at regulating the profession of prosecutors is the Guidelines on the Role of Prosecutors.

The Guidelines recognise that prosecutors play a crucial role in the administration of justice. Principle 4 of the Guidelines provides that States have a duty to ensure that prosecutors are able to perform their professional functions impartially and objectively, without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. The Guidelines include provisions relating to, inter alia, the qualifications, selection and training of prosecutors (principles 1 and 2), status and conditions of service (principles 3 to 7), role in criminal proceedings (principles 10 to 16), and disciplinary proceedings against prosecutors (principles 21 and 22).

In light of the above-mentioned standards, the amendments to the Constitution introduced by Act No. 6771 would fall short of international standards and adversely affect the independence of the judiciary and prosecution service as well as the separation of powers. I am also worried at the wide discretionary powers that the executive power, through the President of the Republic and the Minister of Justice, would retain in relation to all aspects of the career of judges and prosecutors.

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The changes introduced by Act No. 6771

Act No. 6771 introduces several changes to article 159 of the Constitution, which regulates the composition and functions of the Council of Judges and Prosecutors.

Prior to the enactment of Act No. 6771, the (then) High Council of Judges and Prosecutors (HCJP) consisted of 22 members: two *ex-officio* members (the Minister for Justice and his/her Undersecretary), four members appointed by the President of the Republic, three members elected by the Court of Cassation, two members elected from the Council of State, one member elected from the Turkish Justice Academy, seven

[3] Council of Europe, recommendation of the Committee of Ministers on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, 2010.

members elected from among ordinary judges and prosecutors, and three members from among administrative judges and prosecutors.

The procedure for the appointment of members of the HCJP was largely in line with existing regional standards relating to the composition of national judicial councils, which recommend that judicial councils have a mixed composition, with a majority of judge members elected by their peers.[4] In an interim opinion on the HCJP, the Venice Commission found that the manner of appointment of the High Council largely met existing European standards, although it regretted the fact that Parliament was not included in the processes of appointing members to the Council.[5]

Act No. 6771 introduces far-reaching changes to the composition of the new Council of Judges and Prosecutors (CPJ). It decreases the number of Council members from 22 to 13, and introduces new modalities for their appointment.

According to the Turkish authorities, the aim of the change in the composition and electoral process of the Council was to remove the politicisation that occurred in the judiciary, in order to prevent its re-seizure by organisations like FETÖ, and to modify the selection process in accordance with the recommendations made by the Venice Commission in its interim opinion of 2010.[6]

The new composition of the CJP

The new CJP consists of 13 members, who are organised in two chambers (article 159, para. 2). They are appointed as follows:

- The Minister of Justice, who presides the Council, and his/her Undersecretary continue to be *ex-officio* members of the Council;
- Four members are appointed by the President of the Republic from among judges and public prosecutors in the ordinary and administrative justice system;
- The remaining seven members of the CJP are elected by the Turkish Grand National Assembly from among members of the Court of Cassation (three members), the Council of State (one member) and law professors and lawyers (three members).

[4] See for instance Council of Europe, European Charter on the Statute of Judges, 1998, art. 1.3; Consultative Council of European Judges, opinion No. 10 (2007) on the council for the judiciary at the service of society, 23 November 2007, paras. 16-20; Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), 2010, para. 13; Council of Europe Committee of Ministers, recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, 2010, para. 27; Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability, 2010, para. 7.

[5] Venice Commission, Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, CDL-AD(2010)042, 20 December 2010, paras. 30-34.

[6] Venice Commission, Opinion on the Amendments to the Constitution, cit., para. 115.

Judges and prosecutors continue to constitute the majority of members of the new CJP (8 out of 13 members). However, none of the judge- and prosecutor-members of the Council is elected by their peers. Out of 8 judges and prosecutors elected to the Council, four are appointed by the President of the Republic and four by the Turkish Grand National Assembly. This is not in line with European standards, which recommend that judge members of the council be elected by their peers and represent the judiciary at large, including judges from first level courts.[7]

The role of the President of the Republic in the appointment of CJP members

Judicial councils may play a crucial role in guaranteeing the independence of the judiciary and should themselves be independent, i.e. free from any form of interference from the executive and legislative branches. In order to insulate judicial councils from external interference, politicization and undue pressure, international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process (A/HRC/38/38, para. 76).

According to Act No. 6771, the President of the Republic is directly responsible for the appointment of four members of the CJP, whereas the Minister of Justice and his/her Undersecretary – both elected by the President of the Republic – continue to be *ex-officio* members of the Council. As a result, almost half of the members of the CJP are appointed, directly or indirectly, by the President of the Republic. The Venice Commission stressed that following the entry into force of the constitutional amendments, the President of the Republic ceased to be a "*pouvoir neutre*," and would thus be able to choose members of the CJP along political line.[8]

This situation could cast serious doubts on the independence of the body that is tasked by the Constitution to guarantee the independence and the autonomy of the judiciary.

The role of the Minister of Justice within the CJP

As regard to the participation of the Minister of Justice and his/her Undersecretary in the CJP as *ex-officio* members, I would like to note that whenever members of the executive branch participate in the work of a council as *ex-officio* members, appropriate measures should be developed to ensure the independence of the

[7] See for instance Universal Charter of the Judge, 2017, article 2-3; Council of Europe, European Charter on the Statute of Judges, 1998, art. 1.3; Consultative Council of European Judges (CCJE), opinion No. 10 (2007) on the council for the judiciary at the service of society, 23 November 2007, paras. 16-20; Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), 2010, para. 13; Council of Europe Committee of Ministers, recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, 2010, para. 27; Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability, 2010, para. 7.

[8] Venice Commission, Opinion on the Amendments to the Constitution, cit., para. 119.

Council from any potential interference from its executive members (A/HRC/38/38, para. 111).

This does not seem to be the case with regard to the CJP, where the Minister of Justice presides the Council and provides to its administration and representation (article 159, para. 7). The Minister also retains important functions with regard to the administration of the judiciary, for instance in relation to the abolition of courts or changes in their territorial jurisdiction (article 159, para. 8) or the transfer of judges and prosecutors or investigating on the conformity of their conduct with the law or standards of professional conduct (article 159, para. 12).

For this reason, I am of the view that the Council should not be presided by the Minister of Justice; the chair should be elected by the CJP itself among its judge members. In order to minimize the risk of political interference, international mechanisms recommend that the president of the council be an impartial person who is not close to political parties.[9]

The involvement of the Turkish Grand National Assembly in the election of CJP members

Regional mechanisms provide limited guidance with regard to the involvement of the legislative branch in the selection of non-judge members of judicial councils.[10] This is a matter that has largely been left to the discretion of States, which have to strike a fair balance between the need to insulate the judiciary from external pressure and the need to avoid the negative effects of corporatism within the judiciary. As a general rule, if elected by the legislative branch, non-judge members should be elected by a qualified majority, necessitating significant opposition support.

Act No. 6771 requires that the Turkish Grand National Assembly elect the seven members of the CJP by qualified majority (two-thirds in the first round, three-fifths in the second round). From this perspective, the solution chosen by the Turkish authorities is in line with European standards concerning the involvement of national Parliaments in the selection of council members.

Nevertheless, four out of seven candidates selected by the Turkish Grand National Assembly are judges, who – as already noted – should be selected by their peers. The fact that judges will no longer have a decisive role in the appointment of the judicial members of the Council puts the new election method at odds with relevant international and regional standards. The election of judicial members of the Council by a qualified majority does not alleviate this concern, as they will still not be chosen by their peers.

[9] See CCJE, opinion No. 10, para. 33; and European Commission for Democracy through Law (Venice Commission), opinion No. 403/2006 on judicial appointments, 22 June 2007, para. 35.
[10] See opinion No. 10 of the Consultative Council of European Judges, para. 32; and Venice Commission, opinion No. 403/2006 on judicial appointments, paras. 31-32.

Furthermore, the election of the majority of the Council members by a political authority could constitute in itself a threat to judicial independence. In this regard, I cannot but note that while the CJP is not a judicial authority *per se* and does not exercise judicial functions, its role of safeguarding judicial independence in Turkey requires that it be independent and impartial from the executive and legislative branches.[11]

As observed by the Venice Commission, it is sufficient for the party of the President to obtain two-fifths of the seats in the National Assembly to place the whole Council under the control of the executive branch of power. That would place the independence of the judiciary in serious jeopardy, because the Constitution entrusts far-reaching powers to the CPJ in relation to the admission to the judicial or prosecutorial career, transfer, promotion, discipline and removal from office of judges and public prosecutors.[12] Getting control over this body "thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice."[13]

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In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to recommend that your Excellency's Government and the Grand National Assembly, where relevant:

1. reconsider the aforementioned changes to article 159 of the Constitution, with a view to ensuring their compliance with existing international and regional standards relating to the independence of the judiciary and the separation of powers;

2. review the composition of the Council of Judges and Prosecutors, so as that judge and prosecutor members of the Council are elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels;

3. remove the discretionary power of the President of the Republic to select any members of the Council;

4. reconsider the participation of the Minister of Justice and his/her Under-Secretary in the work of a council as *ex officio* members, or,

[11] I made similar comments in my country mission report on Poland with regard to the Act on the National Council of the Judiciary: see A/HRC/38/38/Add.1, paras. 67-69.

[12] Article 159, para. 8, entrusts far-reaching powers to the CPJ in relation to the admission to the judicial or prosecutorial career, transfer, promotion, discipline and removal from office. Act No. 6771 introduces a new paragraph 9 to article 159, according to which the CJP can appoint inspectors to supervise whether the judges and public prosecutors perform their duties in accordance with laws and other regulations and investigate on offences perpetrated in connection with, or in the course of their duties. Such investigations can be undertaken upon the proposal of the related Council chambers and with the permission of the President of the CJP (i.e. the Minister of Justice). Article 159, para. 10, stresses that the decisions of the Council, other than dismissal from the profession, are not be subject to judicial review.

[13] Venice Commission, Opinion on the Amendments to the Constitution, cit., para. 119.

alternatively, adopt appropriate measures to prevent members of the executive branch to interfere with its functioning;

5. consider entrusting the election of lay members of the CJP to a non-political authority. If the current system of election is maintained, ensure that the selection of candidates by the Grand National Assembly take place in an open and transparent way in order to reduce the risks of political interference;

6. regardless of whether the Minister of Justice continue to participate in the work of the Council as *ex officio* member, ensure that the role of chair of the Council is entrusted to an impartial person who is independent, not close to political parties, and elected by the CJP itself;

7. regardless of whether the Minister of Justice continue to participate in the work of the Council as *ex officio* member, amend article 159, paras. 7, 8 and 9, so as to eliminate any kind of political interference with the system of administration of justice. In compliance with the principle of separation of powers, the Minister of Justice and, more in general, the executive branch of power, should not play any role in relation to the admission to the judicial or prosecutorial career, transfer, promotion, discipline and removal from office of judges and public prosecutors;

8. amend article 159, para. 10, so as to ensure that all decisions of the Council in relation to the appointment, transfer, promotion, discipline and removal from office of judges and public prosecutors are subject to independent judicial review;

9. ensure that the reform of the Council is the result of an open, fair and transparent process, involving not only the Government and the Grand National Assembly, but also extensive public consultation with judges, prosecutors, lawyers and their professional associations;

10. adopt any other appropriate measure to ensure the protection and promotion of the independence of the judiciary and the prosecution service.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers