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THE RULE OF LAW AND DEMOCRACY IN TÜRKIYE

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THE RULE OF LAW AND DEMOCRACY IN TURKIYE

1. INTRODUCTION

One fundamental concept that promotes democratic societies and ensures the protection of human rights is the rule of law. This idea has been severely challenged in Türkiye, especially in following years of an attempted coup in 2016 that triggered extensive purges of the judiciary and other state institutions. The independence of judiciary in a country depends on how much the rule of law is protected by institutions and society. For this reason, we think that it is appropriate to evaluate the independence of law in a broader context but, rather than doing this, in this report, we are going to draw specific attention on the executive's intervention over the competences and power of judiciary such as executive's impact on new judicial appointments and government interference on the implementation of the ECtHR judgements in “individual cases”¹ and “systematic problems”².

Since the independence of the judiciary is not a phenomenon that is achieved in a short time, and the loss of the independence of the judiciary may occur over a period with systemic changes and being reluctant on resolving systematic issues by political and legal reform legislations. Even though, there are some enormous concerns about the independence of judiciary in Türkiye, as mentioned above, we find it very important to evaluate the issues of events including ECtHR judgements after alleged 2016 coup, considering that the loss of judicial independence is a long process.

¹ *Osman Kavala v. Turkiye*, app no. 28749/18, (ECtHR, 10 December 2009)

² *Y. Yalcinkaya v. Turkiye*, app no. 15669/20 , (ECtHR, 26 September 2023)

2. INDEPENDENCE OF JUDICIARY

2.1. Post-2016 Judicial Purge

As regards to the rule of law in Türkiye, the period following the 2016 coup attempt marked a significant turning point in this trajectory. The failed coup led to a state of emergency that lasted for two years, during which the Turkish government undertook extensive purges across various sectors, including the judiciary.

“In the aftermath of 15 July 2016 in Türkiye, 4.362 judges and prosecutors were dismissed, including members of the Court of Cassation, the Council of State and the Constitutional Court. Criminal investigations were opened against approximately 4.370 judges and prosecutors, 1.311 of them were taken into custody and 2.431 were arrested for their alleged links with the Hizmet/Gülen Movement.”³ according to UN Special Rapporteur on the independence of judges and lawyers

Furthermore, by the conducts of Constitutional Court, concerns raised about the nature of judicial dismissals, especially when such decisions are based on vague and non-transparent criteria rather than concrete evidence of misconduct or criminal activity. The Constitutional Court itself reportedly purged two of its judges for alleged links with the Hizmet/Gülen Movement on the grounds of “information from the social environment” and “common opinion emerging over time”.⁴At that time as well, YARSAV, the Turkish Association of Judges and Prosecutors, which had more than 1.800 members, was closed by decree-law.⁵ The law needs just a "connection," "union," or "affiliation" with a "structure, formation, or group" that Turkey's National Security Council has "determined to operate against the national security of the state" in order to justify the removal of a judge. This ambiguous and too permissive wording greatly increases the likelihood that judges may be dismissed arbitrarily, in breach of the judicial independence protections. Therefore, this broad and imprecise wording fails to establish clear and objective standards, thereby creating a high risk of arbitrary dismissals in violation of the principles of judicial independence. Such provisions allow for the removal of judges without due process, undermining the essential safeguards that protect judges from undue influence

³ Special Rapporteur on the Independence of Judges and Lawyers, 'Letter to the Government of Türkiye Regarding Concerns about Judicial Independence' (21 June 2024) AL TUR 3/2024, 1.

⁴ The Venice Commission noted that “the judgment does not refer to any evidence against the two judges concerned”, para. 136, CDL-AD(2016)037

⁵ Special Rapporteur on the Independence of Judges and Lawyers, 'Letter to the Government of Türkiye Regarding Concerns about Judicial Independence' (21 June 2024) AL TUR 3/2024, 1.

or retaliation for their decisions. The ECtHR is still considering more than 1.000 applications submitted by judges who were detained.⁶

As a result, these actions significantly weakened the judiciary's independence, as the dismissals were often conducted without proper legal procedures, raising concerns about the use of the judiciary as a tool for political repression. The purges also led to a severe shortage of judges and prosecutors, prompting the rapid appointment of new personnel, many of whom lacked the necessary experience and independence.⁷ The impact of these purges on the judiciary cannot be overstated. The removal of thousands of judges and prosecutors not only disrupted the functioning of the judicial system but also created a climate of fear and uncertainty among the remaining members of the judiciary. Many judges became reluctant to issue rulings that might be perceived as contrary to government interests, fearing dismissal or prosecution. This has led to a significant chilling effect, undermining the independence and impartiality of the judiciary.⁸

2.2. Reshaped Structure of High Council of Judges and Prosecutors

The Council of Judges and Prosecutors (HSK) was also known as The High Council of Judges and Prosecutors (HSYK) before the 2017 constitutional amendments, plays a crucial role in the appointment, promotion, and dismissal of judges and prosecutors in Türkiye. Nevertheless, the 2017 reforms have significantly undermined the independence of this body by increasing the influence of the executive branch over its composition since, the President of the Republic appoints 4 members from ordinary judges and prosecutors and the National Assembly elects 7 members, from the Court of Cassation (3), the Council of State (1) and legal academics or lawyers (3). The Minister of Justice, appointed by the President of the Republic, and his/her Undersecretary constitute the 2 remaining members, with the Minister presiding the Council. Hence, while no member of the Council is actually appointed by judges or prosecutors, executive power handed indirectly control over judiciary by giving the President a competence of appointment of almost half of the Council.⁹ This concentration of power in the hands of the executive has raised serious concerns about the politicization of the judiciary. The HSK, which should function as a safeguard for judicial independence, has instead become a tool for the executive to exert control over the judiciary. The influence of the HSK is evident in the pattern of judicial

⁶ Ibid.

⁷ Special Rapporteur on the Independence of Judges and Lawyers, 'Letter to the Government of Türkiye Regarding Concerns about Judicial Independence' (21 June 2024) AL TUR 3/2024, 2.

⁸ Ibid.

⁹ Venice Commission, Türkiye - 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.

appointments and dismissals, where judges perceived as loyal to the government are promoted, while those deemed critical are sidelined or removed.

2.3. Impact of New Judicial Appointments

The independence of the judiciary has been severely impacted by the prompt appointment of new judges and prosecutors in the immediate aftermath of the 2016 purges. There have been questions raised concerning the qualifications and impartiality of the new appointees as a result of the fact that many of these appointments were made without the required inspection, assessment or scrutiny. Furthermore, the inexperience of a large number of recently appointed judges has lowered the standard of court rulings, further diminishing public trust in the judicial system.¹⁰

In order to prevent possible revenge, judges are becoming more willing to closely align their rulings with government policies, which has been facilitated by the recent appointments.¹¹ This has been especially true in politically controversial situations, where the judiciary is no longer viewed as an independent decision-maker of justice but rather as a subsidiary of the executive branch.

3. CHRONIC UNSOLVED ISSUES ON THE IMPLEMENTATION OF THE ECtHR JUDGEMENTS

3.1. Concerns about Independence of Judiciary Post *Kavala v. Türkiye* and Landmark *Yalcinkaya v. Türkiye* Decisions

Based on data from the Turkish Ministry of Justice, almost 265.000 people were convicted between 2016 and 2020 on the grounds that they were members of terrorist organizations. The Turkish courts had filed more than 2 million court cases against individuals for being members of terrorist organizations as of June 2022. Estimates place the number of individuals directly impacted in Turkish society at about 4 million, given the volume of people facing criminal charges.¹²

¹⁰ European Commission for Democracy through Law (Venice Commission), *Türkiye - Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships*, CDL-AD(2017)004, 13 March 2017.

¹¹ *Abdullah Zeydan others v. Türkiye*, ECtHR, App. no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, Coe Commissioner third party intervention in journalist case, para. 35.

¹² Special Rapporteur on the Independence of Judges and Lawyers, 'Letter to the Government of Türkiye Regarding Concerns about Judicial Independence' (21 June 2024) AL TUR 3/2024, 4.

The implementation of judgments from the European Court of Human Rights (ECtHR) by Türkiye has consistently highlighted systemic problems within the country's judiciary. The *Yüksel Yalçınkaya v. Türkiye* and *Osman Kavala v. Türkiye* cases underscore the chronic and unresolved systemic and individual issues related to judicial independence and the impartiality of the judiciary, posing serious concerns about the rule of law in Türkiye.

The *Yüksel Yalçınkaya v. Turkey* decision is particularly significant in understanding the systemic problems within the Turkish judiciary. The court concluded that the proceedings against Yalçınkaya were marred by the lack of an independent and impartial court, undue executive influence, and an overall absence of fair trial guarantees. The ECtHR emphasized that this case demonstrated the judiciary's subordination to the executive branch, which is demonstrating of a wider phenomenon in which politically sensitive cases are not treated impartially.

The *Osman Kavala v. Turkey* decision similarly revealed deep-seated issues within the Turkish judiciary, although it involved a different individual context. The European Court of Human Rights (ECtHR) determined that his imprisonment was politically motivated and in violation of Articles 5 (right to liberty and security) and 18 (restricted on the use of restrictions on rights). The Kavala case brought to light the abuse of the legal system to an individual target people who are considered to be a threat to the government, highlighting the lack of judicial independence.

While both cases arise from different backgrounds, they share commonalities in how the Turkish judiciary has been compromised. Both cases illustrate the judiciary's vulnerability to executive influence, especially in politically sensitive cases. The lack of impartiality and fairness in these proceedings underscores the systemic issues that the ECtHR has repeatedly identified in its judgments against Türkiye

Furthermore, these issues are exacerbated by Türkiye's own legal reforms, which were intended to address human rights violations but have not fully achieved their goals. The 2010 reform of the Constitutional Court introduced the procedure of individual complaints, allowing citizens to lodge complaints for violations of fundamental rights and freedoms protected by the Constitution and the European Convention on Human Rights (ECHR). This system, which became operational in September 2012, was expected to reduce the number of Turkish cases before the ECtHR by providing a domestic remedy. However, as of July 2023, Turkey still has 23,700 pending cases before the European

Court, accounting for 37.2% of the total caseload, which suggests that the domestic mechanisms have been insufficient in addressing systemic issues within the judiciary.¹³

The failure to fully implement the ECtHR's ruling is indicative of a broader pattern of non-compliance with international and European human rights obligations in Türkiye. Despite being a party to the ECHR, Türkiye has increasingly ignored or delayed the implementation of cases of Kavala and Y. Yalcinkaya into its legal order. Since, these judgements particularly in cases involving politically sensitive issues such as freedom of expression, fair trial rights, and the independence of the judiciary.

In conclusion, the Kavala judgment was ultimately not implemented by the domestic court and Kavala remains in prison, in the Yuksel Yalcinkaya judgment the Government, while formally accepting the Court's judgment, has taken limited steps to implement it or address the broader systemic issues highlighted by the case. In the action plan published in August 2024¹⁴ on the Yuksel Yalcinkaya judgment, by presenting the rare acquittals issued prior to the Yalcinkaya judgment, the government has consistently stated that the local courts have acted in compliance with the Yalcinkaya judgment, but in this action plan, it has not pointed to legal and legislative changes that would demonstrate its will to improve and correct the systemic problems identified by the ECtHR in its own judicial system, and has not provided a clear solution to the chronic doubts about the independence of the judiciary.

3.2. The Role of Constitutional Court of Türkiye

The individual application mechanism which introduced in 2010 was a significant reform aimed at enhancing the protection of fundamental rights. Nevertheless, the effectiveness of this mechanism has been increasingly undermined by the broader systemic challenges facing the judiciary after 2016 coup. While the Constitutional Court has issued several landmark rulings upholding individual rights, the implementation of these decisions has often been met with resistance from lower courts and government authorities. In some cases, lower court's judges have outright refused to comply with the Constitutional Court's rulings, further eroding the rule of law in Türkiye. Thus, The Constitutional Court has been isolated within the judiciary by the resistance of lower courts openly rejecting its ruling. This reluctance of lower courts to implement

¹³ European Court of Human Rights, 'Pending Applications Statistics by Month – 2024' (European Court of Human Rights, 2024) <https://www.echr.coe.int/documents/d/echr/stats-pending-month-2024-bil>

¹⁴ Gökhan Güneş, 'The Government's Action Plan and Annexes Regarding the Yalcinkaya Judgment' (drgokhangunes.com, 2024)

Constitutional Court decisions reflects a common broader decline of the rule of law in judiciary and the growing influence of the executive branch over the judges.

4. RECOMMEDATIONS

4.1. Strengthening Judicial Independence

It is vital to **carry out legislative reforms that decrease the executive branch's control over the appointment and removal of judges and prosecutors in Türkiye in order to restore the independence of the judiciary.** To make sure that it operates without influence from politics, this entails changing both the composition and the power of the Council of Judges and Prosecutors (HSK). In order to enable judges and prosecutors to perform their jobs without fear of vengeance, safeguarding measures against arbitrary dismissal or prosecution must also be established in practice not only in legislations.

4.2. Enhancing Compliance with ECtHR Rulings

Türkiye should **take concrete steps to improve its compliance with ECtHR judgments,** particularly in cases involving systematic human rights violations against thousands of citizens and individual fundamental rights. Given that the 2016 post-coup State of Emergency Commission has failed to respond to requests for redress for rights violations, these concrete steps include Türkiye establishing a mechanism to monitor the implementation of ECtHR judgments and holding the authorities accountable for delays or non-compliance. **Strengthening the role and powers of the Constitutional Court** is also vital, as it serves as the primary domestic mechanism for the protection of individual rights in line with international standards

5. CONCLUSION

The decreasing degree of judicial independence, the misuse and abuse of anti-terrorism legislation, and lack of respect for fundamental international human rights duties have all seriously jeopardized Türkiye's rule of law in recent years. The judiciary, which was formerly seen as a pillar of justice and impartiality, has become more political as a result of strong pressure on judges and prosecutors to make rulings that promote government agendas. In this regard, The Yuksel Yalcinkaya v. Türkiye and Kavala v. Türkiye cases serve as an example of the difficulties encountered by people seeking justice in a system where the executive branch is becoming more powerful than ever before.

In order to reverse this trend, it is imperative that the Turkish government undertakes comprehensive reforms to restore the independence of the judiciary, restore citizens' trust in the judiciary and court decisions, increase the compliance of court decisions with international human rights standards, and protect individuals' right to a fair trial. The international community, including academia, international human rights organizations, civil society organizations and the United Nations, should continue to monitor the situation closely, should keep the human rights violations on the agenda, and provide support to those working to uphold the rule of law in Türkiye.

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