

Mandates of the Special Rapporteur on the independence of judges and lawyers and the Working Group on Arbitrary Detention

REFERENCE:
OL TUR 5/2017

23 May 2017

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; and Working Group on Arbitrary Detention, pursuant to Human Rights Council resolutions 26/7 and 33/30.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the dismissal, arrest and detention of a high number of judges and prosecutors, and the arrest, detention and criminal investigation of a number of lawyers, which have taken place since the failed coup attempt of 15 July 2016 and which seem to constitute serious interferences in the independence of the judiciary and the legal profession. We would also like to bring your attention to information we have received concerning changes incurred by the amendments to the Constitution, endorsed by the referendum of 16 April 2017, which may directly affect the independence of the judiciary and the separation of powers in Turkey.

Concerns regarding the massive dismissals and arrests of judges and prosecutors were first expressed by a group of Special Rapporteurs in a press release issued on 19 July 2016. Since then, concerns relating to various measures implemented under the state of emergency declared on 20 July 2016 and their reported serious negative impact on the enjoyment of fundamental human rights were expressed in a series of communications addressed to your Excellency's Government, including urgent appeal TUR 6/2016, urgent appeal TUR 7/2016, urgent appeal TUR 8/2016, and allegation letter TUR 4/2017, as well as in two press releases issued on 19 August 2016 and 13 April 2017. We take this opportunity to thank your Excellency's Government for the replies to these communications.

The Special Rapporteur would also like to note that, given the limited resources available, he is not in a position to address separately the very large number of individual complaints received since July 2016. The Working Group on Arbitrary Detention has also received a significant number of individual complaints during this period, in particular from judges, which it is not able to address individually.

According to the information received:

On 16 July 2016, a day after the failed coup, the High Council for Judges and Prosecutors (HSYK) suspended a first round of 2,745 judges and prosecutors, whose names were published in a list, on the grounds that they were suspected of being members of what the Turkish authorities refer to as Fethullah Gülen

Terrorist Group/Parallel state structure or FETÖ/PYD (hereafter the Gülen movement).

On 19 July, the Deputy-head of the High Council for Judges and Prosecutors reportedly indicated that the prosecutors' office in Ankara had issued a decision to detain 2,740 judges and prosecutors. By the end of July, the Minister of Interior reported that 1,684 judges and prosecutors had been placed in pre-trial detention.

On 23 July 2017, following decree laws issued under the state of emergency declared on 20 July, the independent association of judges and prosecutors YARSAV was dissolved and its assets frozen without any judicial proceedings. Since then, several lawyers' associations have also reportedly been closed down. A court decision issued on 31 July 2016 reportedly froze the assets of 3,048 judges and prosecutors under investigation. By the end of August 2016, the number of suspended or dismissed judges and prosecutors had reportedly reached 3,400, including 2 judges from the Constitutional Court, more than 160 judges from other high courts and 5 members of the High Council for Judges and Prosecutors.

On 12 December 2016, the Minister of Justice reportedly announced that 3,820 judges and prosecutors were being investigated and that 2,430 of them were still detained.

The number of dismissals continued to increase in 2017. For instance, on 20 February 2017, a further 227 judges and prosecutors were reportedly dismissed. On 2 April 2017, the Minister of Interior reportedly indicated that there were 2,575 judges and prosecutors in pre-trial detention.

On 5 May 2017, the High Council for Judges and Prosecutors dismissed 107 judges and prosecutors. On 6 May, arrest warrants were issued for 23 of these judges and prosecutors. At the same time, the High Council for Judges and Prosecutors reportedly reinstated 82 judges and prosecutors who had been dismissed (about 200 judges and prosecutors had been previously reinstated). The Council also rejected appeals for 329 dismissed judges and prosecutors and reshuffled another 1,035 judges and prosecutors.

At the time of writing, a total of at least 4,200 judges and prosecutors had reportedly been suspended or dismissed since 15 July 2016, more than a quarter of the total judiciary as accounted for in May 2016. At least 2,500 of them had been arrested and detained pending investigation.

In addition, since 15 July 2016, more than 1,000 arrest warrants for lawyers have reportedly been issued for their alleged links with the Gülen movement, resulting in the arrest of at least 410 lawyers, including heads of provincial and regional bar associations. More than 1,000 lawyers would currently be under investigation.

The dismissals, arrests and detentions of the judges and prosecutors are said to have been grossly arbitrary; appropriate procedures were allegedly not followed, including respect for the fundamental principle of presumption of innocence, as the judges were suspended or dismissed collectively in lists issued by the High Council for Judges and Prosecutors (with the exception of members of the judiciary in the highest judicial instances) or directly appended to emergency decrees, without any specific evidence having been produced, individual reasoning of their case, or the ability to present a defence.

According to Turkish Law no. 2802, members of the judiciary can be arrested only when caught in flagrante delicto of committing an aggravated felony. Moreover, judicial procedures against members of the judiciary must be expedited (an indictment must be prepared within five days after a judge or prosecutor is arrested and the trial must be concluded in no longer than three months). Yet, it is alleged that by the end of March 2017, no such indictments had been prepared.

It is further reported that provisions introduced in several emergency decrees also severely restricted procedural guarantees in criminal proceedings and the rights of defence. For instance, Decree Law no. 667, which entered into force on 23 July 2016, extended the deadline to present an arrested person to a judge to 30 days (this period was reduced to 7 days, which the prosecutor can extend by a further 7 days in specific circumstances, in a decree law issued on 23 January 2017). Decree Law no. 667 also allows oral consultations between detainees and their lawyers to be recorded and any documents exchanged to be seized for security reasons; it further stipulated that the timing of such consultations may be regulated and that the lawyer may be replaced at the request of the prosecution. Decree Law no. 667 also limited the number of lawyers that can represent an accused to three (this provision was reportedly made permanent by Decree Law no. 676 of 29 October 2016).

Decree Law no. 668 inter alia allows the prosecution to seize and inspect correspondence between defendants and privileged witnesses (such as spouses or lawyers), and to restrict the right of a detainee to have access to a lawyer for 5 days (the latter restriction was lifted in a Decree Law issued on 23 January 2017). Limitations on confidential contacts between a detainee and his/her lawyer have reportedly been made permanent via Law no. 5275.

Decree Law no. 676 of 29 October 2016 prohibits lawyers accused of a specific crime to take part in the representation of a client. This Decree also reportedly made permanent the possibility of detention without access to a lawyer for a period up to 24 hours.

The recruitment of new judges and prosecutors was also rushed. Recruitment processes were allegedly not scrupulously followed; for instance the qualification requirements for the written examination were supposedly lowered. It is also

alleged that candidates with links to the ruling party benefitted from preferential treatment.

Finally, several changes introduced by the amendments to the Constitution which were approved in the referendum of 16 April 2017, reportedly undermine the independence of the justice system. Under the amended Constitution, the High Council for Judges and Prosecutors was reduced from 22 to 13 regular members and the President directly appoints 4 of them. The Minister of Justice and his/her Undersecretary, who are members of the High Council for Judges and Prosecutors, are also appointed by the President. The remaining 7 members of the Council are appointed by the Grand National Assembly. Prior to the amendments, the President was responsible for appointing 3 out of 22 regular members of the High Council for Judges and Prosecutors, but the majority of the members of the Council were appointed by their peers.

Changes in the appointment of members of the High Council for Judges and Prosecutors will also reportedly have indirect repercussions on the Constitutional Court. Indeed the High Council for Judges and Prosecutors is responsible for the elections of the judges of the Court of Cassation and the Council of State; both Courts, in turn, choose two judges of the Constitutional Court (they send three nominees for each position to the President who makes the appointments).

We wish to express deep concern about the extraordinary number of judges and prosecutors that were dismissed, arrested and detained since the failed coup attempt of 15 July 2016. The measures taken against these judges and prosecutors could constitute a violation of their fundamental rights and a severe encroachment on the independence of the judiciary; these measures could also have long term negative consequences on the independence of the justice system, and ultimately democracy, in Turkey.

The independence of the judiciary is prescribed, *inter alia*, in the International Covenant on Civil and Political Rights, ratified by your Excellency's Government on 23 September 2003, and the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on the Role of Prosecutors.

According to the Basic Principles on the Independence of the Judiciary, judges can be suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and only in accordance with fair procedures ensuring objectivity and impartiality (Principles 17 to 19; see also Human Rights Committee, General Comment no. 32, CCPR/C/GC/32, para. 20). The Guidelines on the Role of Prosecutors stipulates that disciplinary procedures against prosecutors alleged to have acted clearly out of the range of professional standards shall be expeditiously and fairly processed, that prosecutors shall have the right to a fair hearing and that the decision shall be subject to independent review (Guideline 21). They further stipulate, *inter alia*, that disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision (Guideline 22).

We are also concerned about the situation of lawyers and the independence of the legal profession, especially in light of the number of lawyers reportedly under criminal investigation and the number of restrictions on the rights to a due process and a defence that were introduced by decree laws under the state of emergency.

We wish to highlight that in accordance with the United Nations Basic Principles on the Role of Lawyers, governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference (Principle 16). In addition, lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions (Principle 18).

Furthermore, as stipulated by the Human Rights Committee in its General Comment no. 32, "[T]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception" (CCPR/C/GC/32, para. 19). Further, the Committee clearly noted that "[D]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times" (CCPR/C/GC/32, para. 6). We are therefore extremely worried about these massive dismissals and the numerous on-going criminal procedures against judges, prosecutors and lawyers, during which fundamental principles of fair trial may have been limited.

Without expressing at this stage an opinion on the facts of these cases and on whether the arrest and detention of the judges, prosecutors and lawyers is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights.

Finally, we wish to express serious concern about the amendments to the Constitution adopted in February this year, in particular about the changes to the appointment of members of the High Council for Judges and Prosecutors allowing the President to play a much more important role. In this context, we wish to note that the new appointment system for the members of the Council does not seem to abide by international standards on the issue. For instance, the Human Rights Committee has noted that a situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal (CCPR/C/GC/32, para. 19). In its Recommendation CM/Rec(2010)12, the Committee of Ministers of the Council of Europe stated that "[N]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary" (para. 27).

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful to receive any additional information and any comment or observations you may have on the above-mentioned allegations. In particular, we would be interested in receiving information about the number of judges and prosecutors that have been suspended,

dismissed, arrested, detained, and under criminal investigation, as well as those who were re-instated. We also would like to know about measures your Excellency's Government may have taken to ensure the independence of judges, prosecutors and lawyers, both at the individual and the institutional level.

While awaiting a reply, we urge your Excellency's Government to take all necessary measures to protect the independence of the judiciary and the legal profession, to ensure that judges, prosecutors and lawyers are able to perform their professional functions without improper interference, pressures or threats, to respect the principle of separation of powers and to ensure fundamental due process and fair trial principles. We also wish to call on your Excellency's Government to release all judges, prosecutors and lawyers currently detained whose arrest and/or detention did not abide by fundamental international human rights norms and standards.

We would appreciate receiving a response within 60 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

We would like to inform your Excellency's Government that after having transmitted this letter to the Government, the Working Group on Arbitrary Detention may transmit the related cases through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such letters in no way prejudice any opinion the Working Group may render. The Government is required to respond separately to this letter and the regular procedure.

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

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Special Rapporteur on the independence of judges and lawyers

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Vice-Chair of the Working Group on Arbitrary Detention