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FACTSHEET ON TURKEY'S CRIMINAL PEACE JUDGESHIPS[i]

1. Republic of Turkey is the member of the United Nations and the Council of Europe, and party to the ICCPR, the ICECSR, and the ECHR.

2. **Article 9 ICCPR and Article 5 ECHR**
   - **Envisage** the right to liberty and security of person,
   - **Prohibit** arbitrary arrest or detention,
   - **Guarantee** due process of law and the right appeal against the decision of arrest or detention,
   - **Entitle** the victims of arbitrary or unlawful arrest or detention seeking compensation.

3. **Article 14 ICCPR and Article 6 ECHR**
   - **Envisage** the equal treatment before the courts and tribunals,
   - **Guarantee** a fair and public hearing by a competent, independent and impartial tribunal established by law.

4. Within the Turkish judicial system, Criminal Peace Judgeships (CPJ)
   - which were established with the Law no. 6545 adopted by the Turkish Parliament on 14 June 2014 and entered into force on 28 June 2014,
   - function under the authority of the Turkish Council of Judges and Prosecutors (HSK),
   - have been given the power to: order pre-trial detention; decide on the continuation of detention; accept or reject requests on release; decide on searches, seizures, appointments of trustees, and disclaimer trials; and examine objections lodged against the decisions given in these proceedings.

5. **Appeal Procedure within the Criminal Peace Judgeships (CPJ) system:**

Avenues to appeal decisions of judges of the peace exercising their criminal jurisdiction are very limited. Apart from the highly exceptional circumstances in which a case can be referred to the Constitutional Court, the only appeal is to another criminal judge of the peace of the same district. Effectively, therefore, there is a closed system of appeals within the criminal procedural jurisdiction presided over by judges of the peace, with minimal recourse to the wider courts system. This situation is particularly worrying given the allegations of lack of independence of judges of these courts. Formerly criminal peace courts were empowered to carry out most of the duties now fulfilled by criminal peace judges. However, there were two main differences in the former system: they were responsible not only for pre-trial judicial measures, but were also dealing with petty offences; and their decisions could be appealed at an upper court, i.e. first-instance criminal courts (asliye ceza mahkemesi).

This appeal system had practical consequences for the independent review of the first judicial decision on detention or other pre-trial measures. For instance, in Ankara there were 40 criminal peace courts and 60 criminal courts. An arrest warrant produced by one of those 40 criminal peace courts could be appealed at one of those 60 criminal courts, randomly selected. The randomness of the choice of appeal body, as well as the high number of judges that could be entrusted with such an appeal, provided strong guarantees against possible influences by members of the executive or legislative powers. The closed-circuit system of appeal by criminal peace judges abolished this guarantee. For example, while in the old system around 100 judges in Ankara were involved in decisions on pretrial measures, now only 10 are empowered to decide on them. (International Commission of Jurists, The Turkish Criminal Peace Judgeships and International Law, p.11)

6. **The Venice Commission concluded that:**

... the Turkish system of "opposition" to a single peace judge of the same level does not offer sufficient guarantees that the appeal will be impartially examined. Criminal peace judges are colleagues of equivalent experience and qualifications, sharing premises and examining each other's appeals; they form a closed circuit. It is not unreasonable to imagine that they trust each other and to expect that they tend to respect each other's decisions. They are indeed likely to naturally defend the reputation of competence of their own colleagues, their won and of their institution as a whole. This system does not offer sufficient prospects of an impartial,

meaningful examination of the appeal against applications for review of the legality of detention.

.. the lack of an appeal to a superior court of general jurisdiction exacerbates the difficulties .. regarding the dangers of a specialist court; it also removes the common safety-net of an appeal to an independent superior court that is present in most European systems.

The system of horizontal appeals among a small number of peace judges within each region or courthouse is problematic, prevents the unification of case-law, establishes a closed system and cannot be justified with the need for specialisation. There are numerous instances where peace judges did not sufficiently reason decisions which have a drastic impact on human rights of individuals.

Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March, 2017, para. 71-72 and 106

7. **The Office of the UN High Commissioner for Human Rights** has found that "the jurisdiction and practice of the CPJs, established by Law 6545 in June 2014, gives rise to numerous concerns. These courts have been using the emergency decrees to issue detention orders, including decisions to detain journalists and human rights defenders, to impose media bans, to appoint trustees for the takeover of media companies, or to block internet." **The UN Special Rapporteur on freedom of opinion and expression, in his report on Turkey, found that** "the system of horizontal appeal falls short of international standards and deprives individuals of due process and fair trial guarantees." (OHCHR, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, March 2018, para. 52.)

8. **The Council of Europe's Commissioner for Human Rights concluded that**

"decisions of these judges (CPJs) being at the origin of the majority of the most obvious violations of the right to freedom of expression. ... One of the main reasons for this development seems to have been the fact that the system of criminal judges of the peace works as a closed circuit, since the decisions of one judge of the peace can only be appealed to another such judge. [This] seems to have allowed the criminal judges of the peace to ignore or resist the positive developments in the

case-law of Turkish courts, including the Constitutional Court, to better take account of Article 10 standards." (Council of Europe's Commissioner for Human Rights. Memorandum on freedom of expression and media freedom in Turkey, February 2017)

9. CPJs – within the context of Article 5 (right to liberty and security) and Article 6 (right to a fair trial) of the European Convention on Human Rights and Article 9 (right to liberty and security, and to fair arrest proceedings) and Article 14 (right to equality before the courts and tribunals) of the International Covenant on Political and Civil Rights to which Turkey is signatory – do not satisfy the sine qua non requirements of a 'judge' or a 'court', which are 'independent, impartial and previously establishment by law'.

10. The UN Human Rights Committee has affirmed, in its General Comment no. 35, that the right under article 9§3 ICCPR "is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control [and it] is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with." According to the Committee, the "court" specified in article 9§4 ICCPR "should ordinarily be a court within the judiciary" and must enjoy commensurate guarantees of judicial independence. (CCPR, General Comment no. 35, UN Doc. CCPR/C/GC/35, op. cit. para. 45, footnote 141, referring to General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), paras. 18-22.)

11. The UN Working Group on Arbitrary Detention's Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings are clear that only "[a] court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful." (Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.)

12. Specifically, in its Guidance, the Working Group stressed that
    - the "court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention",

- "[t]he competence, independence and impartiality of such a court cannot be undermined by procedures or rules pertaining to the selection and appointment of judges",
- If a specialized tribunal is exceptionally set up, this "must be established by law affording all guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature." (UN Working Group on Arbitrary Detention, Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings, UN Doc. WGAD/CRP.1/2015), Principle 6.)

13. The UN Human Rights Committee has also noted the relevance of criteria for independence and impartiality under article 14 ICCPR, to the specific judicial roles in articles 9§3 and 9§4. It has affirmed that the requirement of competence, independence and impartiality 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. It has stressed 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. It is necessary to protect judges against conflicts of interest and intimidation." (Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.)

14. **CPJ system was created for a specific aim targeting a certain social group:** CPJs which was defined as a 'Project' by the then Prime minister Erdogan, was created to purge and prosecute members of the Gulen Movement which was labelled as 'parallel structure' by the AKP Government:

- On 22 June 2014, upon a journalists' question on "whether an operation would be directed against parallel structure", the then Prime Minister Erdogan reacted as follows: "Steps taken by the executive body are being blocked by parallel judiciary. Some of our legislative acts are before Mr. President (Abdullah Gül). After his approval, rapid actions will be taken" In the same speech, specifically referring to the operations to be initiated against police officers, he said "We are

designing a project. We are preparing the basis of this job". (Platform Peace and Justice, Turkish Criminal Peace Judgeships, 2018, para. 18)

- On 16 July 2014 the First Chamber of High Council of Judges and Prosecutors appointed six criminal peace judges to İstanbul Courthouse. Then Prime Minister, in the province of Ordu, with reference to the operation to be carried out two days later against police officers, stated that "*Judicial process is about beginning. This process will be performed by criminal peace judgeships*". On the same day, he also pointed out that "*in the context of the fight against parallel structure, you know, appointments in regard to criminal peace judgeships was made. As of tomorrow they will take office. We will see what will happen in police and judiciary*". Thus, the purpose of establishment of criminal peace judgeships was clearly enunciated. (Platform Peace and Justice, Turkish Criminal Peace Judgeships, 2018, para. 20)
- On 21 July 2014, Criminal Peace Judgeships started to perform their duties. On this date, one judge named Hulusi Pur issued orders of detention and seizure against over 100 police officers who are involved a graft probe targeting Erdogan Government's three ministers and its close circle. (Platform Peace and Justice, Turkish Criminal Peace Judgeships, 2018, para. 21)
- Since then, CPJs have been performing as not a judicial body but an integral part of the Executive Branch targeting dissidents of the AKP Government.

15. Criminal Peace Judgeships are performing their duties under the authority of the Turkish Council of Judges and Prosecutors. Thus, the independence and impartiality of the courts of the first and second instance are directly related to the structure and practices of this Council of Judges and Prosecutors ('HSK'). The HSK is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors.

16. The Council of Judged and Prosecutors consists of thirteen regular members consists of
    - Justice Minister and Deputy Justice Minister,
    - Four members appointed by the President of the Republic from among the judges and prosecutors,
    - Seven members elected by Turkish Grand National Assembly from among the members of the Court of Cassation and the Council of State, and from among the university jurist lecturers and lawyers.

Hence, 6 of 13 members are appointed by the Executive Branch of the State (Government), and the remaining 7 members are elected by the Parliament which is quintessentially under the control of the Government.

So indeed, Hamit Kocabey who is lawyer to Devlet Bahceli, leader of Turkey's National Movement Party, partner of President Erdogan's Cumhur Alliance, was elected as the member of HSK. Muharrem Ozkaya, brother of Erdogan's lawyer and AKP Deputy from the province of Afyon was appointed as the member of HSK.

17. Venice Commission defined the legal environment shaping HSK and Turkish Judiciary as follows:

> [2017] amendments weaken, instead of strengthen the Turkish judiciary. The Council of Judges and Prosecutors … reformed by providing that six of the thirteen members are appointed by the President, who [is] no more be a pouvoir neutre, while seven members to be chosen by the Grand National Assembly, over which the President have influence and which, due to the synchronization of elections, would very probably represent the same political forces as the President. No member of the Council would be elected by peer judges anymore. On account of the Council's important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors, the President's control over the Council would extend to all the judiciary. Control over the Council of Judges and Prosecutors would also indirectly enhance the President's control over the Constitutional Court. The enhanced executive control over the judiciary and prosecutors which the constitutional amendments bring about would be even more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary. The [2017] amendments weaken an already inadequate system of judicial oversight of the executive. (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, the Venice Commission Venice, 10-11 March 2017), paras. 128-129

18. On 14 January 2015, the Constitutional Court rejected an application about the Criminal Peace Judgeships with respect to that they violate the principle of natural judge, do not satisfy the requirements of independence and impartiality, and their unconstitutionality (2014/164E – 2015/12K). Kemal Karanfil, a criminal peace judge in Eskişehir province who referred a case to the Constitutional Court on the

grounds that the criminal peace judgeships do not satisfy the requirements of an independent and impartial tribunal and violate the principle of natural judge, was appointed to Zonguldak province on 15 January 2015, only 6 months after his instatement in office.

19. Conclusion:

- The system of the criminal peace judges in Turkey does not meet international standards for independent and impartial review of detention.
- First, the body in charge of appointment and dismissal of the peace judges, the Council of Judges and Prosecutors, falls short of the international and regional standards pertaining to the independence of the judiciary, in particular in its structural dimension. This does not allow peace judges, who sit as single judges, to withstand influence or pressure from external powers.
- Second, reliable reports, including from international organisations suggest that, in practice, the method of selection of and decisions by peace judges show a situation of lack of institutional independence and leave room for pressures from political branches of the State.
- Finally, as identified by several international bodies, the closed appeal/opposition system in its structure and in its actual operation, does not mitigate this lack of independence but, rather, compounds it.
- These factors call into question the independence and capacity of judges of the peace to judicially review restrictions on the right to liberty under articles 5.3 and 5.4 ECHR and 9.3 and 9.4 ICCPR.

20. **Recommendations:**

- With regard to the judiciary as a whole, in order to ensure the institutional independence of the judges tasked with judicial review of detention, the constitutional provisions on the appointment of members of the Council of Judges and Prosecutors should be amended to ensure a majority presence on the Council of judges elected by their peers, and their sole presence in chambers dealing with appointment, career, transfer and dismissals of judges.
- Article 26 of Law no. 7145, which essentially extended the emergency powers over judges and prosecutors for a further three years, should be abolished.
- The Council of State should proceed promptly to acknowledge, and move expeditiously to process and decide, cases in which judges or prosecutors request review of their dismissal.
- All decisions of the Council of Judged and Prosecutors 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 Council of Judged and Prosecutors.

- 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.
- The competence of the criminal judgeships of peace on protective measures during the investigation phase ('protective measures') should be removed. Ordinary judges should be entrusted with the protective measures on personal liberties during the investigation and prosecutorial phases.
- The horizontal system of appeals between the peace judges should be replaced by a vertical system of appeals to either the criminal courts of first instance or possibly to the courts of appeal.
- For persons who have been detained on the basis of insufficiently reasoned decisions by peace judges prosecution should request their release as soon as possible, unless a trial court has taken over responsibility for their detention.

[i] **3 August 2019, Brussel**

Disclaimer: Extensive use of the following reports have been made in the preparation of this factsheet:
International Commission of Jurists, The Turkish Criminal Peace Judgeships and International Law <https://www.icj.org/wp-content/uploads/2019/02/Turkey-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf>
Platform Peace and Justice, Turkish Criminal Peace Judgeships
< http://www.platformpj.org/wp-content/uploads/CPJreport.pdf>