

Vito Monetti, Public Prosecutor General, Genova (Italy)

Christoph Strecker, former judge, Stuttgart (Germany)

Report on a visit in Turkey

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1. Introduction

On behalf of the European association “Judges and Prosecutors for Democracy and Human Rights” (MEDEL) and invited by our Turkish colleagues organized in the association YARSAV we have spent a week (from June 3rd to June 9th) in Ankara and Istanbul. Our mission was to study the situation of Judiciary in Turkey.

We talked to judges and prosecutors, the presidents of Constitutional Court and Supreme Court, members of the High Council of Judges and Prosecutors, to the Minister of Justice, to lawyers including heads of some Bar Associations and to journalists, finally to the representatives of European Union and European Council in Turkey. We got further information in the form of documents and newspaper articles translated in English.

Judges and prosecutors, lawyers and journalists complained about the lack of separation of powers, emphasizing that Executive, legislation and justice were in one hand. Judges and prosecutors complained about interference of political power and government in pending cases, lawyers complained about obstruction of defence, lawyers and journalists complained about many cases of long-term detention.

We are aware that sometimes the presentation of facts and their interpretation differed between the persons with whom we spoke. We cannot judge definitely about the truth. But often the accounts were so spontaneous and authentic that we cannot have reasonable doubts in their reliability. We do not report whatever we have heard. We limit our report on information that seems credible to us.

2. Elements of Turkish Judiciary

In Turkey there are about 12.000 judges and public prosecutors.

2.1 Courts

2.1.1 Ordinary Courts

There are 701 courts in Turkey. Some of them in small towns will be closed.

2.1.2 High Criminal Courts with special authority

For criminal cases with extraordinary importance as terrorism, drug trafficking and arms trade, there are 16 special courts all over the country, 6 of them in Istanbul.

2.1.3 Courts of Appeals

In 2005 parliament has voted a bill on the introduction of Courts of Appeals. Actually, the four courts are being planned. They will begin to work in Sept. 2013.

2.1.4 Council of State

The Council of State is the Court of Appeals for administrative litigation.

2.1.5 Supreme Court

The Supreme Court is a cassation court. Until now, it is the only court of second instance.

2.1.6 Constitutional Court

The Constitutional Court has jurisdiction for constitutional disputes. There is no individual complaint of unconstitutionality.

2.2 Principle of Rotation

The Turkish judiciary is organized in five regions and categories of towns. All judges and prosecutors are obliged to serve a part of their professional career in each of them. Such a system can grant equal provision of justice over all the country and be considered as a useful tool.

Nr. 5 is the lowest category. Here the judges and prosecutors have to spend 2 years. In the category nr. 4 they have to spend 2 years again, and 3 years in nr. 3. After having passed 5 years in nr. 4, in all 12 years, they can be promoted to first degree.

Judges, prosecutors, lawyers and journalists have told us that the principle of rotation is seen as a threat because they have the feeling that often it is applied arbitrarily. This is felt as a pressure, especially as the transfers can be abused as a punishment and for the manipulation of pending cases.

In addition to that, except the decision of dismissal there is no legal remedy against the decisions of the High Council of Judges and Prosecutors.

The members of the High Council of Judges and Prosecutors with whom we spoke explained us that the elaborate system of written criteria does not admit arbitrary decisions.

When we told that to judges, prosecutors, lawyers and journalists, nobody believed it. We have been told that the decisions are not foreseeable and that there is no transparency.

Meanwhile, we have got English translations of

- "Regulations on Appointment and Transfer of Judges and Public Prosecutors" by Ministry of Justice, published in the Official Gazette form 19.02.1988,
- "Principles to be applied in summer 2012 Decree of Civil and Criminal Jurisdiction",
- "Principles to be applied in summer 2012 Decree of Administrative Jurisdiction",
- "Decision of the Plenary Session of High Council of Judges and Prosecutors" from 13.09.2011 concerning Dr. Rusen Gültekin.

Our first impression is that considering the amount of criteria, rules and exceptions it seems possible to motivate any desired result. Such a statement, however, would be more reliable after having discussed with members of High Council their practical experience.

Anyway, even although we cannot clear up the details, undoubtedly an essential part of the reality that we observed is the general idea and fear that transfers are used and abused as reactions on decisions and behavior of judges and prosecutors in their institutional work. This conclusion is – in some extent – strengthened by the remark already formulated: the fact that no remedy is provided for against the transfer's measure.

Such a fear is a threat to the individual and institutional independence of judges and prosecutors and for the rule of law as well.

2.3 High Council of Judges and Prosecutors

The HCJP has 22 members and is composed as follows:

Regular	substitute		
1		Minister of Justice	
1		Undersecretary of Minister	
4		Academicians and Lawyers	Appointed by President of the Republic
3	3	Members of Supreme Court	Elected by plenary assembly of S.C.
2	2	Members of Council of State	Elected by Council of State
1	1	Justice Academy	Plenary of Justice Academy
7	4	First category judges and prosecutors	Selected by judges and prosecutors
3	2	Administrative judges + public prosecutors	Selected by judges + public prosecutors
22	12		

The decisions are taken in three chambers:

First Chamber:

Appointments and transfer; temporary authorizations; distribution of cadres (et cetera)

Second Chamber:

Promotion and classification as first class; disciplinary matters; transfer to another locality due to disciplinary or criminal investigations (et cetera)

Third Chamber:

Admission of candidates judges and prosecutors in profession; inspections (et cetera).

For the inspections there is an inspection board that has to observe if judges and prosecutors perform their duties correctly (et cetera).

As mentioned above already, there are no legal remedies against the decisions of HCJP, except the decision of dismissal.

Although formally the High Council is an independent institution with a majority of judges and prosecutors, it is presided by the Minister of Justice and his undersecretary. In the public perception it is mainly seen as a branch of the executive power. A recent example has been reported to us in the time between our visit and the redaction of this report: By decision of June 16th the HCJP closed 146 courthouses located in small towns and transferred the respective judges to other courts in bigger towns. One week later, on June 22nd the decision was modified, and 46 of the closed courthouses were reinstalled on order of the Prime Minister and demand of the Minister of Justice, president of the council.

2.4 Tribunals established by Law?

Pursuant to Article 6 of the European Convention on Human rights, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

When a government or a council has the power to establish or to close courts and to remove or to transfer judges without absolutely binding legal criteria, this is an usurpation of an original right of parliament and a negation of everyone’s right to a tribunal established by law.

3. Interference of political power in judicial proceedings

When inquiries of prosecutors or trials in court are becoming dangerous for spheres of political power, their reaction can be removal of the prosecutor or judge from the case, from the office or from the city; disciplinary or criminal measures against judges or prosecutors; and an amendment of law. These reactions can be combined as the following examples may show:

3.1 Lighthouse (Deniz Feneri)

From April 2007 to September 2008 there was a case before the Criminal Court in Frankfurt (Germany) against board members of the Turkish charity organization named “Deniz Feneri” (Lighthouse e.V.).

It was founded in 1999 and collected money mostly from Turkish people living in Germany.

Instead of being spent for humanitarian causes, at least 17 million Euros of charity donations were transferred between 2002 and 2007 to companies in Turkey. Allegedly they funded Kanal 7 TV channel and a business group whose owners are close to the ruling AK Party.

Three officials, Mehmet Gürhan, Firdevsi Ermis and Mehment Tashan were found guilty of fraud by the court in Frankfurt (Germany), and sentenced to prison on September 17, 2008.

Against two more, Zekeriya Karaman and Zahid Akman, the case is still pending. The trial cannot take place because they are in Turkey.

One copy of this case was sent to Turkey. Ankara Chief Public Prosecutor commissioned this case to the public prosecutor Nadi Türkaslan.

Public Prosecutor Nadi Turkaslan was accompanied by two of his colleagues Abdulvahap Yaren and Mehmet Tamöz.

In November 2008, the prosecutors began to make investigations to find out if some politicians close to the ruling AK Party were involved in the affair. Later on, they interviewed some witnesses and put suspects Zekeriya Karaman and Zahid Akman behind bars.

During the pre-trial phase, a warrant was issued for the seizure of some assets. Since it dealt with real estate, the enforcement of the seizure implied that a note of the seizure had to be put down in the public register of real estate. In order to avoid the unnecessary dissemination of restricted news the prosecutors had eliminated in the copy notified to the office a part of the motivation of the sequestration warrant that was to be communicated only to persons involved in the trial. In the centre of the copied typescript appears a blank patch which makes it evident that a part of the text is hidden.

Such procedure is usual and reasonable. It respects as far as possible the private data of the persons implied in the case and the secret of inquiry. In this case, however, the respect for the confidentiality of inquiries has been turned against the prosecutors.

Nadi Türkaslan is charged of forgery of official documents and abuse of office, Abdulvahap Yaren and Mehmet Tamöz, for abuse of office. It has also been demanded that all three be banned from practicing their profession.

Karaman and Akman have been released from prison and prosecutors were changed. Contrary to former prosecutors' opinion, new prosecutors concluded that there is no need for legal action regarding claims that the suspects were involved in organized crime.

German prosecutors applied to Turkey to take part in the investigation that relates to Turkey leg of Lighthouse case, but Justice Ministry refused this request.

3.2 Match-fixing

In April 2011, Parliament voted an amendment to criminal law concerning match-fixing. The elements of the offence were specified and the punishment was increased.

When Public Prosecutors inquired in such a case, they bumped into players and managers of various football clubs, among them Fenerbahçe. Among the arrested persons was the Vice President of Turkish Football League, Göksal Gümüşdag, a son-in-law of the Prime Minister's family. Despite the demand of the Prime Minister, the accused was not released.

The Prime Minister proposed in Parliament an amendment to law which reduced the statutory period of limitation with the consequence that the accused would have to be released. The bill was

approved in Parliament, but President of Republic refused to sign it. After a second vote in Parliament, however, he had to sign. The accused has been released.

3.3 MIT / KCK

Members of Turkish Intelligence Service MIT have been suspect of being involved in criminal activities. Allegedly they had contacts to Kurdish PKK and covered some of its murders.

Prime Minister Erdogan reportedly said that the leader of MIT is his confidant and that attacks against him were to be seen as attacks against the Prime Minister himself. The Public Prosecutor leading the inquiries was removed from this investigation, also the leader of the anti-terrorism-unit of police and 700 police officers inquiring for the Public Prosecutor were transferred from Istanbul to other places. After the transfer of the leading prosecutor, his office continued the inquiries. When on its demand the High Criminal Court was about to hear defendants, the Prime Minister prohibited that. Within a few days the Parliament voted a modification of the law: Now high officials of MIT cannot be heard and investigated by Courts or Prosecutors without previous permission of the Prime Minister.

3.4 Various removals

We have been reported that in many cases when a judge did not admit an indictment, the prosecutor demanded his removal by the High Council of Judges and Prosecutors, and often the judge was removed from his post and replaced by another one.

3.5 Excessive reactions as a threat to judicial independence and rule of law

In their professional work judges and prosecutors often have the choice between two or even more different interpretations of the law and consequently between different decisions. Errors cannot be avoided generally. It is a fundamental principle of judicial systems to provide within themselves for remedies. Before a decision is taken, there can be communication and information. After the decision has been taken, there is the right to appeals.

As we have been told, in the Turkish Judiciary every alleged error can imply the risk of harsh reactions as transfer, degradation and even criminal charge. We have heard of at least four prosecutors who have been submitted to disciplinary or criminal proceedings, one of them even put in detention, for their professional activity.

Hence all judges and prosecutors live in the uncertainty that they might be accused for a decision they have taken in the past or that they are going to take in a pending case.

Such interventions and the fear that they provoke are an existential menace for the judges, a danger for the conduction of their cases and an objective threat to the justice itself and to the rule of law. The principle of Fair Trial as enshrined in article 6 of the European Convention on Human Rights grants "an independent and impartial tribunal".

4. Obstruction of defence

4.1 Diyarbakir

Almost all members of Diyarbakir Bar Association are under investigation for their statements they made in court trials as defence counsel.

4.2 Bayoz / Sledgehammer (Ergenekon)

At the special court of Istanbul a trial is pending against about 300 officers of the army, accused of attempted coup d'état. The trial takes place in a special building in the prison at Silivri.

Lawyers complain that motions of the defence counsels to take evidence were rejected systematically, and finally the lawyers did not even get an opportunity to present them. When some of the 70 defence counsels insisted in their right to speak, after 16 hearings they were banned by the president of the court for the time until the end of trial. They put off their robes, and all their colleagues followed them in solidarity.

The president of Istanbul Bar Association made a speech in which he demanded from the court to grant a fair trial for the defendants, not to obstruct defence and to respect the dignity of lawyers.

Now, there are criminal inquiries against the lawyers under the allegation to have obstructed the trial. The punishment can be from 6 months to 3 years.

As the trial cannot go on without defence counsels, the president of the court demanded from the president of the Bar Association the nomination of other defence counsels. He refused to do so, because the lawyers still have the confidence of the defendants, their clients. When the Bar Association informed the court about this, the court brought a charge also against the president of Bar Association for professional misconduct.

In the meantime Government presented in parliament a draft of a bill that will permit the court to continue the trial also without defence counsel.

5. Judicial Associations

In all European countries there are judges' and prosecutor' associations, often not only one of them, but several groups with different political approaches.

5.1 YARSAV

In February 2005 a group of 501 Turkish judges and prosecutors founded the professional association YARSAV. Soon it had more than 1.700 members among the (at that time) 11.000 judges and prosecutors.

The Ministry of Justice informed the Home Office that this association allegedly was illegal. Both ministries announced that an autonomous association of judges and prosecutors would be a contradiction to their impartiality. The ministry filed a suit against YARSAV at the Council of State which however ruled that the association was legal.

In the meantime the Ministry of Justice has brought a draft of a bill into parliament on a uniform association with compulsory membership of all judges and dissolution of YARSAV.

Actually, YARSAV is still existing and active, but in an uncertain situation. However, the Minister of Justice told us that there will be new regulations and that YARSAV will not be closed.

YARSAV is member of the International Association of Judges (IAJ), the European Association of Judges (EAJ) and the Magistrats Européens pour la Démocratie et les Libertés (MEDEL). YARSAV is also represented regularly on the meetings of Administration Board of MEDEL

5.2 YARGI SEN

In view of the uncertain situation, judges and prosecutors founded in January 2011 a trade union named YARGI-SEN. Omer Faruk Emingaoglu, one of the founders, was elected as President

With the view of obtaining legal personality, on 31 January 2011, the union submitted a petition for registration, together with the relevant documents, to the Governorship of Ankara. In reply, the Governorship of Ankara sent a letter to the founders of the trade union requesting the union to amend its constitution so as to bring it into conformity with the legislation in force within a one-month period. The letter indicated that should the union fail to do so, a procedure for its dissolution would be initiated.

On 28 July 2011, the Ankara Labour Court ruled for the dissolution of YARGI-SEN as judges and public prosecutors cannot establish trade unions.

On 18–19 June 2011, during its first ordinary congress, its three founding members Ömer Faruk, Dr Rusen Gültekin and Ahmet Tasurt were elected to the union's Executive Committee. On the same dates, these three trade unionists were transferred from their first class posts at the Supreme Court to positions in other provinces by the High Council of Judges and prosecutors. Ömer Faruk was transferred to Istanbul, Rusen Gültekin to Gaziantep and Ahmet Tasyurt to Sanliurfa.

On 21.02.2012 Superior Court has ruled that YARGISEN is illegal. The reasons for the decision have not yet been published.

Dr Rusen Gültekin and Ahmet Tasyurt were also members of the Association of Judges and Public Prosecutors (YARSAV) and played an important role in the affiliation of YASRAV to the International Association of Judges (IAJ), European Association of Judges (EAJ) and the Magistrats Europeens pour la Démocratie et les Libertés (MEDEL). YARGI-SEN believes that its intention to affiliate with the international trade union organizations (Public Services International (PSI) and the European Federation of Public Service Unions (EPSU) has also been the reason for the transfer of the trade union leaders.

We had the opportunity to speak with the chairman of the first chamber of the High Council of Judges and Prosecutors. He emphasized that these decisions were no arbitrary acts. The three members of YARSAV had been prosecutors in Ankara, and the head of their office had said he did not want any longer to work with them and 13 other prosecutors. This wish were binding for the HCJP.

The three prosecutors filed a complaint to the International Labour Union (ILO), considering that Dr Rusen Gültekin, Omer Faruk and Ahmet Tasurt are victims of anti-union discrimination.

In its recommendations the committee of ILO decided:

(a) + (d) [Turkey should harmonize its legislation on trade unions with international norms]

(b) "The Committee urges the Government to take the necessary measures to immediately register YARGI-SEN as a trade union organization of judges and prosecutors so as to ensure that it can function, exercise its activities and enjoy the rights afforded by the Convention to further and defend the interests of these categories of public servants. The Committee requests the Government to keep it informed of the developments in this respect."

(c) "The Committee urges the Government to provide its observations on the alleged acts of anti-union discrimination suffered by trade union leaders Dr Rusen Gultekin, Omer Faruk and Ahmet Tasurt."

5.3 Remarks

Associations are the space for discussion and forming of an opinion. Likewise, they are the social environment in which solidarity can grow. Without the solidarity in a group, individuals are isolated subjects that can be manipulated and commanded. Judges and prosecutors need associations for the common reflection of their role, for the assertion of human rights and the rule of law and for the defense of their independence against executive and political power.

We have learned that the association YARSAV and the trade union YARGI SEN are meeting many formal obstacles.

MEDEL has underlined several times that the European Convention on Human Rights guarantees in Art. 11 the freedom of association. Restrictions are permitted only for the executive. This does not apply to judges and prosecutors.

Harassments of judges' and prosecutors' associations are an attack on the independence of judiciary.

6. Concluding remark

We have come to Turkey with the intent to limit our statements scrupulously on what we can observe ourselves and to check the truthfulness of the information that we get.

We cannot and don't pretend to have reached full knowledge of Turkish judicial system. But beyond any doubt, an integral part of the reality that we observed is the general idea and fear that removals and transfers as well as disciplinary and criminal prosecution are used and abused as reactions on decisions and behavior of judges and prosecutors in their institutional work. Such a fear is a threat to the individual and institutional independence of judges and prosecutors.

It is evident that jurisdiction is often and in many ways manipulated by the executive power. It is evident likewise that sometimes defense is severely affected.

Justice has in principle three functions: The first one is conflict management, the second one is maintenance of order, the third one is limitation of political power. Apparently judiciary in Turkey is subordinated to political power and not allowed to accomplish this essential function of control and limitation.

Now we are amazed about the clearness of our first impression which does not admit any doubt that very much has to be done for the rule of law and for the independence of judiciary in Turkey, for which autonomous associations of judges and prosecutors are absolutely essential.

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V.M.

C.S.