Assessment on Changes regarding the Specially Empowered Judicial System in Turkey

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Preface

A number of amendments for criminal law have been instituted in Turkey in recent years within the framework of the judicial reform process that especially were geared towards the realization of the fair trial principle. Between 2011 and 2013, four groups of legal amendments named "Judicial Reform Packages" were passed. These brought about important improvements regarding fair trial, freedom of speech, personal liberty and security. The TESEV Democratization Program published a report evaluating the effect of these four judicial reform packages on rights and freedoms in September 2013. The present report provides an evaluation of the recent amendment package instituted in March 2014 that included important changes vis-a-vis the specially empowered judicial system.

INTRODUCTION

The recent round of legal amendments does not only abolish Specially Empowered Courts which are regarded to be the most important obstacle to the full implementation of the right to fair trial, but also decreases the maximum custody period of 10 years to 5 years as a response to the long custody periods problem. Furthermore, the new judicial package limits the utilization of protection measures that violate the right to privacy and the right to property. It could be said that the aim of these changes is to put an end to the imbalance of authority and power some judges and prosecutors enjoy within the same judicial system and to eliminate the grievances and damnification this imbalance has caused.

What endows some judges and prosecutors with special authority and powers, is the fact that they have the right to apply different investigation and prosecution procedures. Judges and prosecutors who are granted special authority and power are expected, of course, to stay within the established legal boundaries. However, when we look at the history of Turkey, starting with the Independence Tribunals (*İstiklal Mahkemeleri*) and continuing with the State Security Courts (*Devlet Güvenlik Mahkemeleri*), it becomes obvious that the adherence of these "special" judicial bodies to rights and freedoms, and to universal, democratic legal principles has always been weak. Ill-intentioned individuals or groups can easily use the authority concentrated in the hands

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of the special judges and prosecutors for the furthering of their own political aims, and also, at times, as a means of blackmailing. Therefore, no matter who is controlling such courts or who is appointed to them, they invariably run the risk of being politicized.

With the recent round of legal changes, the specially empowered court system which was established in 2004, and which has been dealing with important political cases such as KCK (Kurdistan Communities Union) and Ergenekon is being abolished. Law No. 6526, which entered into force upon being published in the Official Gazette on March 6, 2014, has brought about significant changes in the Anti-Terror Law, the Law on Criminal Procedures and the Turkish Criminal Code. [1]

This new law foresees the following changes:

- Specially Empowered Courts have been fully abolished.
- The limitation on the right of attorneys to view case files that are being investigated (with the justification that the investigation might be put at risk) has been lifted.
- The maximum pre-trial detention period will not surpass 5 years.
- Detention and custody decisions must be based on "concrete evidence."
- A detainee is guaranteed to be brought before the court within 24 hours of being detained.
- Decisions on search and protection measures must be based on "concrete evidence."
- Measures such as technical surveillance, interception of communication, seizure of real estate, rights and assets and secret investigations have been limited in scope and duration.
- Penalties with regard to illegal recording of personal data have been increased.

ASSESSMENT

Abolition of Specially Empowered Courts

State Security Courts which entered the Turkish judiciary with the March 12, 1971 "coup by memorandum" had been operational as Specially Empowered Courts since 2004. This system of special judiciary has been abolished with the recent legal changes.

As a continuation of State Security Courts, Specially Empowered Courts, which were established under Article 250 of the Law on Criminal Procedures, were first abolished with the 3rd Judicial Package that was put into force in 2012, but these courts then became subject of Article 10 of the Anti-Terror Law. This change led to the establishment of "Regional Heavy Penal Courts Courts" in place of "Speacially Empowered Heavy Penal Courts". With Provisional Article 2 added to the Code on Criminal Procedures in 2012, it became legally established that the ongoing cases that are being heard in Specially Empowered Courts should be finalized by the same courts. This legal provision was criticized for contradicting the "principle of immediacy." Furthermore, this provisional article led to the emergence of three different Courts of Serious Crimes.

With the recent legal changes, both Article 10 of the Anti-Terror Law and Provisional Article 2 of the Law on Criminal Procedures have been quashed, thereby abolishing the special courts that had been granted

1 **Law no. 6526 on Amending Provisions of the Anti-terrorism Act, the Code of Criminal Procedures and Other Laws, Official Gazette: 06.03.2014**

authority by these articles as well. The cases that are being heard by the courts established under these legal provisions shall be transferred to responsible courts who will take on their jurisdictional duties.

Specially Empowered Courts are legal bodies which issue verdicts within the framework of the political conjuncture present at the time of their establishment and operation. For instance, in the 1990s, during the civil war and in a state of emergency, these courts issued verdicts which prioritized the security of the state over individuals and justice. However, today the political conjuncture has changed considerably. Turkey is currently a candidate country for the European Union, and has initiated a peace process with the Kurds. Therefore, the previously issued verdicts have lost their legitimacy and should be readdressed.

These special courts, different from general judiciary, had the authority to carry out special investigation procedures which led to a double standard in criminal law proceedings, and thereby an open violation of the fair trial principle. Additionally, due to the past legal practices in cases such as the Kurdistan Communities Union (KCK), Zirve Publishing House Massacre and Ergenekon trials, these courts came to be seen by the public as legal bodies utilizing the law as a political instrument rather than a means to ensuring justice for all.

The fact that these courts are problematic in terms of the adherence to the fair trial principle clearly crystalizes in some of their decisions. [2] This, in turn, brings up the question of how the hundreds of verdicts issued by the State Security Courts during the coup years and the state of emergency in the 1990s, and by Specially Empowered Courts since 2004 will be remedied for those who suffered an unjust treatment by these courts and who are still wrongfully imprisoned.

A few suggestions regarding how to address this issue are as follows:

- The options of compensation, amnesty or retrial should be considered as possible reconciliatory measures in order to make up for the breach of rights of the accused in those cases where a final verdict has been issued by the date of enactment of the new law.
- The scope of retrial provisions in the current Law on Criminal Procedures could be broadened so as to allow for retrial upon application/request.
- Ongoing cases which previously were being heard by the abolished Specially Empowered Courts have been transferred to general courts to be resumed. This shows that the cases will maintain their continuity with the previous legal practices and therefore, that the final verdict will stem from a flawed legal basis. Retrial options, especially for those in custody or those who have been convicted based on illegally obtained evidence, should be considered.
- It is a very positive development that Specially Empowered Courts, which have been openly violating the fair trial and natural judge principles, are abolished. However, the abolition of these courts does not guarantee that general courts will not engage in similar unlawful juridical acts. ***In order for the judicial system in Turkey to ensure justice for anyone regardless of their crime, the judiciary needs to attain a pluralistic character; it should be open to outside moni-***

2 **In the general justifications of the law, the following is stated: "This proposal eliminates the practice of courts and prosecution offices having special functions, and the application of special procedures for both investigation and prosecution as a matter that has sparked many debates on fair trial, thereby ensuring that all criminal courts of serious crimes will be subject to the same rules and procedures."**

toring, answering and prioritizing the needs of the society. As long as the judiciary is not reformed in this fashion, the risk that general courts also turn into institutions issuing political verdicts will remain.

Changes to Long Custody Periods and Other Related Issues

Long custody periods have constituted a major problem with regard to personal liberty and security in Turkey for many years. In the current system, long periods of custody, rather than being preventive measures, turn into a preliminary punishment mechanism. The main reason behind long custody periods is that the judicial proceedings in Turkey take too long.

Before the present legal change, a maximum custody period of 5 years for crimes that were within the jurisdiction of general courts, and a maximum custody period of 10 years (legal wording: "twice as long as the normal custody period") for crimes related to terrorism and crimes against the state were in effect. These custody periods established themselves in the legal practice. The Constitutional Court revoked this law after an action for nullity was lodged before the Court in August 2013 with the justification that the law is not in conformity with the Constitution. The decision of the Constitutional Court was going to take effect on August 2, 2014, exactly one year after it had been issued, in case the Turkish Parliament had not passed any legislation amending the then existing legislation. The verdict issued by the Constitutional Court was passed into law with the new judicial package. With this legal change, the maximum period of custody for "terrorism and crimes against the state" has been set at 5 years.

While it was sufficient to have certain indications about a certain criminal act to issue a custody verdict before, with a further legal change, the criterion of "concrete evidence" for such decisions has been introduced. The criterion set by the European Court of Human Rights (ECHR) on this matter is referred to as "probable cause." In this respect, the recent legal change seems to be a step forward towards ECHR criteria; however, "concrete evidence" is not defined in the law, which raises concerns on ambiguities that could arise with regard to its practical implementation. The Ministry of Justice should therefore closely follow the implementation of these newly passed legal changes and should adequately train judges and prosecutors.

After the legal changes went into force, the accused of the Ergenekon, Hrant Dink Murder and Zirve Publishing House Massacre cases were released, while the release requests of the 92 accused persons[3] within the KCK main case were revoked with completely unlawful justifications such as "if we let them out, they will go fighting in the mountains."[4] Courts of Serious Crimes have interpreted the same law differently for different cases. On the one hand, the law was interpreted by Istanbul courts in favor of expanding freedoms for the already sentenced individuals within the Ergenekon case. On the other hand, the opposite interpretation was applied to the accused (not yet sentenced) individuals of the KCK case by the 2nd Court of Serious Crimes in Diyarbakır. The responsible courts also decided to release the accused in the Hrant Dink Murder (14th Court of Serious Crimes in İstanbul) and the Zirve Publishing House Massacre cases (1st Court of Serious Crimes in Malatya) *ex officio* without any formal request.

3 **The release requests of some of the persons in custody within the KCK main case were accepted afterwards.**

4 **Sabah, "KCK'da tahliye talepleri reddedildi", [The release requests were revoked in the KCK case] (17 March 2014), http://www.sabah.com.tr/Gundem/2014/03/17/kckda-tahliye-talepleri-reddedildi.**

As can be seen in these examples, even if there exists legal assurance on paper, the legal practice in Turkey has established itself in following political and ideological aims, rather than ensuring justice for all. Although the legal change with regard to long custody periods is very positive, there is no guarantee that it will produce just and fair results. ***Legal assurances given on paper are no guarantee for fair legal practices.*** Furthermore, these decisions have strengthened the perception that there exists no legal guarantee in terms of equal application of the same rules to everyone.

The recent legal changes are positive in terms of the realization of the principle of fair trial and in that they define custody as a measure where judicial proceedings without custody should be the rule and not the exception. However, in Turkey, one of the main reasons for long custody periods is the long trial periods. The Zirve Publishing House Massacre case, the Hrant Dink Murder case as well as the Ergenekon case, all very significant for the realization of societal peace and confronting the past in Turkey, were about to be finalized with the prosecutors' final opinions delivered. With the enforcement of the new law, the accused of these cases were released, since their custody periods had passed the maximum of 5 years. The release of these individuals has had a disturbing and disruptive influence on the public conscience. In this regard, the limitation of the custody period to 5 years is a positive development, however, the fact that these cases have been continuing for more than 5 years is another dimension of the problem which needs to be assessed in its own right. Judicial proceedings in Turkey take too long. This is even more so in cases heard by the Specially Empowered Courts. One of these courts, for instance, was not able to finalize its decision in the Zirve Publishing House Massacre case, even though the accused had been caught during the act. The reason for this was that the prosecutor decided to merge this case with the Ergenekon case which by itself already had hundreds of accused and in which the indictment was more than 1 million pages long. ***The swift finalization of these cases in adherence to the fair trial principle is crucial for reinstating the trust of the victims and their relatives towards the judicial system. This is also crucial for adherence to and realization of the rights of accused.***

Legal Changes regarding Search, Technical Surveillance, Interception of Communication, Seizure of Real Estate and Rights, Secret Investigation Measures

Resorting to unlawful measures such as interception of communication, technical surveillance within the specially empowered judicial system leads to unjust treatments and grievances on part of the individuals. According to the data revealed by the Telecommunications and Communications Directorate (TIB) in March 2014, 509.506 individuals have been subject to technical surveillance in the past 3 years.[5] These figures show that practices which should normally be the exception have become the rule. The fact that many politicians, activists, journalists and high-ranking government officials have been subject to these unlawful measures has also raised concerns with regard to respect for privacy in personal and familial life.

5 **Radikal Newspaper, "509 bin Kişi Dinlenmiş" [509.000 Communication Interceptions] (08.03.2014), http://www.radikal.com.tr/turkiye/509_bin_kisi_dinlenmis-1180137**

The situation with regard to communication interception and technical surveillance before the recent legal changes was as follows:

The Code on Criminal Procedures includes provisions on interception of communication and technical surveillance. Accordingly, these measures can only be resorted to if the following conditions are present: – A criminal investigation involving the person to be subject to technical surveillance is initiated. – The alleged act constitutes a crime provided specified by the law. – Serious suspicion regarding the involvement of a person in an act constituting a crime is present. – It is not possible to collect any other evidence concerning the alleged criminal act. – Persons who have the right to refuse testimony are not involved. – The surveillance is not conducted in the private home or business office of the attorney. The Code on Criminal Procedures also includes provisions on the duration and procedure of technical surveillance stating that evidence acquired in accordance with the law can be used as proof of the alleged criminal act.

However, in practice, it has been observed that nearly all authorization requests for technical surveillance made by prosecutors to the courts are granted without thorough justification and inspection of whether the above-stated legal conditions are met.[6]

In addition, although it is openly stated in the law that technical surveillance can only be resorted to if it was not possible to obtain evidence through other means, in practice, it can be observed that a search on the suspects' belongings, home, office, and vehicle for obtaining evidence is usually done after technical surveillance.[7]

The criminal acts for which technical surveillance is allowed are openly listed in the Law on Criminal Procedures (catalog crimes). However, it becomes clear that, in many other cases, the allegations are made by referring to Article 220 of the Turkish Penal Code ("Establishing organizations for the purpose of criminal activity") in order to ensure that courts allow for technical surveillance for crimes that normally do not fall under the category as stated in the law. In cases where the number of suspects is more than two, law-enforcement officials file requests for technical surveillance to the courts with the claim that an established criminal organization is involved. Prosecutors and courts easily grant these authorization requests.

The following legal amendments were passed regarding the abovementioned issues:

- Search, interception of communication, technical surveillance and seizure of real estate, rights and assets can only be utilized as a means of collecting evidence, if the criminal suspicion is "based on concrete evidence."
- The competent authority to make such decisions in the investigation and prosecution phases shall be the responsible Court of Serious Crimes. Decisions on authorization will be taken unanimously by the judges.
- "Establishing organizations for the purpose of criminal activity" has been removed from the list of catalog crimes for which the utilization of these measures shall be allowed.
- The maximum duration within which the measure can be applied has been decreased. Furthermore, the unlimited measure duration for organized crimes has been limited.

6 **Osman Doğru, "Mills that Grind Defendants," TESEV Publications, 2012.**

7 **Osman Doğru, "Mills that Grind Defendants," TESEV Publications, 2012.**

- The penalties for unlawful recording, delivery or attainment of personal data, and not abiding by the time limits set for termination of personal data have been increased.

The changes in these measures were aimed at the protection of personal privacy and the prevention of the collection of personal information (which may or may not be related to the alleged criminal offence) for reasons that are not related to the ensuring of a healthier investigation and prosecution process, but to be used against the suspect. The acceptance of Courts of Serious Crimes as the sole responsible authority in these processes is also a sign of the mistrust towards judicial proceedings. Since legislative and executive bodies do not trust the judiciary due to problems caused by past legal practices, they limited the utilization of these measures, and made them subject to stricter controls.

The removal of the "establishing organizations for the purpose of criminal activity" crime from the list of catalog crimes for which the measure can be applied, was made in order to prevent the utilization of the measure by basing claims on non-existent, fictious criminal organizations. From now on, it will only be possible to apply these measures where armed criminal organizations and terrorist organizations are involved.

Although it is a positive development that these protection measures are subject to the authorization by the courts, it might be problematic in practice that the only responsible judicial authority having the right to grant these is the Courts of Serious Crimes. The reason for this is that the court that will decide on the protection measures could also be the court that will hear the case in the prosecution phase. The fact that the court that makes decisions with regard to protection measures in the investigation phase could handle the case in the prosecution phase is clearly in contradiction with the fair trial principle.

On the other hand, making it mandatory for courts to grant authorization "unanimously" was introduced in order to ensure that more pluralistic and fair decisions are taken.

GENERAL ASSESSMENT

The recent round of newly passed laws (March 2014) and related amendments to Turkish criminal law are positive. These changes have the potential of producing legal practices which, in turn, will eliminate the grievances suffered by different segments of society in the past.

Many legal advocacy groups have already been asking for these changes for a long time. The realization of these changes, however, was only possible with the December 17 Corruption Investigation process in which tensions between the different ideological groups within the Turkish judiciary and the government rose, and as a result of which the same unlawful practices were this time threatening state officials on different levels. Besides being a positive step forward, the recent legal changes have also laid bare the actual core problems within the judiciary in Turkey.

From its initial establishment on, the judiciary in Turkey has functioned as a means of disciplining society of which it has always been suspicious. The aim of the judiciary, therefore, was not to secure the rights of individuals and the community vis-à-vis the state, but to ensure that individuals would not become a threat to the state. As a result, although the nature of the perceived threat has changed over time, the essence of the judiciary has stayed the same.

It has been claimed that a group with a certain political and social agenda has, with a clear majority, established itself within the judiciary after the changes to the structure of the High Council of Judges and Prosecutors following the referendum in 2010.[8][1] Therefore, it is possible to understand the recent political developments as an attempt by the government to eliminate especially the high ranking officials within the judicial system belonging to this alleged group. It could be said that the recent developments are a result of this conflict between the alleged group and the government. It is possible that, within the established judicial practice, new disputes and perceptions of threat could emerge. This new threat perception might target a political movement (as was case in the Kurdish issue), or new disputes might emerge among executive, legislative and judicial bodies. However, what is going to stay the same is that this judicial structure will not set the establishment of justice for individuals and communities as a priority.

What is highly problematic in Turkey is how and with what aim the judiciary is organized. Legal amendments instituted without changing this judicial structure will only have a very limited impact in practice.

This structural change can only be realized if, through a new constitution, the judiciary attains a democratic, pluralistic character and turns into a mechanism that interacts with and operates for the public.

The TESEV Democratization Program will continue its work towards achieving a pluralistic judicial system, and unearthing the problematic relationship between the judiciary and society in Turkey.

8 For further information, see Ali Bayramoglu "The High Council of Judges and Prosecutors in Turkey:Roundtable Discussion on Its New Structure and Operations", TESEV Publications,2012 Link: http://www.tesev.org.tr/assets/publications/file/12475ENG_HSYK24_12_12.pdf

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