TESEV DEMOCRATIZATION PROGRAM
POLICY REPORT SERIES

JUDICIAL REFORM 5

JUDICIAL REFORM PACKAGES:
EVALUATING THEIR EFFECT ON RIGHTS AND FREEDOMS

NAİM KARAKAYA
HANDE ÖZHABEŞ

TESEV

Judicial Reform Packages: Evaluating Their Effect on Rights and Freedoms

Naim Karakaya
Hande Özhabeş

TESEV
PUBLICATIONS

Judicial Reform Packages:
Evaluating Their Effect on Rights and Freedoms

TESEV

Türkiye Ekonomik ve Sosyal Etüdler Vakfı
Turkish Economic and Social Studies Foundation

Demokratikleşme Programı
Democratization Program

Bankalar Cad. Minerva Han
No: 2 Kat: 3
Karaköy 34420, İstanbul
Tel: +90 212 292 89 03 PBX
Fax: +90 212 292 90 46
info@tesev.org.tr
www.tesev.org.tr

Authors:
Naim Karakaya
Hande Özhabeş

Prepared for Publication by:
Hande Özhabeş
Lokman Burak Çetinkaya
Betül Kondu

Edited by:
Özlem Dağ

Translation:
Alex Balistreri

Design: Myra
Publisher Identity Design: Rauf Kösemen
Implementation: Gülderen Rençber Erbaş
Coordinator: Buket Yalçın

Place of Publication: İmak Ofset Basım Yayın San. ve Tic. Ltd. Şti.
Atatürk Cad. Göl Sok. No : 1 Yenibosna
Bahçelievler/İSTANBUL-TÜRKİYE
Tel: 0212 656 49 97
Publication Run: 500

TESEV PUBLICATIONS

ISBN 978-605-5332-49-5

SWEDEN

The TESEV Democratization Program wishes to thank the Swedish International Development Cooperation Agency (SIDA) and the TESEV High Advisory Council for their support during the preparation of this publication.

Table of Contents

Abbreviations used

Art.	Article
CMK	*Ceza Muhakemesi Kanunu* / Law on Criminal Procedure
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HSYK	*Hakimler ve Savcılar Yüksek Kurulu* / High Council of Judges and Prosecutors
JRP	judicial reform package
KHK	*kanun hükmündeki kararname* / government order carrying the force of law
PKK	Kurdistan Workers' Party
TCK	*Türk Ceza Kanunu* / Turkish Penal Code
TMK	*Terörle Mücadele Kanunu* / Anti-Terror Law

TESEV Preface

Hande Özhabeş, *TESEV Democratization Program*

One of the most critical areas for reform in Turkey during the last few years has been judicial reform. The judiciary is an important component of the country's tutelary regime, a regime that has been dealt blows by a series of reforms in Turkey that began with the process of European Union membership in 2004. This has therefore become one of the areas in which TESEV has been most committed to producing research.

On one hand, the efforts at judicial reform look at the judicial system as a whole, aiming to ensure that this system meets international standards of independence and impartiality. In this respect, the TESEV Democratization Program published the report "A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform in Turkey," edited by Serap Yazıcı, in order to participate in the ongoing public discussion leading up to the 2010 constitutional referendum that had proposed important changes to the highest judicial bodies of the country. Following the referendum, public discussions on the independence of the judiciary surrounding the new makeup of the High Council of Judges and Prosecutors (HSYK) inspired a new public report on that topic, entitled "The High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on Its New Structure and Operations."

Another dimension of judicial reform has been the attempt to transform the judicial system into a mechanism that can satisfy the system's users'—citizens'—need for justice. In this respect, two reports from 2012 presented us with striking facts and analysis regarding access to justice and defendant rights, respectively: "Access to Justice in Turkey" by Seda Kalem Berk, and "'Mills that Grind Defendants'" by Osman Doğru.

TESEV now continues its work in the field of judicial reform with this report, "Judicial Reform Packages: Evaluating Their Effect on Rights and Freedoms." Judicial reform efforts since 2011 have been characterized by a series of omnibus bills presented to the public as "judicial reform packages" (though they might be more correctly called "legal reforms"). These bills introduced changes to a great number of other laws. The initial inspiration behind the introduction of these reform packages had been the expectation during the European Union accession process that Turkey take concrete steps toward becoming a state governed by the rule of law. The packages also sought to create a permanent solution to Turkey's frequent convictions for violating certain articles of the European Convention on Human Rights.

Many provisions of the Anti-Terror Law and the Turkish Penal Code, in particular, have subjected certain segments of Turkish society, particularly Kurdish citizens, to long and difficult years within the legal system. While these reform packages have amended such provisions in favor of rights and freedoms, they have also been subject to serious criticism for failing to meet the expectations of those segments of society suffering most under the old system. With societal expectations for reform surging before every new reform package, extensive discussions after the packages' passage into law revolved around how much they actually satisfied these expectations. Yet just as such discussions strayed clear of viewing the judicial system as a whole, they also generally took place among legal experts,

excluding the very individuals who utilize the judicial system themselves.

Based on this consideration, we at the Democratization Program decided to prepare this report to analyze the four judicial reform packages that have been passed since 2011 from the points of view of freedom of thought and expression, personal liberty and security, the right to a fair trial, and the execution of sentences. The report includes: articles amended by the judicial reform packages, questions regarding these articles, solutions proposed by the reform packages, and the extent to which such solutions succeeded or failed to meet expectations. We hope, with this publication, to make the judicial reform packages more understandable and to satisfy at least some of the need for information and discussion in the public sphere. We also hope that the opinions and analysis contained in this report will shed light on future reforms of the judiciary.

TESEV would like to extend its thanks to İdil Elveriş, Meral Danış Beştaş, Emma Sinclair-Webb, and Didem Bulutlar Ulusoy for spending their valuable time sharing their views with us at our round-table discussion; and to legal expert Mehmet Uçum, for broadening our horizons with his analysis of the Turkish judicial system.

We would like to thank Naim Karakaya, whose research extended far beyond the abridged report presented here, for his careful work and valued efforts. The longer version of the report will be available only in Turkish. Many thanks go to Lokman Burak Çetinkaya and Betül Kondu for their hard work during the preparation of this report.

Introduction

A BRIEF HISTORY OF JUDICIAL REFORM IN TURKEY

Ever since the foundation of the Turkish Republic, some observers have worried that the mission with which its judiciary is charged has more to do with protecting the state and its interests than with protecting the rights and freedoms of its citizens. As such, the judicial system has been unable to adequately satisfy citizens' need for justice; on the contrary, rights and freedoms have often been ground up in the cogwheels of this justice system, particularly during periods in which the state's reflex toward self-preservation is high. The need for a fundamental reform in the administration of justice in Turkey, therefore, has long made itself felt.

An important indicator of the extent to which the justice system actually harms individuals are the statistics of the decisions taken by the European Court of Human Rights (ECtHR). Between 1995 and 2010, the ECtHR ruled against Turkey a total of 2,573 times, the highest number among all other member countries of the Council of Europe. Among these decisions, 699 related to the right to a fair trial, 516 related to the right to liberty and security, and 440 dealt with the extreme length of trials.[1] These data demonstrate the existence of a systematic and functional defect within the judicial system.

The steps taken to correct the defects of the justice system in Turkey, meanwhile, had generally been taken haphazardly in order to correct only the most urgent problems. As such they stanched the flow of blood but did not created permanent solutions for the illness. After Turkey officially won the status of candidate for membership in the European Union (EU) in 1999, the first motions could be heard in the direction of a strategic reform of the judiciary. Having determined that Turkey met the Copenhagen criteria, the EU decided to officially begin accession negotiations with Turkey in 2004. During this process, EU officials asked the Turkish Ministry of Justice to prepare a strategy to enhance the independence, neutrality, and effectiveness of the Turkish judicial system (Chapter 23, Judiciary and Fundamental Rights) and to present this strategy to the European Commission. In 2008, the ministry established a commission for this purpose and prepared a "Strategy for Judicial Reform and Action Plan." This document outlined the strategic goals for judicial reform as follows:

1. Strengthen the independence of the judiciary
2. Develop the neutrality of the judiciary
3. Increase the efficiency and effectiveness of the judiciary
4. Increase professional competence in the judiciary
5. Develop the administrative system of judicial organizations
6. Increase faith in the judiciary
7. Facilitate ease of access to justice
8. Render conflict-prevention measures effective and develop alternative methods of resolution
9. Develop the system of execution of sentencing

1 **ECtHR Annual Report 2010, p. 157, http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf**

10. Continue work on the issues required by our country and by the EU harmonization process.

In addition to reforms aimed at improving judicial institutions in general, 2010 saw a wave of reforms that effected a change in the structure of the highest judicial bodies in particular. The government of the Justice and Development Party (*AK Parti*), pursuing the mission with which it has charged itself, raised the issue of constitutional amendments in 2010 with a discourse directed at transforming the high courts into institutions that are "more modern, pluralist, and tied to the principle of the rule of law."[2] On 12 September 2010, Turkey decided in a referendum to amend the constitution to, among other things, radically change the makeup of the High Constitutional Court and the High Council of Judges and Prosecutors (HSYK) and to restrict the competence of military courts to military crimes only. Following the referendum results, significant changes were made to the membership and electoral procedure for the Constitutional Court and the HSYK. While this process did render the structure of the HSYK more pluralist than before, it also initiated a debate about the institution's independence, given the increasing role of the Justice Ministry in the institution, the HSYK elections, and practices like removing prosecutors from certain critical cases.[3] Aside from these changes, the 2010 constitutional amendments also made it possible for individuals to appeal directly to the Constitutional Court and appointed a government ombudsman (*Kamu Denetçiliği Kurumu*).

The Judicial Reform Strategy was updated by the ministry in 2012 after, according to the ministry, 70 percent of the goals of the previous strategy report had been reached. The new strategy report contained eleven goals, one of which was "to prevent the violation of human rights arising from judicial practices and regulations and to strengthen human-rights standards." It was in this framework that the judicial reform packages, the subject of this report, were first introduced to Turkey in 2011, prepared and enshrined into law with the goals of protecting basic rights like the freedom of expression, fair trials (the right to a truthful trial), and personal liberty and of accelerating the process of adjudication.

THE JUDICIAL REFORM PACKAGES

The laws known by the public as the judicial reform packages (*yargı paketleri*) are omnibus laws that aim to complete the process of harmonization with EU norms in the field of justice by changing fundamental legal regulations. Because these laws themselves change a number of other laws that are actually quite different from one another, and because such packages generally seek to enact changes to the structure of judicial bodies, their operation, and the actual legal rules that are used in such processes, they were generally seen as "judicial reform packages" and presented to the public under that name.

As much as the structure and operation of judicial institutions seem merely "matters of form," such legal rules are actually fundamentally related to a number of basic rights and freedoms, particularly the right to a fair trial, equal standing before the law, and personal liberty and security. The changes taking place now must be evaluated alongside the developments taken to achieve harmonization with EU standards, especially in the realm of personal rights and freedoms.

2 **TESEV published a report edited by Serap Yazıcı in 2010 containing analyses of the Constitutional Referendum. See: Serap Yazıcı, "A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform in Turkey (Judicial Reform 1)," TESEV Publications, 2010. http://www.tesev.org.tr/Upload/Publication/804638a9-a2f3-4a02-b8b2-eb22c9e785fc/EngYargi1WEB.pdf**

3 **For a report analyzing the HSYK's new makeup after the constitutional referendum, see: Ali Bayramoğlu, "The High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on Its New Structure and Operations (Judicial Reform 4)," TESEV Publications, 2012. http://www.tesev.org.tr/Upload/Publication/506b640d-6520-4cfb-aae7-c7287620a6ae/12475ENG_HSYK24_12_12.pdf**

The reasons for passing the judicial reform packages were generally directed toward the achievement of two basic goals: first, to accelerate the administration of justice by reducing the duration of trials, and second, to start a reform in the areas of human rights, especially the right to a fair trial, freedom of expression and of the press, and personal liberty. The decisions taken by the ECtHR against Turkey were almost certainly taken as a point of reference during the preparation of the reform packages.

The basic legal regulations that were given the name "judicial reform packages" during the process of legislation consist of three laws and one "government order carrying the force of law" (*kanun hükmündeki kararname*, KHK).

The **First Judicial Reform Package**, consisting of 33 articles and 4 provisional articles, was approved on 31 March 2011 as "Law No. 6217 on the Amendment of Several Laws for the Purpose of Accelerating the Provision of Judicial Services." The justification text for the law stated that it was prepared for the purpose of "ensuring the acceleration of state services and the provision of justice administered in a swift, efficient, and economical way; relieving the current caseload at the courts; and preventing the loss of time and labor in judicial proceedings." The first judicial reform package resulted in amendments in 17 other laws.

The **Second Judicial Reform Package**, approved on 26 August 2011 with a government order carrying the force of law, was generally related to the structure of the Justice Ministry and the regulation of administrative judicial bodies. This "KHK No. 44 on the Amendment of Several Laws and KHKs by Amending the KHK on the Organization and Duties of the Justice Ministry" consisted of 44 articles. The justification for the order was "to contribute to the more effective and efficient operation of judicial services." Nevertheless, many of the order's articles were struck down by the High Constitutional Court. The articles that remain in force governed the establishment of a Department of Human Rights within the Justice Ministry's Bureau of International Relations and International Law. They also amended the Law on the Council of State (*Danıştay*), the Law on the Court of Cassation (*Yargıtay*), the Law on Judges and Prosecutors, the Law on the Justice Academy, and the HSYK Law.

The **Third Judicial Reform Package** was approved on 2 July 2012 as "Law No. 6352 on the Amendment of Several Laws to Improve the Effectiveness of Judicial Services and the Postponement of Trials and Sentencing in Crimes Committed in the Press." It consisted of 107 articles and 3 provisional articles. The justification given for the law noted that the damages that Turkey was being forced to pay because of ECtHR were becoming an increasing burden because of the significantly increasing caseload in recent years and the resulting inability of the court to administer justice in a timeframe compatible with the Turkish constitution and the European Convention on Human Rights (ECHR). In order to accelerate the trial process, the third judicial reform package changed the regulations governing bankruptcy and debt enforcement trials, criminal cases, and administrative law cases. In the justification for the law, it was also noted that there was a need to change the way free speech and privacy were governed, and that some amendments were made with this need in mind.

Finally, the **Fourth Judicial Reform Package** was accepted on 11 April 2013 under the title "Law on the Amendment of Several Laws Related to Human Rights and Freedom of Expression." As can be gleaned from the title, this law's 27 articles were essentially aimed at making changes in the field of human rights. The package made some changes to the Anti-Terror Law(TMK) and the Turkish Penal Code (TCK). The goal of the fourth judicial reform package was to make it easier to comply with the definitive judgments of the ECHR whose application is being monitored by the Committee of Ministers of the Council of Europe but have not yet been carried out in Turkey.

Aside from these four reform packages, this report will also examine Law No. 6411, which can be evaluated in conjunction with the fourth judicial reform package.

This law, the "Law on the Amendment of the Law on the Execution of the Law on Criminal Procedure and Security Measures," essentially changes the regulation of the criminal sentencing system and also contains new regulations regarding the right to defend oneself in one's native language in court.

SCOPE AND OBJECTIVES OF THIS REPORT

The aim of this report is to examine the content of the judicial reform packages from the perspective of basic rights and freedoms and thus to make it possible for these packages to be discussed in a healthy way by the public.

The judicial reform packages have not been examined individually or chronologically, but rather systematized as a whole according to four major fields that experienced changes: freedom of thought and expression, personal liberty and security, the right to a fair trial, and the execution of sentencing. We examined what changes were made to the governing of these four fields through the new regulations in the reform packages, along with the meaning and application of these changes. After each section, the related changes were then evaluated as a whole. In this respect, the report is more about compiling and charting the changes related to these four major fields rather than taking in the entirety of the content of these judicial reform packages. The concluding section of this report includes a general evaluation of the methods and content of the judicial reform packages.

Analyzing the Judicial Reform Packages

1. EFFECTS ON THE FREEDOM OF THOUGHT AND EXPRESSION

The freedom of expression is one of the most important basic rights and freedoms guaranteed both by international as well as domestic legal norms. Thinking is one of the basic characteristics of human existence, and, as such, it is impossible to actually limit thought. The expression of this thought in words, too, must thus be evaluated in the same framework. But in this second step, it is inevitable that the law should intervene when the means used to share thoughts themselves violate individual and collective rights. But it is of utmost importance the tools used during such interventions are sensitive to the balance achieved, and it is certainly unacceptable in a state governed by the rule of law for such interventions to violate the essence of this right or seriously limit its expression.

It is a well-known fact that in Turkey, until the process of harmonization with the European Union, there were serious limitations on the freedom of expression and that many of the country's intellectuals and politicians were imprisoned for years simply because they expressed their views. The legal reforms that began with process of European Union harmonization in the 2000s took important steps forward not only in the field of freedom of thought and expression, but in many other areas as well. Yet freedom of expression continues to be a problematic area. In 2011, Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, visited Turkey and wrote a report focusing on freedom of expression and the press in Turkey. In the report, Hammarberg wrote, "The Turkish Criminal Code and the Anti-Terrorism Law, at the origin of the vast majority of freedom of expression cases against Turkey brought to the European Court of Human Rights, were amended in 2004 and 2006 respectively. … However, the provisions in the amended texts have kept the contents of the former texts largely intact."[4]

According to the Media Monitoring Reports published by the Turkish online news platform BİA (*Bağımsız İletişim Ağı*), 30 journalists were imprisoned at the beginning of 2010, but this number rose to 104 journalists at the beginning of 2011, then dropped to 68 at the beginning of 2012.[5] According to the Media Monitoring reports, in 2011, "104 journalists and 30 distributors or media employees were first arrested and charged with being 'members of an armed organization' who used journalism; this charge later became 'knowing and willing aid to someone who commits a crime in the name of a [criminal] organization even if s/he is not a member of the crime and/or directly to an organization even if s/he is not a member of that organization's hierarchy,' while other journalists were tried under charges of founding an armed or unarmed [criminal] organization, incitement or guidance, or being a member of such an organization." In 2012, meanwhile, 45 people (including 20 journalists and two distributors) were sentenced to a total of 214 years, 11 months, and 15 days in prison and 40 thousand Turkish lira in fines under the TMK and the TCK's articles on "terrorism." One journalist was sentenced to life in prison.

4 **Thomas Hammarberg, "Freedom of expression and media freedom in Turkey" (12 July 2011), https://wcd.coe.int/ViewDoc.jsp?id=1814085**

5 **Emel Gülcan, BİA Media Monitoring Reports for 2010, 2011, 2012, http://www.bianet.org/bianet/ifade-ozgurlugu**

According to data provided by the Platform for Solidarity with Imprisoned Journalists (*Tutuklu Gazetecilerle Dayanışma Platformu*), 67 journalists were imprisoned as of April 2013, the majority of which worked for the Kurdish press and six of whom were media outlet owners or editors in chief.[6] According to data we were able to obtain from the Ministry of Justice regarding this statistic, nine of these 67 people were released, and 15 people were convicted of various crimes. Forty-three of them, meanwhile, continue to face trial while under custody. According to investigations conducted by the Ministry, 53 of the journalists imprisoned as of April 2013 were arrested or convicted under allegations of membership in an armed terrorist organization.

Both domestic and international organizations and institutions frequently point out that freedom of expression and of the press are under threat in Turkey. The answer given to such arguments by government officials is that the journalists who are said to be in prison are not being held for their journalistic endeavors, but for their connection to terrorist organizations.[7] As can be seen in the ECtHR decisions condemning Turkey, however, this situation arises because courts consider even non-violence-inciting statements as evidence of crimes of terrorism and armed organizations, in contravention of the ECHR. Yet the state is obliged to protect its citizens' freedom to express non-violent views.

The main articles of the TCK for which Turkey has been found guilty of violating Article 10 (Freedom of Expression) by the ECtHR are as follows:

- Article 215: Praising a Crime or Criminal
- Article 216: Incitement of the population to enmity or hatred and denigration
- Article 301: Denigration of Turkishness, the republic, the organs and institutions of the State
- Article 318: Discouraging the people from performing military service
- Article 285: Violation of confidentiality
- Article 288: Attempt to influence a fair trial
- Article 220, Clause 6: Committing a crime on behalf of the organization, even if they are not a member of that organization
- Article 220, Clause 8: Spreading propaganda for a criminal organization

The main articles of the TMK for which Turkey has been found guilty of violating Article 10 by the ECtHR are as follows:

- Article 6, Clause 2: Printing or publishing leaflets and declarations of terrorist organizations
- Article 6, Clause 5: Suspension of publication, by court order, for 15 days to one month, of periodicals that contain open incitements to criminal activity, praise for offences committed or for offenders, or the propaganda of a terrorist organization
- Article 7, Clause 2: Spreading propaganda for a terrorist organization

Furthermore, the punishment for some of these activities is increased by half if done through the press.

By expanding the freedom of thought and expression, the judicial reform packages brought important changes to some of these articles.

6 **Tutuklu Gazetecilerle Dayanışma Platformu, "3 Mayıs Dünya Basın Özgürlüğü Günü'nde Türkiye dünya birinciliğini sürdürüyor!" [Turkey's number-one spot in the world continues on 3 May World Press Freedom Day!] (3 May 2013), http://tutuklugazeteciler.blogspot.com/2013/05/3-mays-dunya-basn-ozgurlugu-gununde.html**

7 **AK Parti website, "Gazetecilik Faaliyeti ile ilgili tutuklu olan yok" [No one under custody because of journalistic activity], 24 July 2013, http://www.akparti.org.tr/site/haberler/gazetecilik-faaliyeti-nedeniyle-tutukluolan-kimse-yok/49902**

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
TMK 6(5), "Statements and Publications"	Because the definition of terrorist organization and propaganda were unclear, this article, related to the suspension of periodicals that "spread the propaganda of a terrorist organization," in practice, resulted in court decisions that restricted freedom of expression.	3rd JRP	Article removed.	This positive change was intended to change domestic courts' approach to the issue into a pluralist and democratic approach in line with the decisions of the ECtHR. It is expected that the number of convictions given for spreading the propaganda of a terrorist organization based on the law's vague wording will decrease.
TMK 6(2), "Statements and Publications"	Though it classified the publication of a terrorist organization's leaflets and declarations as a crime, this article did not establish any criteria regarding the content of the leaflets and declarations. The ECtHR, however, counts any statements which do not incite violence within the realm of free expression.	4th JRP	Article amended. According to the new regulation, such activities will only be considered a crime when they contain violence, threats, and coercion or if they seek to legitimize the methods of the organization or if they encourage the use of such methods, and only when such leaflets or declarations are published.	This is a positive change, because it does indeed limit the freedom of expression to consider any and all leaflets and declarations a potential crime. On the other hand, the article as it stands results in a contradictory outcome: given the legal definition of "terrorism," this article now *allows* for acts by "terrorist organizations" that do not resort to violence, threats or coercion. The solution ought to be, above all, a change in the legal definition of "terrorism."
TMK 7, "Terrorist Organization Propaganda"	While the article called for the punishment of those who spread the propaganda of a terrorist organization, the characteristics of such propaganda were not described in any way.	4th JRP	Article amended. In the revised version of the article, it is now a crime to spread the propaganda of a terrorist organization "in a way that would legitimize or praise methods that contain violence, threats, or coercion, or incite others to use such methods." Thus, the characteristics of the propaganda covered under the law were delineated.	While it is possible to say that this amendment is a positive one, the fact that the terms used in the revised version are still unclear raises doubts as to the extent to which the changes will actually bring about a solution in practice or the extent to which they will meet ECtHR standards. Furthermore, the argument above that the definition of terrorism ought to be changed applies here as well.
TCK 215, "Praise of Crime and Criminals"	According to ECtHR criteria, praising a crime and criminals can only be punished as a crime if the result of the act truly threatens the public peace. The former version of this article, on the contrary, held the praise of crime in the abstract to be a sufficient condition to establish a crime.	4th JRP	Article amended. A regulation was added to the article which said that praise for a crime and criminals would only be punished if "a clear and imminent threat to public order emerges as a result."	In assessing a crime, it is necessary to examine not simply whether a thought was expressed, but whether such expression resulted in a physical threat to public order. The acceptance of the amendment is an important and extremely positive change from the perspective of freedom of thought and expression.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
TCK 220(6), "Committing a Crime in the Name of a [Criminal] Organization"	A person who commits a crime in the name of a [criminal] organization is punished for being a member of that organization even though this may not be the case. This results in such people receiving punishments for crimes they did not commit. The act of committing a crime in the name of a [criminal] organization was not clearly defined in the law. In practice, the precedents set by the Court of Cassation and the opinions of other courts saw people being tried and punished for membership simply for acts like making a "victory" sign, clapping, shouting slogans, or throwing stones.	3rd JRP	A judge was now given the possibility to reduce the sentence for such crimes.	This is an inadequate amendment, because the possibility for individuals to be punished for crimes they did not commit continues. Furthermore, there was no solution proposed to the problems posed to freedom of expression in applying the law.
		4th JRP	The scope of the article was limited to armed organizations.	While the limitation of the article's scope is a positive development, it still does not provide a solution to the problems in the law.
TCK 220(7), "Aiding a [Criminal] Organization"	This article provides for the punishment of individuals who knowingly and willingly aid a [criminal] organization even if they are not a member of that organization's hierarchical structure. These individuals are sentenced as if they were members of a [criminal] organization.	3rd JRP	Because it was found to be inappropriate that someone aiding a [criminal] organization would be seen as equivalent to and sentenced to the same punishment as someone who was actually a member of that organization's hierarchical structure, this amendment gave judges the option of "reducing a punishment down to one-third that of organization membership in accordance with the type of assistance rendered," in the interest of securing substantial justice.	The new article leaves the decision of whether to reduce the sentence up to the judge. We can say, therefore, that the article's basic logic has not changed and that non-members of a [criminal] organization will continue to be punished as if they were members. In fact, being a member of a [criminal] organization and simply aiding that organization are crimes that require us to think and react differently. It is thus unwarranted to punish non-members of a [criminal] organization as if they were members. What is necessary is an amendment that would make aiding an organization a new and independent type of crime. As it stands, the amendment is quite lacking.
TCK 220(8), "Propaganda of a [Criminal] Organization"	The law did not specify what acts counted as "propaganda," a crime included within the broader crime of founding an organization with the intent of committing a criminal act. In practice, therefore, this resulted in undesired outcomes—for instance, considering acts such as wearing certain colors of clothing or quoting certain individuals as propaganda for an organization.	4th JRP	This provision now specifies which kinds of propaganda are subject to punishment and was amended to read, "Individuals who spread the propaganda of a [criminal] organization that seeks to legitimize its violent, coercive, or threatening methods or seeks to encourage others to use such methods […] will face punishment."	The new provision made it possible for people to know for a fact under what conditions their discourse will qualify as a criminal act. The instances under the old law in which all kinds of expression were considered a part of the word "propaganda" have now been limited. In this way, from the point of view of freedom of expression, this has become a significant example of the general norm that takes freedom as a given and limitations thereon as an exception.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
TCK 318(1), "Discouraging the People from Military Service"	The former article envisioned a prison sentence for "those who, through incitement or indoctrination, commit an act that could discourage the people from military service, or those who spread propaganda in this regard" and represented a significant barrier to free expression. Because the structure of the article could be broadly interpreted, it became easy to consider any views expressed on military service as a crime.	4th JRP	The scope of the law was somewhat restricted, with the new definition of the offence reading: "encouraging those currently completing their military service to desert; or inciting or indoctrinating those who are yet to serve in a way that would make them refuse to complete their military service."	As much as we can speak of progress in terms of the restriction in the scope of the law, we still see that statements qualifying as the expression of a thought are considered crimes. Therefore, we can say that the barrier standing in the way of free expression has not been removed.
Press Law 26, "Limitation of Trial"	Article 26 of the Press Law stipulated that the criminal trials against crimes committed in the press could be initiated within two months for a daily publication or four months for any other publication. Because this was struck down by the Constitutional Court in 2011, a media outlet could be sued without respect to any specific trial period other than the general statute of limitations. A new regulation was needed that would remove the threat to journalists and writers of being put on trial without any specific limit on when they could be sued.	3rd JRP	The law was amended to reduce the timeframe in which lawsuits could be initiated to four months for daily publications and six months for other publications. These limitations were determined in accordance with the guidelines of the court verdict and are thus required to be implemented.	While at first glance it may not seem particularly positive for the trial limitation to be raised from two and four months to four and six, respectively, this is a legal requirement, as the Constitutional Court also stated in its verdict. As much as members of the press may want more limits to be placed on the timeframe under which they face the threat of a lawsuit, we must also consider the need to prevent those who suffer an offence in the press from freely seeking redress. Establishing preconditions for lawsuits to be brought against the freedom of thought and expression and introducing a restriction on legal attempts to oppose this right, even if it is only a limitation on the time frame, is a positive development. But this amendment alone is not sufficient to prevent practices that limit rights and freedoms.
Press Law Provisional Art. 3, "Continuation of Decisions to Forbid Publication"	Until 31 December 2011, the extremely high number of decisions taken by courts, administration officials, and other officials to recall printed publications, forbid their publication, or to obstruct distribution or sale was a problem from the perspective of the freedom of thought and expression.	3rd JRP	In the absence, within six months of the passage of this provisional article, of a decision by a qualified and competent court to uphold decisions related to this article that had been taken by courts, administration officials (provincial and subprovincial leaders), and other officials before 31 December 2011, such decisions will lose the force of law.	It is a positive development that the decision whether to continue pre-31 December 2011 decisions by the courts, administration officials and representatives, and other officials to recall, ban, or prevent distribution or sale is now being left up to a judicial body. An even more positive development is that the pre-31 December 2011 decisions taken under the provisional law expire automatically in the absence of a claim to a competent and qualified court within six months. This could be seen as an effort to correct past errors in restricting freedom of thought and expression.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Law No. 6352 (3rd JRP) Provisional Art. 1, "Postponing an offence"	In the last few years, the number of journalists and writers in prison in Turkey has reached worrying proportions. This has resulted in frequent criticisms of the government by international bodies.	3rd JRP	For offences committed before 31 December 2011 that used the press or publications or any method of expressing a thought or opinion and which in their basic form would not require a monetary fine or a prison sentence of more than five years, the new regulation stipulates that, as long as the same offence is not repeated within three years, a court can decide to postpone the initiation of public prosecution during the investigation stage, postpone prosecution during the prosecution stage, and postpone the execution of a sentence that has been handed down.	Even if the new regulations on the postponing of every stage of a trial for offences committed before 31 December 2011 may be perceived as positive from the perspective of the right of free thought and expression, the regulation will likely have a negative effect on this right when it is put into practice. Because the rights of journalists on trial regarding their trial and acquittal have been taken from them, they face a three-year period of a constant threat of another lawsuit. This situation may cause writers and journalists under pressure by the courts to practice auto-censorship.

Evaluation

Several articles standing in the way of freedom of expression were changed by the judicial reform packages.

The TMK in and of itself represents a serious barrier to freedom of expression and the press. It is known that many of the cases for which Turkey, in particular, is found guilty of violating the right to free thought and expression by the ECtHR arise from stipulations in this law that limit the freedom of expression. Significant improvements to freedom of thought and expression were made to the TMK through the judicial reform packages. The removal of the TMK stipulation that would suspend publications containing incitement to commit the crimes of a terrorist organization, praise for offences committed or for offenders or propaganda for a terrorist organization is a positive and significant step. Similarly, other amendments that expand the freedom of the press can be seen in the delineation of what constitutes "leaflets and declarations" in the article regarding the printing of a terrorist organization's leaflets and declarations as well as the inclusion of a new definition of a "propaganda crime."

The TCK, meanwhile, was improved significantly by adding the criteria of "a clear and imminent threat to public order" to the extremely problematic crime of "praise for a crime and criminals." The amendment of the article that criminalized the use of propaganda in the formation of a [criminal] organization is an improvement in the direction of the ECHR, because it added the more concrete criteria that such propaganda must be spread "in a way that would legitimize or praise methods that contain violence, threats, or coercion, or incite others to use such methods." Meanwhile, though the crime of "committing a crime in the name of a [criminal] organization" is not directly related to the freedom of expression, the precedent set by the Court of Cassation and the practices of the courts in recent years has made it a significant limitation on the freedom of expression. The amendment made to this article in the judicial reform packages, however, does not actually remove the barriers to freedom of speech and thought, because the basic problem with this article is not its content, but rather judges' interpretation of it and the views which have developed over time.

Three changes made to the Press Law might be considered positive: the limitation on the amount of time during which a trial can be brought against a writer or journalist; the introduction of the possibility for the owner of a written publication banned before 31 December 2011 to apply to a competent court within three months of the provisional article's coming into force and for that court to decide whether to continue with the publication ban; and the introduction of a decision to postpone a trial under certain conditions for crimes committed through the press before 31 December 2011, no matter what phase the trial is in. Yet it should also be noted that the removal of several unwarranted limitations through the amendments listed above does not mean that there has been a sufficient broadening in the scope of freedom of expression and the press.

Nevertheless, many legal regulations remain in the content of the articles that continue to significantly restrict the freedom of thought and expression, and new regulations are necessary to correct these gaps. In this respect, many articles still in the TCK contain provisions that could be used to restrict freedom of thought and expression: the crimes of inciting the people to hatred and animosity (216), violating the confidentiality of an investigation (285), attempting to influence a fair trial (288), and denigrating the Turkish state and state institutions and organs (301).

On the other hand, it cannot be expected that the existing problems of freedom of expression and the press in Turkey can be solved by amending laws alone. In practice, most of the cases brought against freedom of expression are done so within the framework of "organized crime" in the TMK and TCK. In many cases, the notion of "incitement to violence" is interpreted so broadly and excessively that in comes in conflict with the precedent set by the ECtHR. This helps support the idea that the basic problem is not in the content of the laws but with the perspectives that have developed over time among judges and prosecutors. And as long as such perspectives are maintained, the removal of problematic articles will remain without effect, because almost every freedom-restricting article has a backup replacement in the penal code. For instance, the scope of application of the TCK's famous Article 301 was restricted after a domestic and international outcry after the assassination of a journalist, but there has been a simultaneous rise over the last few years in the number of prosecutions for inciting the people to hatred and animosity (TCK 216). Similarly, it cannot be expected that simply adding criteria of "violence" to crimes of propaganda (TCK 220(7) and TMK 7) will reduce the number of violations of freedom of expression, because a significant portion of the people who are tried for this crime are, for example, also being tried for membership in an armed organization (TCK 314(2)).

As long as judges' and prosecutors' views of such cases do not change in favor of human rights and freedoms, the current violations of rights will likely continue. Their views are the product of a judicial system designed not with a basis in protecting the individual, but in protecting the state. Without questioning the way in which the judiciary is organized or the aim of judicial proceedings, it is unrealistic to expect any change in favor of human rights and freedoms.

2. EFFECTS ON PERSONAL LIBERTY AND SECURITY

Personal liberty and security are a basic human rights and the foundation of all other freedoms. Thus, outside of special cases delineated by law, no one can be deprived of their liberty and freedom of movement.

The ECHR guarantees personal liberty and security in Article 5, which states, "Everyone has the right to liberty and security of person." The Convention outlines the following exceptions to this right with respect to the prosecution of a criminal case, among others:

- The lawful detention of a person after conviction by a competent court.
- The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law.
- The lawful arrest or detention of a person effected for the purpose of bringing her or him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent her or his committing an offence or fleeing after having done so.

Even during the cases outlined above, individuals subject to limitations on their liberty ought to be given the reason for their arrest and the crimes of which they are being accused in brief, clear language; furthermore, they should be immediately brought before a judge and tried within an appropriate timeframe. Everyone who is deprived of their liberty has the right to appeal to a judge to decide in a short time whether the act of detention was legal and to be let free if the detention is found to be illegal. Everyone who suffers an arrest or detention that violates the terms of the Convention has a right to redress.

Detention comprises the most serious type of violation of a person's liberty before conviction and is thus a type of protective measure that must be held to extremely strict conditions. Using such measures means imprisoning someone who has not yet been convicted of a crime and, with some exceptions, holding her or him in essentially the same conditions as someone who *has* been convicted. The ability to make a decision about someone's detention must therefore be tied to strict conditions. These conditions are outlined in the Law on Criminal Procedure (*Ceza Muhakemesi Kanunu*, CMK).

The long duration of detention in Turkey has represented a problem for personal liberty and security for many years. Extremely long detention times essentially make the act of arrest more of a "pre-sentencing" than a preventative measure. According to the Detention Report of the Turkish Bar Association's Human Rights Center, as of 2010, 51 percent of the people in prisons in Turkey were simply under arrest, while only 49 percent had actually been convicted.[8] Statistics released by the Justice Ministry's General Directorate of Prisons and Detention Houses, however, show the proportion as 28 percent detainees, 72 percent convicts. The reason behind the discrepancy in these data is that the Bar included people who had been convicted by a court of first instance and appealed the decision but whose appeals process was unfinished as "detained" in its calculations, while the ministry considered such individuals to be "convicts." Considering a number of factors—that the appeals process is a part of an ongoing trial, the fact that the conviction has not yet been confirmed, and that Article 4 of the Law on Executing Sentences and Security Measures even states that sentences cannot be carried out before a conviction is confirmed—characterizing these individuals as convicts is a major legal inaccuracy. Here it is possible to say that the ministry's statistics falsely represent the real proportion of detainees to convicts in prison. The Justice Ministry should continue the practice, as it did in years past, of

8 **Türkiye Barolar Birliği İnsan Hakları Merkezi, "Tutuklama Raporu" [Detention Report], 10 August 2010, p.18.**

distinguishing between detainees, detainees with pending convictions, and convicts in their statistics.

The main reason behind the excessive length of detentions can be seen in the quite long trial process in Turkey. For 83 cases in 2010 and 53 cases in 2011, he ECtHR reached the conclusion that Turkey had violated the ECHR because of an excessively lengthy trial.[9] In a report entitled "Administration of justice and protection of human rights in Turkey," the Council of Europe's Human Rights Commissioner Hammarberg argues that "the excessive length of proceedings has been a chronic dysfunction in the Turkish justice system."[10]

The Council of Europe's Committee of Ministers' recommendation No. Rec (2006) 13[11] lists good practices for detention. According to these standards, detention should always be exceptional and have a good reason. The decision to bring someone under custody should only be given if it is necessary to make the investigatory stage of the trial effective (e.g., if tampering with evidence is suspected) or if it is suspected that she or he will attempt to flee from the law. The Committee of Ministers recommends widening the possibility to use alternative measures, such as probation, release on bond, or a ban on leaving the country. Whatever the case, the period of detention should be kept as short as possible and should only continue as long as the justifications on which it is based remain valid.

Through the judicial reform packages, a number of amendments were made to expand the right to personal liberty and security. By passing these amendments, the government generally began to distance itself from the detention-friendly culture that dominates the judiciary now, while seeking to expand the ability to use alternative methods of coercion.

9 ECHR Statistics, http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956867932_pointer

10 Thomas Hammarberg, "Administration of justice and protection of human rights in Turkey" (10 January 2012), p. 2, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2005423&SecMode=1&DocId=1842380&Usage=2

11 Council of Europe, "Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse" (27 September 2006), https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
TMK 13, "No suspension, postponement, or commutation of sentences to alternative methods of coercion"	With regard to the TMK, several practices present in the CMK, including the suspension of a sentence, the conversion of imprisonment to alternative forms of coercion, or its postponement were not applied to people accused of crimes of terrorism.	3rd JRP	By removing this article, practices like the suspension of a sentence, the conversion of imprisonment into an alternative form of coercion, and the postponement of imprisonment became applicable to persons tried for terrorism as well.	From the perspective of personal liberty and security, it is positive that alternative forms of coercion, other than detention, can now be applied to people being tried for crimes of terrorism. But given the attitude judges show toward suspects being tried under the TMK, it is likely that this change will only be applied sparsely.
TMK 10 (3-f), "Establishing the jurisdiction and court district and procedure for investigation and prosecution proceedings"	In practice, the personal addresses or telephone numbers of law-enforcement officers were included in the reports on the suspect's testimony. This posed a threat to the security of these officers.	3rd JRP	Under the new regulation, with regard to crimes falling under the scope of the TMK, when a law-enforcement officer must be invited to a testimony, the officer's work address is used on the invitation or subpoena and the deposition and testimony report for these officers now use their work addresses as well.	This new regulation is advantageous from the perspective of the security of law-enforcement officers; a similar regulation is now necessary for defendants as well. The inclusion of defendants' personal telephone numbers and address when they sign documents also creates a security problem.
CMK 100(4), "Establishing the jurisdiction and court district and procedure for investigation and prosecution proceedings"	Because Turkish law features a trial procedure accustomed to detaining suspects and the span of crimes for which detention is not ordered is narrow, judges often order the detention of suspects. As we have seen, however, in practice, detention has turned from a preventative measure into a kind of punishment itself.	3rd JRP	This change broadened the number of crimes for which it was illegal to order detention and the maximum prison sentence was raised from one to two years.	Detention stands out as a kind of "punishment" frequently assigned by judges without regard for the rights of the suspect. Yet detention should be a preventative measure, not a punishment, and this measure should be the exception, not the rule. The introduction of limits on the "culture of detention" that has become a norm in Turkey is a positive development from the perspective of personal liberty and security.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
CMK 101(2), "Decision to detain"	The justifications that are used to detain, prolong a detention, or refuse a demand for detention consist of stock phrases or citations simply copied from the law. This not only raises suspicions that the decision to detain was made without an adequate assessment of the conditions for detention; it also makes it unclear on exactly which grounds the decision to detain was made. This thus creates serious problems when detainees object to their detention or when these objections are examined.	3rd JRP	The content required of a decision to detain was outlined more explicitly. Detentions must now be justified using concrete evidence, not abstract phrases, relating to the conditions laid out in the article. This change ensured such decisions and their justifications are more transparent.	Despite the fact that the amendment to this law made required the justification for detention to be more detailed, a change that would improve the situation in practice has yet to be seen. Judges, pointing to their workload, continue to write repetitive justifications for detention. As such, the amendment passed here does not have the potential to change the application of the law.
CMK 109(1), "Probation"	Probation is used only rarely as an alternative method of coercion to detention. Prior to the amendment of the law, probation was used in place of physical detention only during investigations of a crime whose sentence would be at most three years.	3rd JRP	The amended version of the law eliminates the limitation on the use of probation as a coercive measure and allows a judge to decide for probation even if there are reasons to detain.	Simply having the possibility of using probation without any limitations instead of a coercive measure like detention that interferes so heavily in personal liberty is a positive development from the point of view of personal liberty and security. Yet this measure has not been put into practice, owing to judges' reserved feelings toward the notion of probation. Therefore, the broad scope for application envisioned in the new regulation has not completely solved the problem because judges prefer not to use the measure of probation.
CMK 105(1), "Detention procedure"	Before the amendment, if a Republican Prosecutor either asked to rescind the decision to detain or asked for the release of the suspect, the Republican Prosecutor would have to record the opinion of the suspect, the indictee, or their lawyer regarding this demand. The process of declaring these opinions, which gave the court more opportunity to intervene in the case, would slow down the process of release and reduce the chances that detention could be turned into probation.	4th JRP	After the law is amended, the Republican Prosecutor will only be able to take down the opinions of the suspect or defendant in cases where the detainee requests to be released from an ongoing trial.	Outside of an actual trial, suspects, indictees, or defendants' requests for release will not require the opinion of a Republican Prosecutor. Outside of an actual trial, it will now be possible for the decision for release to be evaluated and granted without the opinion or outside interference of a Republican Prosecutor, as will be the transfer of detention into probation. This is a positive change.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
CMK 270, "Procedure for objecting to detention"	The defendant had no possibility to provide her or his views after the Constitutional Prosecutor, in accordance with the provisions of the CMK, gave an opinion against an objection to detention; this constituted a violation of the right to a fair trial.	4th JRP	The law was amended so that when there was an objection to a decision made regarding a detention, the suspect or her/his lawyer would be informed if the opinion of a Republican Prosecutor was requested.	Because they have a contested outcome, criminal trials should provide equal opportunity for both sides to make their case. From this standpoint, an opportunity presented to the prosecution must, by necessity, be given to the defense as well. Thus, granting the opportunity to suspects, indictees, or defendants to present their views is an obligation from the standpoint of ensuring a fair trial. As positive as the change may seem at first glance, using the word "or" rather than "and" in the amended text is problematic from the standpoint of ensuring a fair trial.
CMK 141(1), "Demand for damages because of detention"	During the criminal investigation or trial period, people who are forbidden by law from taking advantage of the opportunity to appeal a decision against arrest or detention were unable to seek compensation for economic harm or pain and suffering.	4th JRP	Such individuals were added to the list of those authorized to seek damages from the state.	Both of these changes are extremely positive because they expand the possibility for people who are harmed by violations of their personal rights and liberties to receive compensation for at least the material harm caused to them. Nevertheless, the problematic way in which the process of damage awarding is carried out, however, will most likely mean these positive developments will continued to be overshadowed by poor practices; when damages are awarded to someone who has been detained for months, for example, that person's income and economic losses are taken into consideration, while pain and suffering is compensated with only a nominal amount. Given this practice by the courts, even if the spectrum of people eligible to seek damages is expanded, the goal of these amendments will never be attained.
Law on Criminal Procedure 144 (1-a), "People who may not sue for damages"	Those whose duration of custody or detention was reduced because of another ruling had no right to seek damages.	4th JRP	The clause forbidding people whose detention or custody period was reduced because of another ruling from seeking damages was removed from the text of the article.	

Evaluation

From the perspective of personal liberty, it is extremely important to maintain the balance in law between the requirements of a criminal trial and the quality and essence of this liberty. Therefore, the preconditions for ordering measures that restrict a person's liberty should be kept as strict as possible, these preconditions should be made to be carefully reviewed by judicial bodies, and any damages that arise as a result of violations of liberty should be eliminated in a quick, effective way.

By passing these judicial reform packages, lawmakers have sought to monitor these three liberty-related goals and, having restricted the number of crimes for which detention can be ordered, have aimed to create a more careful detention review process by amending the law such that the decision to detain could only be made on the basis of clear justifications and that the detention review process be done in court. By expanding the possibility for granting probation, they also aimed to create an effective and practical alternative to detention. As we noted above, however, in practice, detention continues to be ordered in many cases in which probation would have been sufficient, and the justifications for doing so continue to be simplistic stock phrases that do not comply with the new law. Thus, while the new regulations are an improvement, they largely remain yet to be reflected in practice. Furthermore, while the article governing the conditions under which those subject to unjust detention or other violations of basic rights and freedoms could demand compensation, the extremely unreasonable amounts of damages granted by the court mean that, in practice, the number and type of people who can demand compensation has not expanded.

One must not forget that the reason that the amended laws have not effected a significant change with regard to personal liberty lies less in the content of the laws than with the way they are actually put into practice. Therefore, as many new regulations and improvements may be made in this field, as long as the mentality covering their application in the justice system does not change, these new regulations are bound to remain on paper only. The latter is the reason that the new regulations, which intended to make the decision to detain more difficult, did not have any positive effect in practice; detentions based on insufficient grounds continued to take place; and, as far as can be observed, the proportion of detainees to the working population has not declined.

The precondition for fully achieving these goals in personal liberty is for the content of the new statutes to be given their full due in practice. On the other hand, the main reason that personal liberty is violated with long detention periods is the fact that Turkey's criminal justice system does not function properly. Courts make the decision to detain too easily, because of the worry either that the victim of a crime will not feel that justice has been served during a long trial in which the defendant is not in detention, or the worry that the sentence handed down to a non-detained person will be unable to be carried out fully later. Because the organization and aims of the judicial system protect the public and not the individual, the person standing trial is presumed guilty and is stripped of her or his rights. Because trials are not completed in a timely manner, detention has become a sort of "advance punishment" for defendants. To solve this, in addition to permanent and far-reaching reforms in the organization of the legal system, we should consider providing education to all those involved in the trial process on the topic of human rights and laws protecting freedoms.

3. EFFECTS ON THE RIGHT TO A FAIR TRIAL

The right to a fair trial is guaranteed by Article 6 of the ECHR. According to the Convention, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and remains innocent until proven guilty. The convention outlines the following minimum rights enjoyed by those accused of a crime:

- To be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them;
- To have adequate time and the facilities for the preparation of their defense;
- To defend themselves in person or through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- To examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- To have the free assistance of an interpreter if they cannot understand or speak the language used in court.[12]

Practices that violate the right to a fair trial are generally observed in cases where individuals are being tried for terrorism.

It is not a rare thing for states to include "super-legal" institutions and rules outside the realm of normal laws in the name of protecting their own existence or constitutional orders. The existence of such laws today, even in the most modern democracies, is a sign that this issue continues to exist as a socio-political reality. The adoption by states of rules aimed at preserving their own political systems is not *a priori* opposed to the basic principles of the law. It is necessary here, however, for the balance between the preservation of the political system of a state and the protection of basic rights and freedoms to be correctly maintained. It should be remembered above all that what ought to be protected is not the *"state"* but the *"rights of citizens to live in a constitutional order."* In the effort to protect citizens' right to live in a constitutional order, the state should also take care not to violate citizens' other rights. One of the laws which does violate this principle in Turkey is the TMK, which is still in effect. (It should be noted, however, that the TMK does not actually effectively serve the purpose of protecting the citizens, but rather has an essential function of protecting the state.)

The TMK came into force on 12 April 1991 at a time when the conflict between state security forces and the PKK in eastern and southeastern Anatolia was at its peak. It was during this exceptional period that the conditions for exceptional trials were also laid out. This situation gave rise to countless examples of violations of the right to a fair trial, from restricting the right to a defense to trying of hundreds of suspects at once, to conducting trials in courts presided over by military judges who were themselves a part of the chain of command in military divisions charged with combating terrorism. The provisions of the TMK have been the reason for Turkey to be convicted by the ECtHR for violating the right to a fair trial in a great number of appeals.

The judicial reform packages amended a number of provisions in laws, most importantly the TMK, that violated the right to a fair trial.

12 **The text of the convention is available at: http://conventions.coe.int/treaty/en/Treaties/Html/005.htm**

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
CMK 250, 251, and 252 were removed and TMK 10 was amended, "Establishment of Regional Heavy Penal Courts"	The existence of special courts established to deal with terrorism and the use there of exceptional judicial practices against defendants gave rise to unjust outcomes.	3rd JRP	Specially Empowered Heavy Penal Court were turned into Regional Heavy Penal Court.	Through this change, the extraordinary judicial practices used for crimes of terrorism were not abandoned; rather, even though the Specially Empowered Heavy Penal Courts were changed, most of the regulations of these courts were maintained. From this angle, the change seems to have consisted only of a change in name and carries no meaning beyond a superficial change in form.
TMK 101(1-b) and 15, "Investigation and Trial Procedure in Regional Heavy Penal Courts"	Suspects in custody for crimes listed in the TMK were limited in the number of lawyers they were able to consult and judges may restrict, upon the prosecutor's request, the right of the suspect to confer with their defense counsel for up to 24 hours ; these limitations resulted in violations in the right to fair trial and defence and in discrimination.	3rd JRP	Though the limitation on the number of lawyers was lifted, the 24-hour restriction of conferring with a defense counsel remained as before.	The lifting of the regulation limiting the number of lawyers is a positive development in favor of the right to a fair trial for those accused of a crime. However, the fact that restricting the suspect's right to see a lawyer in the first twenty-four hours of custody upon the request of a Republican Prosecutor and the approval of a judge means there is a risk of extra-legal practices occurring during this period. Therefore, this provision must be lifted, as it violates the right to defend oneself before a court.
Law of Criminal Procedure 251(2) was removed and TMK 10 (1-c) was amended in its place, "Investigation and Trial Procedure in Regional Heavy Penal Courts"	Decisions during the investigatory phase of terrorism cases that would normally have to be given by a judge (search, seizure, arrest, etc.) were instead taken by a member of the Specially Empowered Heavy Penal Courts who was staffing the court when the request for such a decision was made. This judge then presided over the investigation phase of the trial. After presenting her or his opinion, this judge, in contravention of the right to a fair trial, was able to join the committee of judges who were presiding over the trial itself. It was thus possible for the same judge to play a role in the court that would establish the final verdict.	3rd JRP	It was determined that only qualified judges would be able to take decisions like search, seizure, and arrest during the investigatory phase of a trial covered by the TMK as well as the decision to examine objections to such decisions.	This amendment is significant from the perspective of the impartiality and need for expertise building of the judge, but it would be unrealistic to expect that this amendment will immediately give rise to a cadre of judges striving to protect personal freedoms. While the institution introduced by the amendment is new, the judges that will be appointed by the law are those who are already serving, so it would be incorrect to expect anything to change in practice right away. The judges covered by this practice, known as "*liberty judges*" and who are appointed, make the decisions that need to be made by a judge during investigations covered by TMK Article 10. Yet actually, the system of "*liberty judges*," supposed to be a guarantee of personal freedom, must be adopted not only for crimes covered by the TMK, but for all cases under investigation.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
TMK 10(1-d), "Investigation and Trial Procedure in Regional Heavy Penal Courts"	In cases for people being tried under the TMK, upon the request of the Public Prosecutor and the approval of the judge, a lawyer's ability to examine the contents of the case file or to make copies of the documents found there could be limited if such acts threatened the aims of the investigation. But because there was nothing in the law which defined the conditions under which such acts would threaten the aims of the investigation, there were many instances of violations of the right to defense and the principle of "equality of arms."	3rd JRP	This clause was abolished.	Following this change, the general regulations relating to such limitations found in the CMK will also be applied to terrorism cases. Therefore, it will no longer be possible to limit the right of the defense to access the report containing an expert opinion or the arrestee's or suspect's testimony. This was thus a change that was aimed at protecting and ensuring the principle of "equality of arms" emphasized in the decisions of the ECtHR and thus the principle of a fair trial overall.
TMK 10(1-e), "Investigation and Trial Procedure in Regional Heavy Penal Courts"	In investigations of crimes falling within the scope of the TMK, the law stipulates that a defense lawyer's documents, files, and records of interview with the suspect will not be subject to investigation. However, there were exceptions made to this principle. In order to acquire documents related to the lawyer's status as an intermediary among members of a terrorist organization, upon the request of a prosecutor and the approval of the judge, the documents given by such people to their lawyers or vice versa could be examined by the judge.	3rd JRP	This clause was abolished.	The removal of this stipulation from the scope of the TMK meant a significant innovation from the perspective of preserving the independence of the legal profession, preventing limitations of the right to defense, and privacy between the lawyer and defendant.
CMK 202, "Defense in Native Language"	The right of suspects to defend themselves in their native language was not recognized, forcing them to defend themselves in another language in which they could not adequately express themselves. The right of a defendant to defend herself or himself is a natural right that must be interpreted in the broadest sense possible. Forcing individuals to defend themselves in a language they cannot adequately use represents a direct violation of the right to a fair trial.	Law No. 6411 (4th JRP)	Upon the reading of the indictment and the giving of testimony, the ability of suspects to orally defend themselves in another language in which they could express themselves more fluently was recognized. It was stipulated that in such cases, the state would not finance the costs of hiring an interpreter. It was stipulated that the exercise of this right should not be abused to unduly prolong the trial proceedings.	Going beyond the issue of whether the official language was sufficient for the ability of the suspect to express herself or himself, this change left it up to the suspects to determine the language in which they could express themselves best. In this respect, we can say that a right to "native-language defense" was introduced, broadening even the precedent of the ECtHR. Yet the right to defend oneself in one's native language has been subject to various restrictions. In particular, the fact that the costs of interpreter must be covered not by the state but by the suspect will likely result in it being more difficult to apply the provisions of the new law. It can be said that the change is a positive one, but also extremely lacking from the perspective of the right to a fair trial, in particular because the costs of an interpreter are not covered.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Implementation Law for the CMK, addition of provisional Art. 3	The overburdening of prosecutors with work and their resulting inability to be active and effective in trials.	1st JRP	Hoping to reduce prosecutors' workload, until 1 January 2014, implementation of the rule that prosecutors must be present during hearings at courts of first instance was lifted.	In the prosecution of criminal cases, the presence of the prosecutor at a trial hearing in addition to the court and the subject of indictment is an extension of the right to a fair trial. Unfortunately, however, the absence of the prosecutor from trials during the implementation of this article will not make much of a difference, considering the prosecutors were generally ineffective at hearings anyway. Therefore, future changes should be directed at increasing the effectiveness of prosecutors during hearings.
CMK 308, "Republican Prosecutor of the Court of Cassation's Authority to Object"	The Republican Prosecutor of the Court of Cassation has the ability to object to decisions made by lower branches of the Court of Cassation, but the resulting conflict between decisions meant that the case was forwarded directly to the court of last instance, the Court of Cassation's General Criminal Committee.	3rd JRP	The branch court of the Court of Cassation charged with making a decision upon the objection of the Republican Prosecutor of the Court of Cassation will examine the objection as soon as possible and, if approved, will amend its decision. In other cases, it will be sent to the Court of Cassation's General Criminal Committee. Yet the opportunity to submit opinions and views was not given for the phase during which the objection is being examined.	The inability of the defendant to present opinions or views on the case at this phase in the trial represents a violation of the right to a fair trial, which must be guaranteed at all stages of the trial. A requirement of the right to a fair trial, a defendant must be given the possibility to air her or his opinions at all stages of the trial. Therefore, even if this change did eliminate some of the deficiencies of the former law, the standards of fair trial outlined in the precedents of the ECtHR have not yet been reached.
TCK 94, "Torture"	Prior to the amendment, the crime of torture was subject to a statute of limitations. This was the subject of criticism in many opinions of the ECtHR.	4th JRP	The law was amended such that crimes of torture would not be subjected to statutes of limitations.	Though the amendment of the article is a positive one, the fact that it will only be applied to crimes of torture committed after the amendment comes into effect means it is clear that the fact that past violations of human rights will remain unpunished will not be resolved.
CMK 172, "Decision of Lack of Grounds for Prosecution"	The complaint of someone that the investigatory phase of the trial was not conducted effectively was not considered. Though this complaint was brought to the ECtHR and found to be a violation of rights, there was no possibility to demand that an investigation be conducted again.	4th JRP	As determined by the ECtHR in a final verdict, the decision that there were no grounds for prosecution was given in the absence of an effective investigation. The possibility has now been given for the investigatory phase of the trial to be repeated within three months of the judge's verdict.	From the perspective of basic rights and freedoms, the state's burden has now changed, from a negative obligation not to interfere in a person's rights to a positive obligation to ensure the exercise of rights and to undertake the necessary action if a person's rights are violated. From this point of view, the amendment is positive from the point of view of establishing the state's positive obligation toward rights.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Addition of Provisional Art. 2 to the CMK	A decision of the ECtHR that a Turkish court's verdict violated rights would be cause of a retrial. But the law had limited the time during which some petitions made on these grounds could be submitted, meaning that some petitions did not result in a retrial.	4th JRP	The possibility for retrial was introduced for decisions reviewed by the ECtHR since 4 February 2003 and whose sentence was found to be a violation of the ECHR, but which did not result in a retrial and whose implementation was therefore being monitored by the Committee of Ministers of the Council of Europe since 15 June 2012.	The fact that there was a limit brought to the amount of time given to petitions for a retrial after the ECtHR had decided there was a violation of rights meant that a retrial might not take place. The fact that the fourth judicial reform package eliminated this barrier is a positive and significant step toward achieving effective administration of justice.
Addition of Provisional Art. 2 to the CMK	In 2009, a stipulation limiting the appeal of a pecuniary sentence was found to be in violation of the freedom to seek justice and struck down by the Constitutional Court. As a result, there was no law governing this procedure.	1st JRP	This legal lacuna was rectified by adding a provisional clause to the CMK. This established a distinction between a prison sentence that had been converted to a fine and a verdict that had originally sentenced a fine. The limit on appeals for fines was raised from 2 thousand to 3 thousand lira. There was no limit placed on prison sentences converted to fines, thus eliminating the barriers to appeal to sentence.	As can be seen, fines that have been sentenced directly and are up to 3 thousand lira cannot be appealed. As much as this new regulation has raised the limit, considering the decision of the Constitutional Court, it is clear that it is not satisfactory from the point of view of ensuring the right to a fair trial. Looking at this change in conjunction with the decision of the ECtHR, it is clear that it is possible to establish such a limitation. However, this prerogative must of course be used only on the basis of a legitimate aim and be subject to strict regulations. The fact that fines up to 3 thousand liras sentenced directly cannot be appealed is an intervention into the right to seek justice and affects the very essence of the right to a fair trial. Thus, it would be advisable to adopt another change in this respect to this article.
Law on the High Military Administrative Court 46(4) and Law on Administrative Trial Procedure 16, "Summons and Response"	Prior to the amendment, the ECtHR had handed down decisions in cases related to damages caused by the state to the effect that Turkey had violated rights because it had not found an adequate way to eliminate the damages that slow-moving trials caused to plaintiffs.	4th JRP	Under the new regulation, in full-court cases in the High Military Administrative Court or in general administrative courts, until a final verdict has been reached, a one-time decision may be made to raise the amount of potential damages awarded without regard to the amount listed in the complaint, deadline, or other procedural rules.	This change is a positive development from the perspective of the right to a fair trial; if it is revealed during a trial that the damages caused to a person were higher than previously estimated, the inability to raise the potential compensation awarded had impeded the right to a fair trial. From this perspective, the plaintiff is now able, on a one-time basis, to raise the level of compensation if damages are also raised. Furthermore, this change will also be able to be applied not only to suits initiated after its coming into effect, but also to all cases currently underway.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Law on the High Military Administrative Court 64(1), "Remission of Trial"	Prior to the change, final verdicts given by the ECtHR against Turkey were not accepted as grounds to remit trials being carried out in the High Military Administrative Court. The ECtHR found the rejection of demands in this regard to be a violation of the right to a fair trial.	4th JRP	With this change, the ECtHR's final verdicts taken against the Turkish government were also seen as valid in cases underway in the High Military Administrative Court, opening the way for a retrial for these cases in these courts as well.	These changes brought the regulations found in the Law on Criminal Procedure, Law on Administrative Trial Procedure, and the Law on Civil Procedure into harmony with one another and secured a system-wide cohesiveness.

Evaluation

The right to a fair and honest trial has been outlined broadly and in a detailed way in both the Turkish constitution and the European Convention on Human Rights in order to ensure that people who come into contact with the judicial power of the state are tried in accordance with the rules of law and in a just manner. Though this right has been recognized abstractly, however, we see that the stipulations of the law limit, or even violate, this right in a very concrete way. In passing the judicial reform packages in an attempt to increase the effectiveness of judicial services, this was likely one of the main reasons behind the need felt to pass new regulations in this field to ensure harmonization with EU standards.

Though Turkey won the status of official EU candidate in 1999 and laws in all fields were integrated quickly into EU norms, the slowest and most troublesome change has likely been in the regulations that seek "to protect the state and the constitutional order"—criminal law, sentencing, and law enforcement. General laws like the TCK and the CMK, together with the TMK and its status as a special norm, became "protrusions" within the system of general norms. The conflict between two concepts—the concept of fighting terrorism "in every possible way," which emerged in conjunction with the 1980 coup and political developments thereafter, and the concept of "integration with EU norms in all fields" which replaced it at the start of the 2000s—has resulted in serious problems in the application of the laws. This has given rise to a number of decisions taken by the ECtHR against Turkey in cases regarding the violation of rights. By passing the judicial reform packages, lawmakers sought to eliminate such "protrusions" in the TMK and make the extraordinary norms aimed at preserving the political system comply with the basic principles and rules of law and the principle of protecting basic rights and freedoms. In this regard, the most comprehensive changes with regard to the right to a fair trial have been observed in the TMK.

Specially Empowered Courts, founded especially to try crimes of terrorism, represented one of the most significant barriers standing in the way of fair trials. Their abolition is a positive step. However, the fact that they were replaced by Regional Heavy Penal Courts with essentially the same mandate as well as the only very limited changes made to the investigation and trial procedures at these courts shows, in fact, that the main features of the old system remain in place. From this perspective, it would not be incorrect to say that the points of criticism aimed at the Specially Empowered Courts and their trial practices from before the passage of reform packages have been in many respects preserved in the new laws.

Nevertheless, we must also express the fact that a great number of improvements were made in comparison with the prior practices. In this regard, stipulations that violated the right to a fair trial were

abolished, including the limitation without exception of the number of lawyers a suspect under custody during an investigation could consult and of the authority to examine the case file, or the ability of the judge to examine a lawyer's documents related to the defense's case. Nevertheless, some provisions have been preserved, including the prohibition of some suspects from visiting with a lawyer in the first 24 hours of custody and the doubling of custody and detention periods.

Another significant change that must be considered is the recognition of the right of people to defend themselves in a language in which they can express themselves more fluently. On appearances alone, this change seems to go even beyond the right to defend oneself in one's native language, and it is thus significant as the recognition of a human right that Turkey's Kurdish citizens have long demanded. The law in its approved form, however, contains content that will make its application problematic in practice. The fact that the cost of hiring an interpreter will not be covered by the state may serve as a barrier to the free exercise of this right. The fact that this right can only be used during the prosecution phase of a trial is a significant limitation as well. Even more important is the fact that the right may be denied by the subjective decision of a judge who feels that its practice would result in the unduly lengthening of the trial process. Even if the judicial reform packages have ensured this right for defendants on paper, the fact that it was recognized only in stages means that the essence of the right is still being violated. As such, the new regulation is a positive but insufficient one, and it thus may not satisfy requirements in practice. All the same, the fact that the statute of limitations was abolished for crimes of torture is a change that a significant portion of society has long demanded. Yet many were disappointed by the fact that the amended article will only apply to crimes of torture committed after the new version comes into force.

There are some very positive changes as well, including the articles stipulating that ECtHR decisions can now be used to initiate a retrial in administrative courts as well and that charges can be dismissed in criminal cases upon the receipt of a complaint. Furthermore, if such a decision is seen as a violation of rights by the ECtHR, the potential to contest this decision in domestic courts has also been recognized. Another positive development came with the passage of a provisional article to replace a provision struck down by the Constitutional Court that limited people's right to appeal; the fact that the new article raised the limit on fines sentenced directly by the court and did not place any limits with regard to prison sentences converted to fines, in addition to making it possible to raise the amount of damages sought during a trial, are positive developments. Nevertheless, the points of criticism raised about each of these changes should also be noted.

In order to stem all the violations of the right to a fair trial, the eventual goal should be the abolition of the TMK, which serves as the basis for practices that seek to protect an abstract concept of the state at the expense of the people. The adoption of different investigation, prosecution, and sentencing regimes for different kinds of crimes has created serious inequalities. The basic target should be the elimination of such inequalities. As long as the framework of the TCK is in place, there is no need for a parallel extraordinary system of law like the TMK. True reform can only happen with the complete abolition of the TMK. The statements of the Justice Ministry appear to adopt this principle as the end goal.[13]

13 **T24 news service, "Adalet Bakanı: Önce terörü bitirmek, sonra TMK'yı kaldırmak istiyoruz" [Justice Ministry: First we want to end terrorism, then we want to abolish the TMK] (24 August 2013), http://t24.com.tr/haber/adalet-bakani-once-teroru-bitirmeksonra-tmkyi-kaldirmak-istiyoruz/237768**

4. EFFECTS ON THE EXECUTION OF SENTENCES

The execution of a sentence means the carrying out by an executing prosecutor of the terms of a conviction handed down in a criminal court. In modern sentencing, punishments given with the aim of revenge or degradation have been replaced with punishments that aim to reform the criminal. Thus, the procedures and conditions of sentencing have seen corresponding changes over time as well. The modern law of sentencing seeks to reach two basic goals: to protect society from crime and from criminals, and to rehabilitate the convict and bring her or him back into society. The notion of trying to cleanse society of crime must not turn into a practice of using prisons to sequester convicts as far as possible from society, because in this case, a convict who has completed her or his sentence will face difficulties being reintegrated into society and will most likely reenter society as another potential criminal.

In carrying out a sentence, the most fundamental aspect which must not be forgotten is that the individual who will be subjected to the punishment is a human and has rights as such. A human is the subject of law, with rights and obligations, and human rights are those enjoyed by all merely on grounds of their being human. Therefore, it is necessary for the rules applied to convicts to be considered and applied with this in mind. The decision of the ECtHR in Gençay v. Turkey included the following statement: "Because all prisoners are entitled to conditions consistent with human dignity, in order to ensure the well-being of a prisoner with regard to the practical demands of imprisonment, one must ensure, beyond the health of the prisoner, that the procedures and methods used to implement sentencing measures do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."[14] Based on this statement, we can say that the state is not only obliged not to interfere in human dignity, but also to protect it actively.

In carrying out sentences, the violation of the right to life, the most basic of all rights, is an issue when it comes to convicts suffering from illness. According to data provided by the Justice Ministry, 1,734 people lost their lives while in prison between 2001 and 2011.[15] People are dying in prison because they are ill and unable to obtain the necessary health care, yet sick people who are detained or imprisoned have an equal right to care as any other member of society. Pointing to prison conditions as a reason not to provide care related to the most basic right to life is an inacceptable argument, because, as we have seen, a not insignificant number of people have actually died while in prison.

While the capacity of correctional facilities in 2010 was listed as 114,831,[16] the number of people detained or imprisoned there was determined to be 120,814.[17] By 2012, the number of beds in such institutions had increased to 146,705, while the number of people detained or imprisoned was determined to be 136,020.[18] Even though there has been an attempt at reform by increasing the capacity of correctional institutions housing detainees and convicts, it is obvious how high the proportions remain. Such prisoner-to-capacity ratios serve to show just how difficult it is to carry out a sentence with the intent of rehabilitating a convict. Even more, we clearly face a system of sentencing that is not in accordance with human dignity; the fact that detainees and convicts are forced, because of overcrowding, to sleep in shifts or wait excessively for bathrooms, in addition to many

14 *Gençay v. Türkiye*, Application No. 10057/04 (1 December 2005).

15 Hülya Karabağlı, "Sadullah Ergin: Son 10 yılda hapishanelerde 1734 kişi öldü" [Sadullah Ergin: 1,734 people have died in prisons in the last 10 years] (26 December 2012), http://t24.com.tr/haber/sadullah-ergin-son-10-yildahapishanelerde-1734-kisi-oldu/220467

16 Justice Ministry Annual Report 2010, p. 74.

17 Data accessed from the website of the General Directorate of Prisons and Detention Facilities.

18 Data accessed from the website of the General Directorate of Prisons and Detention Facilities.

other problems in this regard, can be evaluated in this context.

Furthermore, efforts to improve the capacity of prisons should not create the false impression that the quality of life in such facilities has also improved. Especially considering the aims of the modern law of sentencing, it is necessary to increase the capacity for social activities like education and career training workshops in prisons as well. In data provided by the Justice Ministry, it is striking how high the rate for convicts' return to prisons is. 68.6 percent of child convicts under 18 return to prison within one year of their release, while 70 percent of youth convicts (18 to 20 years old) return to prison within two years of their release. This situation is a result of the fact that there is not a single serious policy of rehabilitation being pursued for the condition of imprisoned convicts. It is clear that holding people in prisons that are inappropriate for their personhood and that will not secure their rehabilitation is an insufficient means of achieving the desired goals. It is clear that programs must be implemented that are appropriate for human personhood, that respect individual differences, and that foster prisoners' talents.

The judicial reform packets have enacted changes to combat some of the problems listed above.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Sentence Execution Law 94, "Compassionate leave"	The possibility for convicts to attend the funerals of close family members was held to very strict regulations.	1st JRP and Law No. 6301	The scope of people who counted as "close family" for the purposes of funeral attendance was expanded and the conditions for attendance were made easier.	This amendment, in line with the aims of modern sentencing law, highlighted the humanitarian aspect of sentencing rules. This aspect is of high importance.
Sentence Execution Law, Provisional Art. 32	Overcrowding at prisons.	3rd JRP and Law No. 6411 (4th JRP)	The new provision makes it possible to release those convicts early who have less than one year remaining until their conditioned release begins by means of a monitored probation period before their release.	If lawmakers want to create the conditions for the early release of prisoners, the route they should pursue is not to make the period of conditional release more flexible but to reduce the extremely long prison terms being sentenced. The institution of monitored probation is incapable of monitoring whether the conditions of release are being complied with. Changing the law without first expanding the capacity of this institution will not affect a meaningful change to the system of sentence execution.
Sentence Execution Law 16, "Release of Sick Convicts"	There was no provision in the extant laws that allowed for a severely ill convict to be released other than the pardon of the President.	4th JRP	The possibility has been recognized for convicts suffering from a severe illness or disability that would prevent them from continuing to live without outside help to be taken out of prison and postpone the remainder of the sentence until they improve.	The health of a detainee or convict has been left in the care of the broad prerogative of judges and vague phrases like "endangering the social peace." Furthermore, the decision to postpone the execution of the sentence will continue to be given to the Justice Ministry's Department of Forensic Medicine, an institution known for being extremely problematic. With regard to human rights, and in connection with articles like the ban on torture and the ban on discrimination, when the amendment here is considered, it appears to be quite inadequate from the perspective of ensuring the rights of sick detainees and convicts to health.

Amended article	What was the problem?	Which judicial reform package?	Solution	Evaluation
Sentence Execution Law 17, "Postponement of Sentence Execution"	By virtue of the societal conditions they face, immediate imprisonment may affect people's life even more seriously than the execution of the sentence itself; people who the convict is responsible for taking care of may suffer to an extreme extent. Therefore, the possibility to postpone the execution of a sentence was not sufficient to achieve the aims of the law.	4th JRP	The scope of the provision providing for the postponement of the start of the execution of a prison sentence was expanded.	The expansion of the basis for the postponement of the execution of a sentence is indeed positive, but the simultaneous expansion in the number of people to whom this article cannot be applied (for example, the refusal to recognize this possibility to convicts simply because their crime was related to membership in a [criminal] organization) is not helpful. Furthermore, if the person whose sentence is being postponed is accused of another crime during this period, the postponement is automatically cancelled, in violation of the presumption of innocence. It would have been more appropriate if this article had made such a decision dependent upon the handing down of a new conviction instead.

Evaluation

That the process of executing a sentence is one carried out behind closed doors is perhaps an indicator of one of the most problematic areas of the criminal justice system. It is necessary, therefore, to establish strong rules for the procedure of sentence execution and, to the extent possible, prevent convicts from suffering from *de facto* punishments resulting from negative prison conditions beyond that to which they have already been sentenced. For this reason, it is primarily necessary to finally put an end to practices that present no fundamental benefit to the criminal justice system, including the continued imprisonment of a convict struggling with a severe illness or cutting off the education of a convicted student in midstream. Through the judicial reform packages, significant amendments have been made to the regulations, including the introduction of the possibility for the postponement of part of a sentence due to illness, along with new limitations on the application of the provisions relating to this postponement. Likewise, most of the negative legal regulations preventing detainees and convicts from participating in the funerals of close family members have been lifted, something extremely important from the perspective of these convicts' family and social relations. On the other hand, changes like the early release of convicts, passed without a planned policy and simply for the sake of relieving overcrowding in correctional facilities, can hardly be said to be appropriate.

Another important point that has to be stressed is the deficiency of the changes made to the provisions regulating the postponement of the execution of a sentence for seriously ill detainees and convicts, which give rise to violations of the right to life in prison. The greatest deficiency is that the site for decision making in this regard continues to be the Justice Ministry's Department of Forensic Medicine, a part of the executive branch of government. As was noted in the evaluation of the specific article above, the cumbersome and bureaucratic structure of the Department, and in particular the strong sense that the Department takes biased decisions toward political crimes because of its status as an "official" state body, all point to the need for a significant reform in this area. As long as no steps are taken to correct some of the problems in the Department of Forensic Medicine, the positive changes enacted through the judicial reform packages will lose meaning. Examples of this have already been seen in practice. They have cast doubt on the impartiality of this institution acting as an official legal expert

charged with taking extremely critical decisions that affect the right to life. One suggestion that could be implemented in this regard is to end the monopoly that the Department of Forensic Medicine enjoys, instead accrediting hospitals that are fully equipped and have achieved expertise in a variety of medical fields. It would then be left up to judicial bodies to decide whether to approve these hospitals' health reports as adequate.

Finally, it must be noted in this section that even if we achieve a nearly ideal legal text regulating the execution of sentences, as long as the officials responsible for carrying out sentences do not adopt the mindset reflected in these articles, violations of rights behind closed doors will continue. It is necessary, therefore, to develop the mechanisms that protect convicts and to increase the effectiveness of the institutions that already do so. It is for this very reason the Judiciary Sentencing Institution and the Correctional Facility Monitoring Commission were established, to serve as a place where complaints could be lodged about violations of convicts' rights. Nevertheless, these institutions do not have an adequate role in changing the system. Furthermore, an important step toward reducing the risk of violations would be to create an effective system of investigating complaints against those who carry out sentences arbitrarily, showing no tolerance to violations of rights.

We must express the fact that Turkey needs to revise its system of executing sentences as a whole, because it will only be possible to achieve the goals of a sentence-execution system if the system itself works as a cohesive whole. Otherwise, single-use sentencing policies, even if they temporarily reduce crowding in prisons, will not be able to produce a positive result in the long term.

Conclusion

It is a fact that the administration of justice in Turkey is quite problematic. The need for a permanent reform in the justice system began to be accepted as a fact in particular in conjunction with Turkey's process of membership in the EU, and a number of steps have since been taken in this regard. The Judicial Reform Strategy and Action Plan, prepared in 2009, is the most comprehensive and systematic of these steps. When most of the goals in the plan had been achieved by 2012, the strategy was revised and updated. The judicial reform packages, the subject of this report, came about in accordance with the aims of this strategy. The first and second judicial reform packages were passed in 2011, the third in 2012, and the fourth in 2013. As this report went to publication, Turkey was discussing the "Democratization Package," what might be termed a fifth reform package.

The aim of the judicial reform packages is both to ensure that judicial institutions function more quickly and effectively and to improve the status of human rights. In this report, the effects of the reform packages on the freedom of expression and the press, personal liberty, fair trial, and the system of criminal sentencing were examined, with an analysis for each section. This concluding section, meanwhile, will provide a general evaluation of the judicial reform packages by approaching them as a whole.

It is possible, before all else, to argue that the method used during the legislation of the judicial reform packages was problematic. The reforms were passed as an omnibus bill, as a set of changes to a number of laws, and called a "reform package." This made it difficult for practitioners to actually enforce the myriad of new changes. Such a method also made it difficult for both the judges and prosecutors implementing the law as well as the citizen making use of the law to fully understand its contents. It should be noted that, during the preparation of the reform packages, the suggestions of individuals directly affected by the changes as well as NGOs were not adequately taken into consideration and that the process of approving the reform packages was not participatory. Neither is it possible to claim that the reform packages, either from the perspective of their content or their timing, were approved as part of an overarching program. This situation was most clearly expressed in the text justifying the fourth judicial reform package. This justification text established the desire to prevent a repeat of the ECHR's verdicts against Turkey as the reason for amending these laws. The real goal of the laws, however, should have been the desire to implement human rights in the most effective way possible given humans' status as the most valuable entity in society.

The judicial reform packages ensured that significant progress was made toward fulfilling need long felt for a reform of various problematic aspects of legal provisions that violated basic rights and freedoms. Among these, the amendments to the TMK were particularly important. Two other changes were of particular significance: A number of articles that had led to violations of defendants' rights to a fair trial were removed, and the vague wording of regulations that had given rise to lawsuits against non-violent speech were given more concrete conditions, in line with ECtHR criteria. Having watched the public discussions of the reform packages after their announcement, however, it is possible to argue that

the reform packages were found not to have met society's expectations adequately and that the reforms lagged behind actual changes in society. The most concrete example of this are the changes made in the criminal codes with regard to organized crime. Punishing people for aiding a [criminal] organization or committing crimes in the name of a [criminal] organization as if they were a member of such organizations is a practice in contradiction of the most basic principles of criminal law. In this respect, however, the judicial reform packages only allowed for the possibility judges alone to decide whether to reduce a sentence, yet this did not solve the problem either. Likewise, though the change made regarding native-language defense in court was long awaited and an extremely positive development, this positive development continues to be overshadowed by the fact that the fees for interpretation must be covered by the suspect, that this right is limited by the condition of not dragging the trial out too long, and that this right was only given to suspects during the prosecution phase of the trial. It is necessary once again to note that the TMK, which establishes a separate regime of investigation, prosecution, and sentencing for people accused of crimes of terrorism, even today creates serious inequality, despite the fact that amendments did result in partial improvements. The end goal should be the complete abolition of this law. A more detailed analysis of all of the legal changes whose summary we have given in this report can be found in the more comprehensive experts' report available in Turkish.

Despite all of their deficiencies and imitations, the legal changes aimed at protecting human rights and freedoms are extremely important steps, and it is known that these changes will continue into the near future. In order to secure progress in correcting the deficiencies listed here, it is important that future steps take measures to pursue correct application of the reforms in addition to simply legislating them. In this respect, it would be helpful to remind readers once again of some of the main aspects highlighted in this report under the subheadings of freedom of thought and expression, personal liberty and security, right to fair trial, and execution of sentences.

As important as the way in which the activities of the judiciary are carried out, the institutional structure of the judicial bodies, and the related legal regulations is the perspective with which they have been approached. This perspective, a reflex to protect the state before the individual, originates in the system of organization in the judiciary and in the goal of judicial activity itself. This perspective is manifested in the spirit of the 1982 constitution. This mindset is clearly the reason that the areas in which the judicial reform packages were able to effect progress in the regulations could not fully effect the expected changes in practice. In this respect, it would not be incorrect to argue that the judicial reform packages represent a revision within the system rather than a reform aimed at transforming the system as a whole. Without enacting a transformative reform, the changes made to the content of the laws will not have a major effect in practice in the organization of the judicial system or in the structure created by this organization. For example, the decision to detain suspects is often given as a routine part of judicial practice in Turkey even when not legally necessary, and stock phrases are used in the justifications given for detention. Because this has become a standard practice after many years of taking root, as long as the mindset behind such a practice remains the same, legal changes will not affect practice, try as they may to make the decision to order a detention more difficult. We see in the judicial reform packages, for instance that important changes have been made in this area and that lawmakers aimed to establish measures like probation as a strong alternative to detention. Despite this, as noted above, the decision to detain still continues to be taken in practice, even in many cases for which probationary measures would have sufficed. Again, basic and cliché justifications are repeatedly used in such decisions, in contravention of the law. As a result, neither can probation be administered in an effective way, nor is the decision to detain suspects made in accordance with the

requirements of the respective article. The source of the problem is not the content of the law, it is a judicial system created for the purpose of protecting the public instead of the individual.

Finally, we must note that without strengthening the institutions responsible for implementing the law and ensuring the complete independence of the judiciary, changes in the content of the law alone will not be able to realize a true reform with regard to human rights in the judiciary. In this regard, this report also highlighted further necessary steps, including the reform of the Justice Ministry's Department of Forensic Medicine, the introduction of effective monitoring mechanisms to improve probation, and effectiveness-boosting measures for the Judiciary Sentencing Institution and the Facility Monitoring Commission. In addition, the role of the HSYK, though it was beyond the scope of this report, is of critical importance with regard to the independence of the judiciary and to the implementation of legal reforms.[19]

It should be reiterated that the changes brought by the judicial reform packages, despite the deficiencies we have described in this report, are positive steps. It is essential that the judicial reform packages introduced from now on do not go back on these gains and that they are prepared with an eye to fixing these deficiencies. We hope that this report has been able to contribute to the creation of a constructive discussion in this regard.

19 TESEV's report on "The HSYK after the Referendum," cited above, may be referenced on this topic.

References

AK Parti website, "Gazetecilik Faaliyeti ile ilgili tutuklu olan yok" [No one under custody because of journalistic activity] (24 July 2013), http://www.akparti.org.tr/site/haberler/gazetecilik-faaliyeti-nedeniyle-tutukluolan-kimse-yok/49902 (Accessed 5 August 2013).

Council of Europe, "Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse" (27 September 2006), https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM (Accessed 10 August 2013).

Emel Gülcan, BİA Media Monitoring Reports 2010, 2011, 2012, http://www.bianet.org/bianet/ifade-ozgurlugu (Accessed 6 August 2013).

Emel Gülcan, *BİA Medya Gözlem ve İfade Özgürlüğü Raporu* [BİA Media Monitoring and Free Speech Report] (April-June 2013), http://bianet.org/bianet/medya/148653-bia-medya-gozlem-veifade-ozgurlugu-raporu-tam-metin (Accessed 6 August 2013).

European Commission, *Turkey 2011 Progress Report* (October 2011), http://www.abgs.gov.tr/files/AB_Iliskileri/AdaylikSureci/IlerlemeRaporlari/2011_ilerleme_raporu_tr.pdf (Accessed 6 August 2013).

European Convention on Human Rights (November 1950), http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (Accessed 3 September 2013).

European Court of Human Rights Annual Report 2010, p. 157, http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf (Accessed 23 August 2013).

European Court of Human Rights Working Statistics, http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956867932_pointer (Accessed 23 August 2013).

T24 news service, "Adalet Bakanı: Önce terörü bitirmek, sonra TMK'yı kaldırmak istiyoruz" [Justice Ministry: First we want to end terrorism, then we want to abolish the TMK] (24 August 2013), http://t24.com.tr/haber/adalet-bakani-once-teroru-bitirmeksonra-tmkyi-kaldirmak-istiyoruz/237768 (Accessed 25 August 2013).

Thomas Hammarberg, "Administration of justice and protection of human rights in Turkey" (10 January 2012), p. 2, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2005423&SecMode=1&DocId=1842380&Usage=2 (Accessed 6 August 2013).

Thomas Hammarberg, "Freedom of expression and media freedom in Turkey" (12 July 2011), https://wcd.coe.int/ViewDoc.jsp?id=1814085 (Accessed 6 August 2013).

Türkiye Barolar Birliği İnsan Hakları Merkezi, "Tutuklama Raporu" [Detention Report], 10 August 2010,p.18 (Accessed: 10 August 2013).

Tutuklu Gazetecilerle Dayanışma Platformu, "3 Mayıs Dünya Basın Özgürlüğü Günü'nde Türkiye dünya birinciliğini sürdürüyor!" [Turkey's number-one spot in the world continues on 3 May World Press Freedom Day!] (3 May 2013), http://tutuklugazeteciler.blogspot.com/2013/05/3-mays-dunya-basn-ozgurlugu-gununde.html (Accessed: 6 August 2013).

About the Authors

NAİM KARAKAYA

Naim Karakaya was born in 1973. He completed his Bachelor's degree in the Faculty of Law at Marmara University and his graduate education in the Social Sciences Institute at the same university. After working as an independent lawyer between 1996 and 1999, he worked as an assistant professor in the Department of Criminal Law and Criminal Procedure in the Faculty of Law at Marmara University between 1999 and 2000. Naim Karakaya, who has published many articles on criminal law, currently works as a lawyer registered with the Istanbul Bar Association.

HANDE ÖZHABEŞ

Hande Özhabeş completed her Bachelor's degree in 2005 in the Department of International Relations and Political Science at Marmara University, her first master's degree in 2006 at Boğaziçi University's European Studies Program, and her second master's degree in 2009 at the London School of Economics' Development Studies Program. She is currently completing her doctoral studies in the Department of Public Administration at Marmara University. Hande Özhabeş, who joined the ranks of the TESEV Democratization Program, is the coordinator for the working area on Judiciary, Law, and Justice.

Notes

TESEV is continuing its work in the field of judicial reform with this report, "Judicial Reform Packages: Evaluating Their Effect on Rights and Freedoms."

Judicial reform efforts since 2011 have been characterized by a series of omnibus bills presented to the public as "judicial reform packages." By simultaneously amending a great number of laws, these four reform packages that have been passed until now have improved the legal system, long a source of suffering for citizens of Turkey caught within the legal system, in favor of rights and freedoms. On the other hand, they have also been subject to serious criticism for failing to meet the expectations of those segments of society suffering most under the old system. With societal expectations for reform surging before every new reform package, extensive discussions after the packages' passage into law revolved around how much they actually satisfied these expectations. Yet just as such discussions strayed clear of viewing the judicial system as a whole, they also generally took place among legal experts, excluding the very individuals who utilize the judicial system themselves.

Based on this consideration, we at the Democratization Program decided to prepare this report to analyze the four judicial reform packages that have been passed since 2011 from the points of view of freedom of thought and expression, personal liberty and security, the right to a fair trial, and the execution of sentencing. We hope that this report, a summary of a more comprehensive experts' report, will help make the judicial reform packages more understandable and to satisfy at least some of the need for information and discussion in the public sphere.

TESEV
Bankalar Cad. Minerva Han No: 2 Kat: 3
Karaköy 34420, İstanbul
Tel: +90 212 292 89 03 PBX
Fax: +90 212 292 90 46
info@tesev.org.tr
www.tesev.org.tr

SWEDEN

ISBN 978-605-5332-49-5