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"MILLS THAT GRIND DEFENDANTS":
CRIMINAL JUSTICE SYSTEM IN TURKEY FROM A HUMAN RIGHTS PERSPECTIVE

OSMAN DOĞRU

TESEV

“Mills That Grind Defendants”:

Criminal Justice System in Turkey from a Human Rights Perspective

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“Mills That Grind Defendants”: Criminal Justice System in Turkey from a Human Rights Perspective

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

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Preface

Etyen Mahçupyan, *TESEV Democratization Program*

As Turkey continues to call herself a democracy, in reality she is still a country that strives to become democratic. It is only recently that we have recognized the structure of Republic as a tutelary regime, and have accordingly oriented ourselves towards a mindset required to deliver the desired changes in this structure. Presumably, the most important difference between democracy and a tutelary regime materializes in the concept of "the rule of law". This principle requires all governmental bodies, including the judiciary, to be subject to law while taking into consideration the universal rights and freedoms.

In Turkey, however, and also because of its privileged position created by the present coup d'état constitution, the judiciary sees itself as the definer of the law. Seen in this light, judicial reform emerges as one of the most critical steps that needs to be taken in moving ahead with the democratization process. With this insight, judiciary has been one of the key areas on which TESEV has focused its research activities in the last four years. In studies led by Mithat Sancar, the perspectives of first judges and prosecutors, and then of the society regarding the judicial system and its function, were scrutinized. These studies were all compiled in a book and published in May 2009. In March 2010, another study was published; authored by Meryem Erdal, the study explored into the media coverage by various organizations of some specific litigations, as well as the general approach of those same organizations to the judiciary. Thereby an opportunity was created to discuss the problems of perception surrounding the judiciary system.

Democratization of the judicial system, however, requires carrying out a policy of "reform" and sharing this policy with the public. Such a reform would need to evolve around two pillars: First requires reconsidering the concepts of "independence", "impartiality" and "legitimacy" in the context of the system in its entirety and the position of the judiciary, with the aim of ensuring that they are compatible with the international norms. In this context, the relationship between the executive branch and the judiciary, the position of the judiciary between the official ideology and universal law, and election system of higher judicial bodies appear as major problematic areas. The report titled, "A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform in Turkey" edited by Serap Yazıcı and released in May 2010, discussed these issues that also constitute the subject matter of the government's judicial reform, from the point of view of universal democratic criteria, and provided a meaningful basis for the direction and framework of the reform.

On the other hand, the judiciary needs not only a systemic reform, but also a new perspective as a mechanism in order to meet citizens' need for justice. The report titled, "Access to Justice in Turkey: Indicators and Recommendations" authored by Seda Kalem and released in June 2011, explored one of the major issue areas of demand by the citizens from the judiciary: the problem of "access to justice".

TESEV Democratization Program's third policy report on Judicial Reform titled, "Mills that Grind Defendants: Criminal Justice System in Turkey from a Human Rights Perspective", authored by Osman Doğru delves into the problematic aspects of the criminal justice system in Turkey with a comparative approach through European Human Rights Convention's legal framework and implementations. The report focuses on the following problematic aspects of the defendants' rights in Turkey: detentions without indictments; prolonged pre-trial detentions and lengthy trials; prevention of defendants' access to legal counsel and the issuance of indictments based on unlawfully obtained evidences. In addition, Osman Doğru's report critically evaluates the treatment of this issue in the Judicial Reform Strategy, produced by the Ministry of Justice and puts forth specific policy recommendations.

We hope to conduce toward covering essential elements that have to be pointed out for a judicial reform, and respond to the public need for information and discussion of the matter.

Introduction

Many people in Turkey complain about and criticize the criminal justice's lack of proper functioning in recent years. Discontent with criminal justice tends to grow in periods when the state is making increased efforts to control social order through criminal justice. The discontent becomes even more visible when large numbers of people start to be charged or when the charges target prominent figures.

Not only defendants[1] but also victims of crime have complaints about the criminal justice system. Defendants complain that some of their rights and freedoms are being unfairly or disproportionately restricted during investigation and prosecution, and that they are being denied fair trial. Victims of crime, on the other hand, complain that the criminal justice system isn't functioning properly, that criminals go unpunished, and that justice is not being served. Both sides are justified in their complaints to a certain extent. But if these complaints are justified, this means that the justice system itself is aggrieving people, instead of serving justice to those that demand it. This report limits itself to an exploration of defendants' complaints about criminal justice.

By what standard can we decide if those who demand justice from the criminal justice system are justified in their complaints? The Turkish Code of Criminal Procedure ("CCP") and court decisions that interpret and apply its provisions are the two sources that determine how the justice system is going to function, in other words how a criminal case is to be investigated and decided. If the source of the complaint is the criminal procedure itself or the way it is implemented, we still have to apply legal criteria to decide if the complaint is justified, but this time these criteria will have to be those defined by human rights law. Among other international treaties to which Turkey is a party, the most important legal sources of human rights in Turkey are the European Convention on Human Rights ("Convention") and decisions of the European Court of Human Rights ("Court"), the court that interprets and enforces the Convention.

In the original Turkish version of this report, compliance with the Convention's law has been used as a measure to decide if those who demand justice are justified in their complaints. Moreover, with respect to certain complaints related to the criminal justice system, the Convention's law and the national law have been investigated, thus offering a basis for discussing national law's compliance with the Convention's law.

The present English translation, in contrast, carries out a discussion about the key points regarding defendants' rights that have been on the public agenda in recent years, with a view to their current state in terms of national law. The concluding section discusses if the "Strategy and Action Plan for Judicial Reform" prepared by the Ministry of Justice has the potential to solve the problems identified in the earlier sections.

1 **The term "defendant" was used in this report for the translation of the term "*sanık*" in Turkish. The legal term "*sanık*" refers to both legal terms "defendant" and "accused" in English.**

Criminal Justice

The Constitution of the Republic of Turkey does not define "crime". Article 38 of the Constitution contains the principle that crimes and punishments must be defined by law: No one shall be punished for any act that does not constitute a criminal offense under the law in force; penalties and security measures in lieu of penalties shall be prescribed only by law (Articles 38/1 and 38/2 of the Constitution). These constitutional provisions show that only a law can turn an act into a crime. An act is criminal if defined by the law as such. But the Constitution does not contain any general provision about what types of acts a law can or cannot define as a crime.

The Constitutional Court of the Republic of Turkey states that the legislator's discretion as regards the criminalization of acts is limited by the "basic principles of the Constitution". But what the Constitutional Court has in mind when it mentions the "basic principles of the Constitution" is mainly the characteristics of the state as defined in Article 2 of the Constitution, rather than the rights and freedoms defined in the Constitution or the Convention. This becomes evident when we consider the fact that, in the annulment cases it hears, the Constitutional Court tends to discuss compliance with the "General Principles" of the Constitution rather than compliance with the Constitution's "Fundamental Rights and Duties" or with the Convention's provisions regarding rights and freedoms.[2]

It is generally accepted in criminal law that crime has four elements. According to the Turkish Criminal Code ("TCC"), in order for a crime to exist, there must be an act (TCC 2/1); the act must have been explicitly defined as a crime by law (TCC 2/1); the act must have been committed intentionally or negligently (TCC 21/1, 22/1); and the act must not have been committed in order to comply with legal provisions (TCC 24-26), or in other words, must be unlawful. The Turkish Criminal Code also specifies the rule governing the interpretation of provisions related to crimes and punishments: National courts may not apply to analogy when enforcing provisions related to crimes and punishments, and may not interpret these provisions in such a broad manner that would result in analogy (TCC 2/1, 2/3).

Human rights law is not indifferent to how national laws define crime and how crime-related provisions are enforced. A national court's declaration of an act as criminal under national law and its imposition of a penalty may violate a right or freedom defined in the Convention. For instance, the state might be violating freedom of expression as defined in Article 10 of the Convention when a statement is criminalized and the person making that statement is punished under national law. Thus, in order to prevent such a violation, the national judge should, when deciding if the act in question meets the illegality condition, discuss whether the statement is an exercise of a right defined in the Convention.

National courts do from time to time refer to human rights norms, to the Convention, or to judgments of the Court. But decisions of national courts hardly ever discuss whether or not the case at hand constitutes an exercise of a right defined in the Convention.

The Supreme Court of Appeals (Court of Cassation) in some rare decisions refers to the freedom-related provisions of the Constitution or the Convention. But mere reference is not enough; these provisions should also be interpreted in accordance with their spirit. For instance, in its decision dated 11 July 2006, which upheld the local court's decision to convict Hrant Dink

2 **With the introduction of the right to apply to the Constitutional Court in person, the Constitutional Court will obviously find it easier to interpret and implement the rights-and-freedoms-related provisions of the Constitution.**

of the crime of "insulting Turkishness" in his 13 February 2004 article in the newspaper *Agos*, the Criminal Law General Board of the Supreme Court of Appeals referred to the Universal Declaration of Human Rights, the Convention, and the freedom-of-speech provisions of the Constitution, and quoted academic books discussing the importance and interpretation of freedom of speech, but quite contrary to all of these, concluded as follows: "The defendant has insulted Turkishness by stating that 'the clean blood that will replace the dirty blood to pour out from the Turk is available in the noble Armenian vein that will link the Armenian to Armenia', which is a derivation based on a skillful variation on Mustafa Kemal Atatürk's statement 'the strength you will need is available in the noble blood that circulates in your veins'."

Obviously, judicial bodies who believe in the existence of statements from which no "derivations" can be made and statements that cannot be used for "skillful variations" will find it hard to understand that authors may in fact be exercising their freedom of speech when creating those derivations and skillful variations. Those who regard freedom as an island in the sea of crimes and the person on that island as a potential criminal who may at any time plunge into that sea cannot possibly grasp the true essence of freedom. Before criminalizing a statement, national courts should ask themselves if convicting the person who made that statement would also constitute a punishment of the plurality, tolerance and open-mindedness that characterize a democratic society.

What are the Charges against Me?

Individuals have the right to be informed about the charges against them and to get official answers from the investigating authorities, while it is the investigating authority's duty to explain the charges to the person being charged.

NOTIFICATION UNDER ARREST

According to Article 5(2) of the Convention, everyone who is "arrested" shall be informed "promptly", "in a language which s/he understands", about the "reasons for her/his arrest" and about any "charge" against her/his.

According to the Court, Paragraph 2 of Article 5 of the Convention provides a basic guarantee that requires that a person who is deprived of his liberty be able to know why this has been done. This paragraph is an integral part of the protection mechanism specified in Article 5. According to this paragraph, a person who is deprived of her/his liberty should be explained the basic legal and factual grounds of his arrest, in a non-technical and simple language which he understands, thus giving that person the chance to apply to court under Article 5(4) to challenge the lawfulness of his being deprived of his liberty, if he deems necessary. This information should be provided promptly, but the officer in charge does not have to provide full information at the time of arrest. The questions regarding the content of information's adequacy and its prompt provision should be answered according to the specific circumstances of each case (*Fox Campbell and Hartley* (on the merits), §40; *Nowak*, §63).

The Constitution contains the following provision regarding the notification rights of a person who is apprehended or arrested: "Individuals apprehended or detained shall be promptly notified, and in all cases in writing, or orally when the former is not possible, of the reasons for their apprehension or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge." (Constitution, Article 19/4). Article 147/1/b of the CCP states that "the suspect shall be explained the charges being made".

Timing of Notification

Providing information promptly after the arrest is of great importance in terms of the exercise of the right to apply to a court for objecting to the lawfulness of the arrest (Article 5(4) of the Convention, Article 19/8 of the Constitution, Article 91/4 of the CCP). If the information is delayed, exercising this right of application will become impossible.

The Constitution does not specify the timing of the notification. The general rule is "prompt" notification, but "in collective crimes this notification shall be made, at the latest, before the individual is brought before a judge" (Article 19/4 of the Constitution). Considering that the time spent under arrest can be extended to up to four days in collective crimes (Article 19/5 of the Constitution), the Constitution allows for the notification to be delayed until right before the end of that four-day period. Those articles of the CCP that are related to apprehension and arrest (Articles 90-99) do not contain any provisions regarding the notification of the person in general, and the timing of that notification in particular. However, Paragraph 1/a of Article 147 ("Statements and Interrogations") of the CCP provides that the person "shall be explained the charges being made". Therefore, according to the CCP, a suspect can only be notified while her/his statement is taken; but it is not clear when an arrested suspect's statement is to be taken.

According to Article 23(j) of the Regulations on Apprehension, Arrest and Taking Statements (Official Gazette: 1 June 2005 – 25832) ("Regulations"), which

regulate the taking of statements, "the place where the statement was taken and the date" should be recorded. The Regulations do not mention a recording of the time (hour) when the statement was taken. Neither does the Form of Suspect Statement, which is Annex D to the Regulations, require the recording of the time when the statement was taken. However, the date, hour and minute when the statement started and ended should have been mentioned in the relevant report, in order to be able to prove when notification was made.

To conclude, as regards the timing of notification under arrest in collective crimes, national legislation does not seem to comply with the Convention.

Content of Notification

Article 19/4 of the Constitution provides that an arrested suspect shall be notified of the "charges against her/him" and the "reasons for her/his apprehension". Article 147/1/b of the CCP only states that the person "shall be explained the charges being made". Article 23/b of the Regulations repeats this provision of the CCP, *verbatim*. The Form of Suspect Statement, which is Annex D to the Regulations, contains the printed expression "the person making the statement has been explained the charges". Can the charges be deemed to have been explained in accordance with this general printed expression even if the investigating authority has not explained the charges, or has explained them only inadequately?

According to the standards of the Convention, also the questions that have been asked can show whether or not information has been provided. Therefore, in order to be able to prove that "the charges have been explained", the suspect's written statement should contain all questions asked to him, along with all the answers given.

There is another problem related to law-enforcement officers' obligation to "explain the charges" to the suspect: If, while informing the apprehended person, the law-enforcement officer is obliged to mention the name of the crime as defined in the TCC, he will have to undertake a legal description of the suspected crimes. A law-enforcement officer's personal description of the charge would have an impact on the investigation phase as a whole, and maybe even the subsequent trial phase. Therefore, before informing the suspect, and especially before taking his statement, (i) the prosecutor should have described the charges to be made and notified the law-enforcement officers of this description; or (ii) law-enforcement officers should inform the person of the suspected criminal acts without making any descriptions, and not of the charges being made, and the task of describing the crime should be left to the prosecutor.

NOTIFICATION DURING TRIAL

Notification during trial is not limited to receipt of information through the indictment. When the prosecutor presents the court her/his opinion regarding the case (opinion on the merits) at the end of trial by the relevant court, s/he may choose to describe the criminal acts in a way that differs from the indictment. The defendant should be notified of this opinion of the prosecutor as well. Moreover, the conviction of the court may have been reversed by a higher court or by an appellate court, requesting that the criminal act be described in a different way. The defendant should be notified of this higher court or appellate court decision as well.

The Constitution does not contain any provisions regarding notification of the crime charged during the trial phase. But Article 36 of the Constitution states that everyone has the right to a fair trial. The right to be notified of the criminal charge is part of the right to a fair trial. Thus, it is possible to say that the Constitution grants the right to be notified of the criminal charge. Under the heading "Duty to File a Criminal Case" (Article 170), the CCP specifies the prosecutor's right to issue an indictment and defines the elements that must be present in an indictment. Article 174 of the CCP provides that indictments that do not meet the conditions specified in Article 170 shall be returned to the prosecutor by the court. The law allows the defense to be fully informed only after the indictment is accepted by the court: "Starting on the date the indictment is accepted by the court, the defendant may examine the contents of the file and the evidence under custody, and may obtain copies of all reports and documents free of charge" (CCP 153/4).

The law also requires the prosecutor to discuss evidence (to present his opinion on the merits) at the end of the hearing (CCP 216). If in his opinion, the prosecutor claims that the crime has acquired a

character that was not present in the indictment, or if the court hearing the case thinks so, the defendant should be notified that the legal nature of the crime is subject to a change (CCP 226).

With Respect to Time

A violation of the right to be notified may occur when the person is not informed about the charges for a long time, as a result of delays in the preparation of the indictment after the launch of the investigation.

Except for Article 19 of the Constitution, which regulates personal freedoms and contains a provision about the right to receive information, there exist no provisions whatsoever regarding the right to receive information on a criminal charge. The CCP does not contain any provisions specifying the maximum time for preparing an indictment, and does not contain any time-related criteria, even one that says "as soon as possible". Therefore, national legislation does not offer any direct protection against delayed indictments, except for the indirect protection in Article 36 of the Constitution.

It is indisputable that any delay in issuing an indictment will increase the risk of harming a person under pre-trial detention for a suspected criminal act. The absence of a time criterion in the CCP and the fact that the prosecutor has absolute discretion over the time to be spent on the indictment might create problems in terms of both the right to trial within a reasonable time and the right to be informed about the criminal charges. Still, imposing a legal limit such as fifteen days, one month or three months following the launch of the investigation would also be problematic. Therefore, the time between the most recent investigative action in the investigation file and the issuance of the indictment should be reasonable, and also, if investigative action has been delayed, it should be examined, if this is attributable to the public authorities. For instance, failure to invite an easily accessible witness for a long time or delay in receiving forensic medical reports and other related issues would lengthen the investigation and may violate the individual's right to receive information through the indictment.

With Respect to Content

The scope of the indictment and its level of detail might have an impact on the defendant's right to receive information on the charges.

The content of the indictment to be issued by the prosecutor is specified in the CCP (Article 170). According to the law, the indictment must state, among other things, the place, date and time of the suspected crime (reasons of the crime), as well as the crime being charged and applicable legal provisions (nature of the crime) (CCP 170/3/h, i). The indictment must also specify the evidence and explain the suspected criminal acts by linking them to available evidence (CCP 170/4). The law also states that indictments that do not comply with Article 170 shall be returned to the prosecutor by the court (CCP 174).

However, there are no regulations as to the format, style or sections of the indictment. For instance, there are no provisions that require indictments to present facts in a chronological order. Thus, indictments are free to present events in an unordered manner. This makes it more difficult for the defense to grasp the structure of the events. Similarly, there are no regulations requiring the assignment of sequential numbers to the events described in the indictment. This makes it impossible to offer cross-references within the text and necessitates the repetitive presentation of the events. There are also no regulations that require the author of the indictment to present the events by referring to the codes of the documents in the investigation file, or to page numbers in the case of multi-page documents. This makes it very difficult to compare the events being discussed against the relevant documents. Similarly, nothing prevents the inclusion of all evidence in the indictment. Thus, lengthy transcripts of tapped communication or witness statements are incorporated into the indictment as a whole, rather than being mentioned by reference to relevant sections. All these factors make it considerably more difficult to comprehend case files and cause loss of time and effort, especially in cases involving a high number of defendants.

Why am I Being Detained?

SUSPICION OF A CRIME

The existence of the suspicion that a person has committed a crime is a *sine qua non* for depriving that person of his/her liberty during investigation or trial. Suspicion is a key for identifying the person who has committed a crime, after it has been determined that a criminal act defined by law has been committed, for instance that violence has been used to kill someone.

A person whose acts do not constitute any of the criminal acts defined by law cannot be a suspect. If it has been claimed that the suspected criminal acts cited by the relevant national authorities while arresting, detaining or imprisoning a person are not criminal acts according to national legislation, the European Court of Human Rights has the authority to inspect such violations of freedoms to a certain extent. If the acts on which the arrest, detention or imprisonment were based do not constitute a crime according to national law, Article 5(1) of the Convention will have been violated due to noncompliance with national law. The question here is not whether or not the person has committed the acts that constitute the material element of the crime; the question is whether or not the known acts of that person constitute criminal acts. In some cases that were referred to it, the Court has concluded that the acts on which the pre-trial detention or sentence was based did not constitute a crime according to national law (*Lukanov,* §42-43 and *Tsirlis and Kouloumpas,* §59, 62). To sum up, it is unlawful to deprive a person of his liberty based on the suspicion that he has performed an act that would not be criminal.

Purpose of Apprehension

To be able to apprehend, arrest and detain a person, there must exist the suspicion that the person in question has committed a crime. But not all suspects should be apprehended or arrested. Apprehension must have a purpose.

Does national legislation require the law-enforcement officials to have the intention of bringing the apprehended person before judicial authorities? According to national law, law-enforcement may apprehend "a person for whom competent authorities have issued an apprehension order or an apprehension and pre-trial detention warrant" (Regulations 5/d). By apprehending a person for whom such an order or warrant has been issued, the law-enforcement officials may be trying to enforce said order or warrant, or in other words, to bring that person before judicial authorities.

But the law-enforcement officials may also apprehend a person for whom no such order has been issued: (i) it may apprehend "a person for whom an apprehension order or pre-trial detention warrant *should be* issued" (Regulations 5/a). If the law-enforcement officials have based the apprehension on this provision, it must be thinking that a suspected crime requires that person to be apprehended; thus, the law-enforcement officials have apprehended the person in order to bring him/her before a judge who is being asked to issue a pre-trial detention order. Law-enforcement officials may also apprehend a person for whom no such warrant has been issued, if (ii) "there exist clear signs, clues and evidence that a crime has been committed or attempted, in cases where the suspect was caught *in flagrante delicto* or in other cases where a delay would be undesirable (Regulations 5/a/last paragraph). If law-enforcement officials have based the apprehension on this provision, there are no signs that it intends to bring the person before judicial authorities.

Standards of Suspicion

According to the Convention and national legislation, the existence of suspicion is not sufficient for depriving a person of his/her liberty during investigation and trial; the suspicion in question must be of a certain nature which meets certain standards.

National legislation employs different terms to describe the conditions a suspicion must meet in order to justify the deprivation of a person of his/her liberty. The Constitution does not define any suspicion standards applicable to apprehension by law-enforcement officers. It states that the conditions for apprehension shall be specified by law (Constitution 19/3). According to the law, apprehension requires the existence of a suspicion that would require "the issuance of a pre-trial detention order or apprehension order" (CCP 90/2), while a pre-trial detention order requires "clear signs" (Constitution 19/3) or "strong suspicion" (CCP 100/1). Thus, apprehension requires clear signs or strong suspicion. According to the Regulations, on the other hand, apprehension requires that "there exist clear signs, clues and evidence that a crime has been committed or attempted" (Regulations 5/a).

The Constitution also doesn't contain any provisions on the suspicion standard for arrest (detention) orders that may be issued by prosecutors. For such orders, the law requires the "existence of signs that might show that the person in question has committed a crime" (CCP 91/2). The law doesn't define a separate suspicion standard that would allow the prosecutor to extend the arrest period, but requires that the crime is "committed collectively" or that "evidence is hard to gather or there are a large number of suspects" (CCP 91/3).

With regard to the suspicion standard governing pre-trial detention orders to be issued by a judge, the Constitution requires the existence of "clear signs that the person has committed a crime" (Constitution 19/3). According to the law, on the other hand, the issuance of a pre-trial detention order requires the existence of "facts creating a strong suspicion of a crime" (CCP 100/1).

Despite these differences in terminology, national legislation might be said to be requiring the existence of "strong suspicion" for depriving a person of his/her liberty. But what is strong suspicion? Any search for a definition would be in vain! There exist no Supreme Court of Appeals decisions that define the suspicion standard employed by national legislation, that define or specify the criteria of strong suspicion, or that describe the factors that must be taken into consideration when deciding whether or not a specific event meets the criteria. It is impossible for such a thing to exist! This is because a person who has been apprehended, arrested or detained cannot directly apply to the Supreme Court of Appeals, claiming that the court performing the investigation and trial is detaining him "despite the absence of strong suspicion". He can only apply to a penal court of peace to object to an apprehension, to an arrest or to a written extension of the arrest period, which are all acts that interfere with individuals' freedom (CCP 91/4). A pre-trial detention order, on the other hand, can be objected to (101/5). Such an objection may be filed not with the Supreme Court of Appeals, but with another judge or court in the same jurisdiction as the one that issued the pre-trial detention order (CCP 268/3).

How Much Longer Will I Be Detained?

When a person is taken to the police station and be apprehended and then arrested, the suspected criminal asks the following question: For how many hours will I be detained? When he is sent to prison after being detained by a judge's order, and as the detention gets longer and longer, he asks again: How much longer will I stay in prison[3]?

TIME SPENT UNDER ARREST AT A POLICE STATION

In case of increasing concerns about domestic security or the declaration of martial law or a state of emergency, the first measure the state tends to take is to extend arrest periods. During the military regime that followed the 12 September 1980 *coup*, arrest time was extended to 90 days, and during this time detainees were at the mercy of those who detained them, without being able to see a lawyer, doctor, judge, or relative. In subsequent years, among different regions of Turkey where a state of emergency was declared, the arrest period for certain crimes was first reduced to 45 days, then to 30 days, and only in 1997 to 10 days. Excessive arrest periods without legal safeguards coincide with certain incidents that are today urging us to "face the past".

National legislation does not specify the length of the apprehension period. In other words, it is not clear how much time can pass between the apprehension by law-enforcement officers and the prosecutor's arrest order. Considering that Form A annexed to the Regulations requires separate entries for the "Date and Time of Apprehension" and the "Date and Time of Arrest", the legislator must have thought that these are two different times, and that the time between them would constitute the "apprehension period". According to the Regulations, "in the event of an apprehension by law-enforcement officers, the public prosecutor shall be immediately notified of this apprehension, the person apprehended and the measures taken" (Regulations 6/5). But how long can this "immediacy" take at most? It is obvious that it cannot be longer than 24 hours in any case.

National legislation does specify arrest periods. According to the Constitution, in ordinary circumstances, the person who has been apprehended and arrested (detained) "shall be brought before a judge at the latest within 48 hours (4 days in collective offenses), excluding the time it takes to transport said person to the nearest court of the place of detention. No one may be deprived of his/her liberty after the expiration of these periods, save by the decision of a judge. These periods may be extended in states of emergency or during martial law or war." (Constitution 19/5).

The CCP treats arrest periods differently depending on whether the crime was committed in ordinary circumstances, whether it is one of the crimes defined in Article 250 of the CCP, and whether it was committed collectively (in other words, by three or more persons even if they did not have intention of complicity – CCP 2/k):

i) In ordinary circumstances and for crimes that were not committed collectively and are not covered by Article 250, "the arrest period may not be longer than twenty-four hours following apprehension, excluding the time it takes to transport the person to the nearest court of the place of apprehension. The time it takes to transport the person to the nearest court of the place of apprehension may not exceed twelve hours" (CCP 91/1). In such a case, arrest time may not exceed thirty-six hours.

ii) In ordinary circumstances and for crimes that were not committed collectively but "are covered by Article 250, the twenty-four-hour period specified in the first paragraph of Article 91 shall be extended to forty-

3 **Arrested people are kept in "jail", and convicts in "prison", as a rule. But in practice, the jail and the prison are one and the same building.**

eight hours for apprehended persons" (CCP 251/5). In such a case, if we add the twelve hours to be spent *en route*, arrest period may not exceed sixty hours.

iii) In ordinary circumstances and for crimes that are or are not covered by Article 250 but "were committed collectively, the public prosecutor may issue a written order to extend arrest period for up to three days, which shall not exceed one day in each extension, considering the difficulty of gathering evidence or the large number of suspects." (CCP 91/3). In such a case, arrest period may not exceed four days.

iv) For crimes covered by Article 250 in state-of-emergency areas, "the four-day period specified in Article 91.3 for apprehended persons may be extended to up to seven days upon the request of the public prosecutor and the decision of the judge. Before making a decision, the judge shall hear the person who has been apprehended or detained" (CCP 251/5).

Maximum arrest periods seem to be in compliance with the Convention, at least on paper. But does the person have to be kept under arrest until the end of the maximum arrest period? No. To quote the Regulations, "arrest periods are maximum periods, and the basic rule is to conclude arrest procedures as soon as possible" (Regulations 17/3). Does national legislation provide any legal remedy for a suspect who has been detained until the end of the maximum detention period although this was not necessary? The right to apply to a judge, which is defined in Article 91/4 of the CCP is available as an ineffective remedy. The indemnification remedy in Article 141 of the CCP, on the other hand, is only available to persons who have been released at the end of the arrest period. If a person who has been detained at the end of the maximum arrest period applies to the judge and requests indemnification for being unnecessarily detained until the end of the maximum arrest period, the judge would probably deny this request, thinking that the time spent under arrest will, just like the time spent under pre-trial detention, be deducted from the prison sentence.

TIME SPENT UNDER PRE-TRIAL DETENTION IN A PRISON

One of the most basic problems in Turkish criminal justice today is that persons charged of a crime are being held under pre-trial detention for extended periods of time. The ratio of detained people to convicted people in prisons at any point in time[4] highlights only one aspect of this problem. Some questions that must be answered include the link between the crime being charged and the time spent under pre-trial detention, the link between the time spent under pre-trial detention and the sentence, and whether the time spent under pre-trial detention varies depending on the charge made at the beginning of the investigation and the charge on which the sentence is based. The question we must ask at this point is whether a detained person has the "right to be released" during investigation and trial. If he does, under what circumstances would this right be violated?

According to Article 5(3) of the Convention, a person who has been detained "[...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." The first provision in this quotation does not state that the detained person is entitled to be released. But it must be borne in mind that, according to the Court, this provision is one of the guarantees of personal freedom. Therefore, according to this provision "it is the time a defendant spends under detention and not the time spent for trial that should not exceed a reasonable limit [the time spent for trial is subject to Article 6(1)]." (*Wemhoff*, legal reasons, §5). To sum up, this provision might be said to be referring to "the detained person's right to be released within a reasonable time". It must be remembered that the right in Article 5(3) of the Convention is a right that the person should be automatically allowed to exercise, that the person does not need to make a request in order to exercise this right, and that the right to request release is also guaranteed by Article 5(4) of the Convention.

According to Article 19/7 of the Constitution "a person under pre-trial detention shall be entitled to request trial within a reasonable time or release pending trial. Release may be subject to conditions to guarantee the appearance of the person before the court during the entire trial or the enforcement of the sentence". This paragraph contains provisions that are similar to

4 **Human Rights Center of the Union of Bar Associations in Turkey 2011. "Tutuklama Raporu" [Report on Arrests] p. 16.**

those of Article 5(3) of the Convention. There is no national court decision stating that the first provision of this paragraph guarantees "the detained person's right to be released within a reasonable time". But assuming that it is among the guarantees of the right to freedom, we can say that this constitutional provision should be deemed to be referring to "the detained person's right to be released within a reasonable time". Although Article 19/7 of the Constitution defines this right as the "right to request to be released", it should be concluded that this is a right whose exercise should be automatically allowed without the need for a request by the suspect, because Article 19/8 of the Constitution contains the additional right to request to be released.

In order to determine if this right has been violated, we should first know the time spent under detention, and then decide if this is a reasonable time.

Calculating the Time under Pre-Trial Detention

Viewed with respect to the feelings of the person for whom a pre-trial detention order has been issued, detention begins when the person enters the prison and ends when he is released from prison pending trial. But from a legal viewpoint, in order to calculate the time spent under pre-trial detention, the beginning and end of the detention should be determined in accordance with the Convention and national legislation.

There are no explicit provisions in national legislation that specify when a pre-trial detention begins and ends. Although pre-trial detention begins when the judge issues the pre-trial detention order, the time spent in pre-trial detention may also include the time spent under arrest before the detention. When does a detention end? According to the Law on the Execution of Penalties and Security Measures ("LEPSM"), "sentences may not be executed unless they are finalized" (LEPSM 4). Moreover "the filing of an appeal in due time shall prevent the sentence from becoming final" (CCP 293/1). Thus, the detention continues until the sentence becomes final. Since there exists no final sentence at the appeal stage, a person detained during the appeal stage of a criminal case is a "detainee", and a person detained after the finalization of the sentence is a "convict". According to Article 63 of the TCC, "the time that has been served before the finalization of the sentence and has resulted in the individual's being deprived of his personal freedom shall be deducted from the prison sentence". Pre-trial detention deprives the person of his freedom and where the time served shall be deducted from the prison sentence in accordance with this article. Therefore, according to national legislation, pre-trial detention continues until the finalization of the sentence. Obviously, if the person has been released during investigation and trial and before the sentence has become final, the pre-trial detention will have ended on the date of release. If a person has been detained and then released during investigation and trial, and was then detained again, the relevant times spent in pre-trial detention shall be combined.

To sum up, pre-trial detention continues until the date of the first-instance court's decision according to the Convention, and until the date on which the sentence has become final (including the appeal stage) according to national legislation.

Reasonableness of the Time Spent under Pre-Trial Detention

The legal system must limit the time spent under pre-trial detention according to objective criteria rather than subjective criteria based on the feelings of the person detained. Two different sets of objective criteria are possible: (i) reasonableness, (ii) maximum legal time. If the law specifies a maximum time in pre-trial detention, the reasonableness test tends to be de-emphasized in practice.

Although the Constitution can be said to be entitling a detained person to be released within a reasonable time, it is not easy to detect the presence of this right in the CCP. Making a general assessment, the law links the reasonableness of the time spent in pre-trial detention to the existence of the conditions of pre-trial detention, and even if those conditions exist, the law limits that time with the phrase "a certain time". Thus, as soon as its conditions cease to exist, the pre-trial detention ceases to be reasonable, and if the detention continues nonetheless, it violates the detained person's right to be released within a reasonable time (Convention 5(3), Constitution 19/7). However, if the legal time limit (CCP 102) has been exceeded in a case where the conditions of detention

exist, this time we can assert that the "lawfulness condition" in Article 5(1) of the Convention and the "legality condition" in Article 19(2) of the Constitution have been violated.

Does the fact that national legislation contains a time limit for pre-trial detention invalidates the discussion of whether or not the time spent in pre-trial detention has ceased to be reasonable before the expiration of that time limit? The idea that the person can be detained until the end of the prison term prescribed for the criminal charge in question or until the end of the "certain time" specified in the law seems to be invalidating the reasonableness discussion.

Examining (or not examining) the conditions for pre-trial detention: The CCP provides that the judge or the court shall, at certain intervals during investigation or trial, or when conditions require, examine if the pre-trial detention should continue or not (CCP 104-108). The law also provides that objections can be filed against the pre-trial detention, the continuation of the detention or the denial of a related motion for release (CCP 101/2 and 5), and upon such an objection, the judge or the court should reexamine the detention.

Following these examinations, a decision is made "to continue pre-trial detention or to release the detained person" (CCP 104/2). Alternatively, the detained person may be "released under judicial supervision" (CCP 103). In addition, the prosecutor may release the detained person if he concludes at some point of the investigation that "the detention is no longer necessary" (CCP 103/2).

What legal criteria should be taken into account in order to decide if the pre-trial detention is reasonable? According to the law, this decision is made "by taking into account the provisions of Article 100" (CCP 108/1). Article 100 of the law regulates the conditions for pre-trial detention. According to this, "facts pointing out the existence of a clear criminal suspicion" and "a reason for detention" must be present for the continuation of a pre-trial detention, and if the examination reveals that these conditions are no longer present, the detention should be discontinued. It can be asserted that these legal provisions are aimed at providing the guarantees in Articles 5(3) and 5(4) of the Convention and Articles 19/7 and 19/8 of the Constitution.

However, it is not clear if decisions about the continuation of a pre-trial detention are in practice being made in accordance with these legal criteria. This is because decisions about the continuation of a pre-trial detention do not cite any reasons that required the continuation of the detention following an examination based on the relevant legal criteria. In fact, it is not even possible to know if these decisions contain any reasons because decisions of national courts to continue a pre-trial detention are not published unofficially or officially. Thus, only the detained person in question or his lawyer can know if the decision for pre-trial detention or the continuation of detention cites any reasons. This must be one of the reasons why academic studies on pre-trial detention do not refer to decisions of national courts.

Examining (or not examining) the duty of care: In addition to requiring that the reasonableness of the time spent in pre-trial detention be decided in accordance with the conditions for detention, national legislation also contains provisions implying that those authorized to investigate or try a case that involves a detained suspect/defendant have a duty of care: "In cases that involve detained persons, witnesses may be forced to appear in court" (CCP 43/1). "The Supreme Board of Judges and Prosecutors shall decide how investigations, trials involving detained persons and other issues that may be regarded urgent shall be performed during a judicial recess" (CCP 331/2). Still, considering what has been said above, it is observed that these provisions do not adequately guarantee the exercise of care in this regard.

Examining (or not examining) objections to pre-trial detention: Do judicial authorities examine the appropriateness of the pre-trial detention or compliance with the reasonable-time requirement in case of objections filed against a pre-trial detention, the continuation of the detention or the denial for a release (CCP 101/2 and 5)? It is a common observation that objections to pre-trial detentions are not successful in practice. However, even if some objections do succeed, it is not possible to undertake a comparative analysis of these or to define the underlying criteria because national courts' decisions regarding objections to pre-trial detention are not being published. The European Court of Human Rights has examined objections to pre-trial detention during the effective

times of both the earlier and current versions of the CCP, and has answered this question in the negative. The Court has determined that in Turkey, objections to decisions to continue a pre-trial detention do not have any chance of succeeding because decisions consist of stereotyped expressions, that the procedure for discussing objections to pre-trial detention is not adversarial, and that decisions are made in the absence of a hearing (*Koşti and others*, §22; *Mehmet Şah Çelik*, §27-28; *Cahit Demirel*, §32-33; *Yiğitdoğan*, §30-31).

Based on these determinations, one can conclude that Turkish courts do not discuss the duration of a pre-trial detention in view of the continuing presence or absence of the reasons for detention and do not perform the examination required by the Convention and the Constitution. Also the European Court of Human Rights has found that violations of Articles 5(3) and 5(4) of the Convention originated in wide-spread and systemic problems arising out of the malfunctioning of the Turkish criminal justice system and the state of the relevant Turkish legislation (*Cahit Demirel*, §46). The Court noted that, with regard to this systemic situation, general measures at a national level must be taken in the execution of the judgment in order to ensure the effective protection of the right to liberty in accordance with Articles 5(3) and 5(4) of the Convention (*Cahit Demirel*, §48). Accordingly, changes must be made at a national level to the laws and/or the case-law.

Two Recent Examples

During the preparation of this report, the Istanbul 10th Assize Court issued decisions for the detention or continued detention of certain defendants in the case widely known as the "Ergenekon case". The defendants objected, and the Istanbul 11th Assize Court denied the objection with its majority-vote decision dated 4 April 2011, for the following reasons:[5]

> [...] considering the state of evidence in the file, the existence of facts in the file that point to a strong criminal suspicion, the fact that evidence has not yet been fully gathered, that the defendants' positions would allow them to tamper with evidence, that the witnesses have not yet been heard, that the suspected crime is among the catalogue crimes specified in Article 100 of the CCP, and that judicial supervision measures would prove inadequate for these reasons [...]

In its 11 March 2011 decision, the same 10th Assize Court decided that some of the defendants shall continue to be in pre-trial detention, using the following expression: "[...] considering the nature of the charges, existing evidence, the time spent in detention, and the fact that the reasons for detention remain unchanged [...]".

The 11th Assize Court heard the objections to these decisions, and denied them on 4 April 2011, using the following expressions:

> [...] considering the state of evidence in the file, expert witness reports, digital materials and other sound recordings, said defendants shall continue to be in detention. Since there exists a strong criminal suspicion with regard to all defendants for whom a pre-trial detention order has been issued, and further since there exists the risk that the defendants might prevent evidence and the gathering of new evidence, the application of the judicial supervision provisions of Article 109 *et seq.* of the CCP to the defendants would be inadequate [...].

The presiding judge opposed the majority-opinion of the other two judges of the court, and issued a 7.5-page dissenting vote together with the relevant reasons. This dissenting vote contains a detailed discussion of the defendants' motion in view of the conditions for pre-trial detention. This report discusses if "strong criminal suspicion" and "reasons for detention" exist, and criticizes the majority opinion for being unfounded.

A report issued in relation to a case widely known as the "KCK case" contains the following quotation from the court decision denying motions for release:[6]

5 **The content of this link was removed from the Turkish Armed Forces web site, after this report was published in Turkish. By the end of year 2011, Turkish Armed Forces regularly started to delete its Press Announcements after seven days of content release. The same statement was refered in this link, http://www.sabah.com.tr/Yazarlar/ilicak/2011/04/09/balyoz-tutuklama-ve-genelkurmay.**

6 **Joint Platform for Human Rights 2011. "Yargı Gözlem Raporu, Diyarbakır KCK Davası; İnsan Hakları, Hukukun Üstünlüğü, İnsan Hakları Savunucularının Korunması" [Judicial Monitoring Report, Diyarbakır KCK Case; Human Rights, Rule of Law, Protecting Human Rights Advocates], http://www.ihop.org.tr/dosya/diger/20110415_KCK_TR.pdf, p. 23.**

1. The defendants shall CONTINUE TO BE UNDER PRE-TRIAL DETENTION in accordance with Article 100 *et seq.* of the Code of Criminal Procedure No. 5271, considering the existence of facts that point to a strong criminal suspicion against them, the risk that they might escape, destroy, hide or tamper with evidence or pressurize witnesses or others, and also considering that there is strong suspicion that the defendants have committed one of the crimes listed in Article 100/3-a of the Code of Criminal Procedure No. 5271 [...]

In fact, it is not surprising to see in this case yet another example of national court decisions which the European Court of Human Rights has criticized for containing stereotyped expressions instead of reasons.

The Constitutions states that "all decisions of all courts shall cite reasons" (Constitution 141/3). Moreover, the Law contains special provisions regarding the reasons for pre-trial detention: It states that, in their demands for pre-trial detention, prosecutors shall "in all cases cite reasons and explain the legal and factual reasons why judicial supervision would be inadequate" (CCP 101/1). In their decisions for "pre-trial detention, continuation of pre-trial detention or the denial of a related motion for release, judges shall cite the legal and factual reasons" (CCP 101/2).

Why are local courts and judges refraining from citing reasons that discuss the existence of the conditions for pre-trial detention? How can appellate bodies possibly examine these decisions and dismiss the objections without seeing the reasons? One thing is for sure: Since these decisions cannot be appealed to the Supreme Court of Appeals and since they are not subject to the review of the Supreme Court of Appeals, judges think that it is unnecessary to cite reasons. This is because the Supreme Court of Appeals requires decisions referred to it "to be in a form that would permit their review by the Supreme Court of Appeals".[7]

REMEDIES

Following the introduction of new constitutional provisions on personal freedoms, individuals have been allowed to file action for damages: "suffered by persons subjected to treatment contrary to the above provisions shall be compensated by the State with respect to the general principles of the law on compensation." (Constitution 19/last paragraph). Assuming that these provisions include a detained person's right to be released within a reasonable time as defined in Article 19/7 of the Constitution, one can assert that indemnity must be paid to compensate damages arising from treatment contrary to this right.

The CCP contains provisions that guarantee the right defined in Article 19/7 of the Constitution. According to the CCP, "(a) persons who have been apprehended or detained or whose pre-trial detention has been extended during a criminal investigation or trial despite the absence of the conditions specified in the laws, [...] (d) persons who, despite having been detained in accordance with the law, have not been brought before the relevant judicial authorities or given a judgment within a reasonable time [...] may ask the State to indemnify all pecuniary and non-pecuniary damages they have suffered" (CCP 141/1/a and d). According to this article, it must have been determined that the person in question has been detained "despite the absence of the conditions specified in the laws" (i.e. the conditions for pre-trial detention specified in Article 100 of the CCP) or that the person "has not been brought before the relevant judicial authorities or given a judgment within a reasonable time". According to the law, this determination can be made by the assize court with which the detained person has filed an action for damages, and not by the court who has heard or is still hearing that person's case (CCP 142/2).

The Law also specifies those persons who cannot claim damages: "Those whose arrest or detention time has been deducted from another sentence imposed on them [...]" may not claim damages (CCP 144/1/a). The deduction of the time spent in pre-trial detention from the relevant prison term is governed by the Turkish Criminal Code: "the time that has been served before the finalization of the sentence and has resulted in deprivation of personal freedom shall be deducted from the prison sentence." (TCC 63).

7 **Decision of the 4th Criminal Law Circuit of the Supreme Court of Appeals, dated 10 July 2008, numbered E. 2008/8558, K. 2008/15780.**

Therefore, when the decision becomes final, the time spent in pre-trial detention shall be deducted from the prison sentence. Since Article 144/1(a) of the CCP provides that those whose detention time has been deducted from "another sentence imposed on them" may not claim damages, it is difficult to imagine that those whose detention time will be deducted from the sentence imposed in a pending case may claim damages. The provision on the refunding of damages paid (CCP 143/1) also supports this view.

Therefore, the CCP cannot be said to be providing for the payment of damages because of the unreasonableness of a pre-trial detention time that has been deducted from the relevant prison sentence. It is also not possible to claim that a person who has been under pre-trial detention for a long time may file action for damages before the finalization of the sentence, claiming that the time he has spent in pre-trial detention has exceeded the reasonable limit. It is observed that damages can only be claimed in relation to a pre-trial detention that has turned out to be unfair after the decision became final. In other words, national legislation allows damages only for a pre-trial detention whose duration cannot be deducted from a final sentence, but it does compensate the damages related to a pre-trial detention that has lasted for an unreasonable time.

Thus, national legislation does not seem to be granting the right to damages for an unreasonably long detention that violates Article 5(3) of the Convention and Article 19(7) of the Constitution.

Problems Related to Evidence

Since evidence is a constructed tool for proving a claim, it bears the risk of being constructed by violating certain rights and freedoms. To prevent this, rules of evidence have been defined to determine the admissibility of evidence. Once again, since evidence is a constructed tool for proving a claim, it bears the risk of failing to present facts accurately. To minimize this risk, there exist rules of evidence that regulate the presentation of evidence to a court and its discussion by the prosecution and the defense in the presence of the defendant. A sentence must be based on evidence that is admissible and is found to be accurate after having being presented in a hearing. These are the requirements of the right to a fair trial. If evidence that has been gathered in violation of these rules or that has been used without being discussed has resulted in a conviction, the right to a fair trial will be violated. However, if no conviction is pronounced despite the existence of such evidence, there would be no problems regarding the right to a fair trial even if certain other rights have been violated during the gathering of that evidence.

The Constitution contains some rules-of -evidence provisions. With regard to the admissibility of evidence, Article 38(6) of the Constitution bans the use of evidence gathered by illegal means. Article 38(5) guarantees the right to silence and the right against self-incrimination by stating that "no one shall be compelled to make a statement or provide evidence that would incriminate himself or his legal next of kin". Article 138(1) requires judges to give judgment in accordance with the Constitution, the law, and their personal conviction conforming with the law. The CCP introduces freedom of evidence by stating that "a charge may be proven using any evidence that has been gathered lawfully" (CCP 217/2). The law regulates certain tools of proof that are admissible as evidence. Moreover, Law No. 2559 on the Duties and Powers of the Police ("LDPP"), and especially Additional Articles 6 and 7, contain detailed provisions on the authorities of the police to gather evidence. The CCP guarantees that evidence is presented to the court and discussed with a view to testing its accuracy (CCP 217/1).

The European Court of Human Rights has examined some sentences imposed by Turkish criminal courts and affirmed by the Supreme Court of Appeals with respect to the evidence on which they are based, and has concluded that these decisions have been made in violation of several aspects of the right to a fair trial. In more than fifty cases, the Court has also ruled that a retrial is necessary. This shows that there is a systemic problem on the evidence issue in the criminal justice system of Turkey.

SURVEILLANCE RECORDS

The law states that "a charge may be proven by using any evidence that has been gathered lawfully" (CCP 217/2). Thus, materials obtained through the surveillance of telecommunication or technical surveillance can be used to prove a crime, provided that they have been obtained lawfully.

The law regulates the surveillance of telecommunication (CCP 135-138) and technical surveillance (CCP 140). These articles define the following aspects of the investigating body's authority:

i) types (surveillance of communication, wiretapping, recording, analyzing signals; technical surveillance, recording sound and images);

ii) material conditions (a criminal investigation must have been launched against the person; the investigation must involve the crimes specified in the law; there should be grounds for strong suspicion that a crime has been committed; attempts to gather evidence using other means must have failed; the surveillance must not involve persons who can refuse testimony;

the surveillance must not have been conducted at the office or residence of the defense lawyer);

iii) formal conditions (the authorization decision must cite the nature of the charges, the identity of the person who is going to be subject to surveillance, the type of the communication device, the phone number or code that permits the identification of the communication, the type and scope of the surveillance measure);

iv) procedure (the judge makes a decision upon the prosecutor's application; in cases where a delay would be undesirable, the decision can be made by the prosecutor and then approved by the judge; the prosecutor's decision shall be sufficient for the surveillance of communication; the judicial law-enforcement officer who has been assigned after the taking of the relevant decisions must ask the telecommunications services provider to take necessary action; the recordings must be transcribed by the prosecutor's office);

v) duration (the authority shall be allowed to be exercised for a certain period of time, subject to extension).

However, in practice:

- almost all requests by prosecutors for surveillance of communication are accepted by judges, and surveillance decisions are issued;
- surveillance decisions of judges do not cite any reasons demonstrating that a serious investigation has been made to answer the question, if the conditions for this authorization have been met;
- although the law specifies the crimes for which a surveillance decision can be made (catalogue crimes), other crimes are easily and rapidly included in surveillance, claiming that these have been committed to form a criminal organization (TCC 220);
- the definition of the crime is in practice being generally made by law-enforcement officers (the police, gendarmerie), thus allowing law-enforcement officers to claim the existence of an organizational link, and these requests to broaden the scope of surveillance are easily accepted by prosecutors and judges;
- if a request for the surveillance of communication is denied by the judge on duty, additional requests are made to other judges, until the request is granted;
- although surveillance of communication is possible only in cases where evidence could not be acquired by other means, the body, house, office and car of the suspect is being searched following surveillance, and persons mentioned in the phone conversations are asked to testify as witnesses or suspects.

Is it possible to treat materials that have been obtained in violation of the rules for the surveillance and recording of communication as evidence and to base the conviction on such materials? According to the Supreme Court of Appeals, a recording obtained through surveillance cannot be used as evidence if it is related to a crime other than the catalogue crimes defined in the law. Again according to the Supreme Court of Appeals, a recording obtained through surveillance cannot be used as evidence if it is related to communication between the suspect or defendant and persons who may refuse to testify, even if the conversation is about manslaughter.

A recording obtained through surveillance must, as a rule, be related to communication, using means of telecommunication, by a suspect or defendant the surveillance of which has been decided as part of a criminal investigation or trial. If, during the surveillance of a phone for which a surveillance decision has been issued, evidence is obtained regarding another crime that is not related to that investigation or trial, this is regarded as evidence obtained coincidentally (CCP 138/2). Such evidence shall be preserved and the prosecutor shall be immediately notified. This enables the use of that piece of evidence.

The purpose of a surveillance decision is to obtain evidence regarding a suspect or defendant. However, if during the surveillance of the suspect's or defendant's phone, (i) evidence has been found that another person with whom the suspect or defendant had a conversation might have committed a crime, or (ii) third parties have joined the conversation, resulting in evidence of another crime, is it possible to regard these as "evidence obtained coincidentally" and to use them to issue a sentence? The law doesn't seem to contain any conditions that would prevent this. In order to be admissible, evidence obtained coinciden-

tally must be related to one of the criminal acts specified in the law and the prosecutor's office must have been informed of the situation immediately. The Court of Cassation has ruled that the record of conversation by a third party with whom the suspect under surveillance was having a phone conversation on another crime should be regarded as evidence obtained coincidentally, but concluded that this piece of evidence was not admissible, because the legislation that was in effect at that time did not admit evidence obtained coincidentally.

Even if surveillance records are lawfully obtained evidence, in order for them to be used as the basis of a conviction, the defendant must have been asked his opinion about the transcripts of surveillance, and the exercise of the relevant defense rights must have been allowed. According to the Supreme Court of Appeals, the defendant should be asked if the images and conversations really belong to himself, and if so, what they mean.

The lawfulness of decisions for the surveillance of communication should also be examined in terms of requirements as to form. According to the Supreme Court of Appeals, not only records of communication subject to surveillance but also the decisions of local courts underlying these records should be read out during hearings.

Judicial Reform?

Some laws that were introduced recently in Turkey can be regarded to be part of a judicial reform. Moreover, the "Yargı Reformu Stratejisi ve Eylem Planı" [Judicial Reform Strategy and Action Plan] prepared by the Ministry of Justice discusses, under ten headings, provides possible solutions to the judiciary's problems at a macro level. The plan touches upon some of the criminal justice problems discussed in this report, though only indirectly. These include the following:

Article 3.3 of the Plan states that "the effectiveness of defense must be improved in accordance with the right to a fair trial and the equality of arms principle". However, it is observed that the measures discussed under this heading are far from guaranteeing fair trial with all its elements. The Plan proposes cooperation with the Union of Bar Associations in efforts to strengthen defense, and states that the effectiveness of mandatory legal aid will be increased, but does not explain how this effectiveness is going to be achieved.

Article 4.6 of the Plan refers to "translating, into Turkish, ECtHR decisions and international documents on the judiciary, and continuing to provide access to these". This seems to be a very important effort in terms of bringing national legislation in line with the standards of the Convention. Translations prepared by the state are being published on the "Search ECtHR Decisions" page of the Court of Cassation and the "Human Rights Data Bank" of the Ministry of Justice. In their current state, these translations are a mere waste of effort, to say the least, in terms of accessibility, scope, translation quality and referenceability. The translation of ECtHR decisions should be dealt with at a more serious and academic level. The Plan states that translating these decisions is necessary to "improve professional competence in the judiciary", but this is not the only reason. Especially with the introduction of personal application to the Constitutional Court, ECtHR decisions have become one of the sources of national legislation, and for this reason increased efforts must be made for translation.

Article 6.1 of the Plan states that "studies should be made to determine the factors that affect the public's confidence in the judiciary". This is an important issue. Considering that it is lawyers who assist people in appearing before the judiciary, confidence in the judiciary can be said to begin at the time the person contacts his lawyer. The availability of fair-trial guarantees in all cases and the ability to make high-quality decisions are obviously among the important factors that affect confidence in the judiciary. Unfavorable decisions that do not cite any reasons or cite reasons of a low standard cannot be possibly explained by lawyers to ordinary citizens. Under these circumstances, unfair speculation and objections against prosecutors and judges become inevitable. Although official websites provide access to the "substantive law" created by the legislative and executive branches, "case-law", which is created by the judiciary and is one of the sources of law, is only partially accessible through the websites of private publishers. In a state who has the obligation to guarantee its citizens access to law and whose Constitution contains the expression "state governed by the rule of law", it is unacceptable that judicial decisions are not officially available on the Internet, free of charge. This deficiency is resulting in legal textbooks that are detached from case-law and do not discuss court decisions, and in the graduation of "legislation lawyers".

Article 6.3 of the Plan states that "scientific events will be organized and their results published in cooperation with members of the judiciary, the media, non-governmental organizations and universities, to discuss issues such as the right to a fair trial, independence and impartiality of the judiciary, presumption of innocence, right to privacy, freedom of communication, freedom of expression and the public's right to

information". This is a very positive statement and efforts in this regard are eagerly expected.

A very important step would be to periodically review and report the compliance of major laws in general and the Code of Criminal Procedure in particular with the standards of the Convention and the Constitution, in light of the decisions made by the European Court of Human Rights and those to be made by the Constitution.

Conclusion

During the Republican era, Turkey first made efforts to establish a criminal justice system that would comply with the domestic law standards of Western countries. But these standards were easily dismissed whenever a crisis appeared on the horizon. Independence Courts, Military Courts, the Yassıada Trials, Martial-Law Courts and State Security Courts were all courts whose extraordinary jurisdiction has always been disputed. Other jurisdictions have from time to time applied to judicial procedures that failed to convince those involved in the justice system. In fact, the political system's attempts to derive legitimacy from a criminal justice system incompatible with human rights standards has deteriorated the sustainability of the system. Efforts made in Turkey in the 1990s to adopt international human rights standards can be seen as an attempt to ensure the sustainability of the system. But it should be borne in mind that, especially in the field of criminal justice, human rights standards have met with political, judicial and bureaucratic resistance.

This report is an attempt at identifying the law and case-law aspects of the resistance to human rights standards in the field of criminal justice in Turkey. But it is not comprehensive. It does not discuss all human rights standards in criminal justice, but attempts to base its arguments on major rights such as the right to a fair trial and personal freedoms. For instance, the report does not cover the issues of independence and impartiality, which are being widely discussed recently due to recent changes in judicial structures. The report does not deal with the procedural guarantees that must be offered to individuals by judicial bodies whose independence and impartiality is assumed, but rather discusses problems faced by suspects and defendants in the criminal justice system.

This study has enabled us to observe the influence of law-enforcement officials (police and gendarmerie) within the criminal justice system as a whole. The influence of law-enforcement officials is clearly visible from the point a criminal investigation is launched, also covering the gathering of evidence and the measures to be taken regarding the suspect. One of the most important problems is the judiciary's failure to give a law-based response to law-enforcement's requests to interfere, or to be allowed to interfere, with personal rights and freedoms, and the judiciary's tendency to grant these requests immediately. The power of law-enforcement and the weakness of the judiciary is demonstrated by the fact that a person can be detained, and kept in detention for a long time, based on the nature of the crime charged by law-enforcement officers. In such a case, either law-enforcement officials should assume responsibility for its actions, or the influence of the judiciary should be improved.

In Turkey, it is possible to file an objection against violations of personal rights and freedoms during criminal prosecution. But it has been observed that the objection mechanism is not an effective remedy in criminal prosecution in terms of the protection of rights and freedoms. For instance, the European Court of Human Rights has several years ago decided that objecting to a pre-trial detention was not an effective legal remedy. Despite this decision, no changes have been made. It should be possible to apply to the Court of Cassation against a pre-trial detention.

As regards evidence, which is one of the most important issues of criminal prosecution, it is not enough that torture is no longer being used to obtain confessions and that sentences are no longer being issued on the basis of statements made under torture. It is a major problem that sentences are being based on self-incriminating statements made by the defendant without the help of a lawyer or on statements made by the suspect or defendant outside the court hearing the case. For a fair trial, these persons should testify before or be interrogated by the court hearing the case. The state might have to provide funds for the

transportation of defendants and witnesses. It should not prevent individuals from exercising their right to a fair trial on the pretext of inadequate resources.

Evidence obtained through surveillance might create problems with respect to the right of privacy and communication, even if it does not create problems with respect to the right to a fair trial. This report has not attempted any discussion of criminological evidence or forensic medicine, but it must be noted that there exist various problems in these fields as well.

The importance of the lawyer in criminal prosecution, and especially during investigation, has begun to be grasped better in Turkey. The presence of a lawyer at the arrest stage both prevents torture and provides a guarantee against self-incrimination under pressure. Obviously, this requires the lawyer to do his job properly. European Court of Human Rights decisions that identified violations and recommended the presence of a lawyer at the investigation stage are observed to have played an important role in this regard.

There has been a constant fear in Turkey that the supremacy of national authorities would be weakened, if human rights become one of the sources of national law. The introduction of the right to personally apply to the Constitutional Court in relation to the rights defined in the European Convention on Human Rights seems to have shifted the battle for supremacy from the international level to the national level. One can assert that the battle will continue at the national level as long as national courts fail giving decisions that comply with human rights law. The "Judicial Reform Strategy and Action Plan" of the Ministry of Justice seems to have failed to plan for adequate measures to prevent such a battle and to fully base criminal justice on human rights standards. Thus, this report suggests that additional efforts must be made on issues related to both substantive criminal law and criminal procedure law.

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