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The functioning of democratic institutions in Turkey

Addendum to the report[1]
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1. Introduction

1. At its meeting on 23 May 2016, the Monitoring Committee approved a draft report and adopted a draft resolution on the functioning of democratic institutions in Turkey, with a view to its presentation at the June 2016 part-session. Due to lack of time, the committee could not examine all the amendment proposals put forward by the Chairperson of the Turkish delegation, Mr Talip Küçükcan. The committee also agreed to consider, on 20 June 2016, an addendum containing possible committee amendments proposed by the co-rapporteurs.

2. We would like to provide the committee with some updated information, which is useful in the context of the debate on the report on the functioning of democratic institutions, which is scheduled for 23 June 2016 during the plenary session of the Assembly.

3. These developments took place at a time marked by continuous violence and terrorist attacks. Notably, on 7 June 2016 in the Vezneciler district of Istanbul, a car bomb killed 11 people (including seven police officers) and wounded 36. This attack was perpetrated by the "Kurdistan Freedom Hawks" (TAK, reportedly a breakaway faction from the PKK). On 8 June 2016, another car bomb attack targeted the police headquarters in the Midyat district of the south-eastern province of Mardin. The PKK claimed responsibility. Five people were killed and around 30 were wounded. Again, we strongly and unequivocally condemn these attacks, as did Parliamentary Assembly President Mr Pedro Agramunt, who denounced the "blind fanaticism of terrorists" whilst on an official visit to Turkey from 6 to 8 June 2016,[2] and the Secretary General of the Council of Europe, Mr Thorbjørn Jagland.[3]

4. Security operations continued in south-east Turkey, in particular in Nusaybin and Şırnak. According to information released by the Turkish General Staff, 495 PKK militants were killed in operations in Nusaybin (province of Mardin) and another 505 PKK militants were killed in operations in Şırnak. The authorities said that these operations ended on 3 June 2016.[4] The parliament, for its part, started work on a draft law providing legal protection to soldiers involved in security operations against groups listed as terrorist organisations. On 10 June 2016, the Defence Committee approved a draft bill, according to which commanders and the Chief of General Staff could only be investigated and put on trial with the permission of the Prime Minister, while investigations into public personnel and soldiers would require the Governor's permission. Alleged crimes committed during operations would be regarded as military offences, thus excluding civil trials,[5] which would be a step backwards from the reform introduced in 2010 through the

1. Addendum approved by the committee on 20 June 2016.
2. See www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6211&lang=2&cat=15.
3. www.coe.int/en/web/portal/-/statement-of-secretary-general-jagland-on-the-terrorist-attack-in-istanbul-today
4. www.hurriyetdailynews.com/1000-pkk-militants-killed-in-operations-in-nusaybin-sirnak.aspx?pageID=238&nID=100139&NewsCatID=341.
5. www.hurriyetdailynews.com/parliament-commission-approves-draft-proposing-legal-shield-for-turkish-soldiers-in-anti-terror-fight.aspx?pageID=238&nID=100343&NewsCatID=338.

constitutional referendum about appearances before civil courts by members of the military, including officers and persons accused of crimes against the security of the State.[6] This law could also increase the powers of the military and could lead to impunity for the forces involved in the fight against terrorist groups, which would contradict Turkey's obligations to carry out effective investigations into all allegations of misconduct by security personnel during these operations, in line with the European Convention of Human Rights (ETS No. 5).

2. Freedom of expression and of the media

2.1. Lifting of the immunity of parliamentarians

5. The Grand National Assembly of Turkey adopted, on 20 May 2016, Law No. 6178, which will suspend on a temporary basis Article 83, first sentence, of the Constitution, which grants immunity to members of parliament. We have previously expressed our concern about this procedure, which prevents a case-by-case examination. We reiterate our position that immunity should not prevent justice from being rendered, and, in the current context, we have concerns about the possible political consequences of this law on parliamentary life, as this measure will disproportionally affect the opposition members of parliament. The Peoples' Democratic Party (HDP) expressed concern about 105 cases which were hastily sent to the parliament on the very last day before the law entered into force, and that the party lacked information on 93 of these cases. The party also provided information about the 547 criminal charges contained in the other 417 files[7], and claimed that this constitutional amendment amounted to an "administrative coup" aimed at excluding the HDP from parliament.

6. On 3 June 2016, the Constitutional Court dismissed the individual applications lodged by HDP and the Republican People's Party (CHP) members. On 7 June 2016, President Erdoğan promulgated this law, thus allowing the parliament to send back, within 15 days, the files to the Ministry of Justice, for their consideration by prosecutors.

7. At the time of publication of Law No. 6178 in the Official Gazette, 152 MPs were concerned (that is 27.6% of the total number of parliamentarians) and there were 800 pending files, distributed as follows:[8]

– Republican People's Party (CHP): 57 MPs (out of 133) 211 files

– Peoples' Democratic Party (HDP): 55 MPs (out of 59) 511 files

– Justice and Development Party (AKP): 29 MPs (out of 317) 50 files

– Nationalist Movement Party (MHP): 10 MPs (out of 40) 23 files

– Independent deputy: 1 MP (out of 1) 5 files

8. We understand from the explanation sent to us by Mr Kücükçan on 31 May 2016 that "the related cases are subject to judicial procedure by independent courts, with the right to appeal to the Constitutional Court or the European Court of Human Rights", which is what the HDP announced it would do, provided it manages to collect the 110 signatures of MPs needed to lodge a request with the Constitutional Court. The Minister of Justice, Mr Bekir Bozdağ, announced on 10 June 2016 that 117 files had been referred to the Prosecutor's Office. We expect the handling of these cases to comply strictly with Council of Europe standards. We also note that some of the 152 MPs concerned are members of the Parliamentary Assembly and thus enjoy parliamentary immunity.

2.2. Alignment of Turkish legislation with the case law of the European Court of Human Rights

9. We welcome the fact that the informal working group met in Strasbourg on 13 June 2016. *Pro memoria*, this working group was set up upon the initiative of the Turkish Minister of Justice and the Secretary General of the Council of Europe, as part of the "Action Plan to prevent violations of the European Convention on

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6. Resolution 1925 (2013), paragraph 7.9.

7. "Making the propaganda of a terrorist organization propaganda" (180 times), "violating the law on meetings and demonstrations" (110 times), "praising a criminal act or person" (57 times), "insulting the President" (27 times) "inciting people to hatred and enmity" (21 times), "carrying out a criminal act on behalf of an illegal organisation while not being a member of that organisation" (23 times), "membership in an armed organisation" (9 times).

8. www.hurriyetdailynews.com/turkeys-erdogan-signs-bill-lifting-152-lawmakers-immunity-paves-way-for-799-cases.aspx?pageID=238&nID=100247&NewsCatID=338 and www.dailysabah.com/legislation/2016/06/07/president-erdogan-approves-bill-to-lift-deputies-immunity.

Human Rights".[9] One of the 14 goals of this action plan is to "enable freedom of expression and freedom of assembly in the widest sense"[10] and it foresees an analysis of "the impacts of the amendments in practice, made with the Law No. 6459 in Article 220, entitled 'Establishing Organisations for the Purpose of Committing Crimes' of the Turkish Criminal Code and in the provisions concerning the freedom of thought and expression of the Anti-Terror Law No. 3713". The group discussed issues highlighted by judgments by the European Court of Human Rights related to the interpretation of Turkish legislation aimed at fighting terrorism and its effects on freedom of expression (Article 10 of the European Convention on Human Rights) and freedom of assembly (Article 11). The group reviewed the amendments to the legislation made in 2012 (3rd Reform Package), in 2013 (4th Reform Package) and in 2014 (the Democratisation Package) and on their implementation, as well as the case law of the Turkish Constitutional Court and of the Court of Cassation, while addressing the implementation of the anti-terror law, provisions of the Penal Code and the Code of Criminal Procedure within the context of the right to freedom of expression and the implementation of the "Meetings and Demonstrations Marches Act", which is currently being reviewed. We are pleased that this informal working group agreed to meet again as soon as possible, and we remain supportive of such processes that will contribute to better aligning Turkish legislation with the European Convention on Human Rights.

3. Functioning of the judiciary

Recent developments

10. In our report and draft resolution, we mentioned the issue of the transfer of personnel in the judiciary, which led the Group of States against Corruption (GRECO) and the European Commission for Democracy through Law (Venice Commission) to raise a number of questions about the transparency of the process. This trend was confirmed on 5 June 2016, when President Erdoğan signed a decree by which the High Council of Judges and Prosecutors has completed the 2016 Civil and Administrative Judiciary Main Decree and relocated 3 228 judges and prosecutors in the civil jurisdiction and 518 judges and prosecutors in the administrative jurisdiction.[11] This represents a fourth of all judges and prosecutors in Turkey. According to the Association of Judges and Prosecutors "Yarsav" (a member of the International and European Associations of Judges), more than half (8 720 out of 15 000) judges and prosecutors have been relocated to other positions or locations by the High Council of Judges and Prosecutors since its renewal in October 2014.[12] We heard about allegations of prosecutors and judges who had been promoted, or relocated to remote places, depending on the decisions they took. This, again, raises questions. We therefore reiterate our call to implement the GRECO recommendations on this issue and to prevent any further speculation by clarifying the criteria applying to transfers and promotions of judges and prosecutors.

11. A draft law was introduced in parliament on 13 June 2016 to restructure the Court of Cassation and the Council of State as the regional courts of justice in ordinary judiciary will become operational on 20 July 2016. We welcome the establishment of these long-awaited regional courts of appeal, which should increase the efficiency of the justice system, and which requires the reshuffling of personnel in the judiciary. In this case, we understand that the setting up of regional courts of appeal will result in a decrease in the number of members of these high judicial bodies, as well as the number of their chambers, given the fact that nearly 90% of the decisions by the courts of first instance, and 80% of the decisions of administrative courts of first instance, are finalised during the appellate review. The number of files sent to the Court of Cassation is thus expected to decrease by the same percentage.

12. The total number of members of the Court of Cassation and the Council of State would be gradually reduced respectively from 516 to 200, and from 195 to 90. All members of both courts, except their first president, chief public prosecutor, deputy first presidents, deputy chief public prosecutor and presidents of the chambers, would be dismissed on the day the law comes into force. The new members would be selected by the High Council of Judges and Prosecutors five days after the law comes into effect from among the dismissed members. Other members should be relocated to other jurisdictions. In line with Article 104 of the Constitution, one fourth of the members of the Council of State will be appointed by the President of the Republic. One new aspect introduced by the law is that the tenure of judges of both courts will be limited to 12 years, although existing laws allowed judges to remain in place until the retirement age of 65.[13] This draft

9. Action plan adopted on 24 February 2014 by a Decree of the Council of Ministers and published in the Official Gazette dated 1 March 2014 and numbered 28928.
10. www.inhak.adalet.gov.tr/eng/announced/actionplan.pdf, p. 28.
11. www.hurriyetdailynews.com/turkish-govt-shakes-up-judiciary-with-decree-shifting-more-than-3700-judges-prosecutors.aspx?pageID=238&nID=100164&NewsCatID=338.
12. Information provided to the co-rapporteurs by Yarsav on 16 June 2016.

bill, in conjunction with the massive transfer of judges and prosecutors, might be yet another source of concern with respect to the independence of the judiciary. This relates in particular to the compliance of fixed terms of office for the Court of Cassation or the Council of State judges with the Constitution, and the appointment of a large number of judges by the President without involvement of other bodies (as foreseen in the Constitution[14]).

13. The Association of Judges and Prosecutors, Yarsav, for its part, fears that the draft law is against the constitutional principle of security of tenure and irremovability of judges and that the appointment procedure of the future members of the Court of Cassation and the Council of State might be selective. The Association also raised the question of the retroactive effect of a decision of the Constitutional Court, should the latter declare the law, or some of its provisions, as unconstitutional.[15]

14. Given the impact of this draft law on the structure of the judicial system, we would recommend asking the Venice Commission for an opinion on this draft law and the constitutional aspect of the appointment of members of high judicial bodies. We would also invite the relevant authorities (either members of parliament or the President of the Republic) to send this draft law to the Constitutional Court to check its constitutionality, and also to ensure that the adopted law takes into account the recommendations of the Venice Commission.

Newly adopted opinions of the Venice Commission pertaining to Turkey

15. At its meeting of 23 May 2016, the Monitoring Committee decided to ask the Venice Commission for an opinion on "the duties, competences and functioning" of the "criminal peace judgeships" established by Law 5235.

16. In the meantime, at its last meeting (10-11 June 2016), the Venice Commission adopted two opinions relevant to this report:

16.1. An opinion on "the Law of Turkey on regulation of publications on the internet and combating crimes committed by means of such publication" ("the Internet law").[16] This opinion was requested by the Parliamentary Assembly (at the recommendation of its Committee on Culture, Science, Education and Media) and looks into the means and proportionality of measures allowing the blocking of websites.[17]

16.1.1. While the Venice Commission noted that the [2007] "Law No. 5651 on the Internet aims at fighting offences committed by misuse of opportunities provided by the Internet and at taking necessary preventive measures against the broadcast promoting harmful content, as the use of drugs, sexual exploitation of children etc." (namely legitimate aims for restrictions listed in Article 10.2 of the European Convention on Human Rights), the overall assessment of the amendments introduced in 2014 and March 2015[18] "have resulted in the increase of the powers of the Presidency of Telecommunication to issue blocking orders without prior judicial review and of the number of alternative procedures for access-blocking/removal of content on different grounds". The Venice Commission notes the fundamental difference between Article 8 of the law (where the measure of access-blocking appears as a "precautionary measure"),[19] and the

13. www.hurriyetdailynews.com/govt-submits-draft-to-overhaul-entire-supreme-justice--.aspx?pageID=238&nID=100442&NewsCatID=338.
14. See Article 155 of the Constitution "the remaining quarter [of the members of the Council of State] [shall be appointed] by the President of the Republic from among officials meeting the requirements designated by law".
15. Information provided to the co-rapporteurs by Yarsav on 13 June 2016.
16. Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016) CDL-AD(2016)011.
17. For a fully detailed information on this complex matter, see Yaman Akdeniz's thorough analysis on the situation in Turkey, included in the study on "Blocking, filtering and take-down of illegal internet content", commissioned by the Council of Europe to the Swiss Institute of Comparative Law (as revised on 3 May 2016, taking into consideration comments from Turkey to the report), pp. 711-727.
18. Laws Nos. 6518 (6 February 2014) and 6527 (26 February 2014).
19. This applies when there are "sufficient grounds for suspicion that the content constitutes any of the crimes [such as] Incitement to commit suicide, Sexual exploitation of children, Facilitating the use of narcotic or stimulant substances, Supply of substances which are dangerous to health, Obscenity, Prostitution, Providing premises or facilities for gambling and any of the offences under the Law on Offences against Atatürk" (CDL-AD(2016)011, paragraph 40).

procedures under Articles 8A, 9 and 9A (which constitute fully-fledged, autonomous procedures through which substantive decisions on "access-blocking" are taken).[20] The Venice Commission highlights a number of problematic issues:

– lack of obligation of the judge to make a proportionality assessment in order to set a fair balance between competing rights;

– lack of a list of less intrusive measures than access-blocking,[21] denying the judge any room for a lower sanction in specific circumstances following a proportionality assessment;

– problematic possibility for the presidency of telecommunications to take access-blocking measures without prior judicial review.

16.1.2. The Venice Commission thus invited the Turkish authorities to implement notably the following recommendations in order for Law No. 5651 to meet the applicable European standards:

16.1.2.1.

– the procedures on access-blocking under Articles 8A, 9 and 9A should, as in the procedure under Article 8, be made dependent on the institution of a criminal or civil procedure, and the decision on access blocking under those procedures should only constitute a "precautionary measure" which can be taken in the framework of substantive criminal or civil proceedings;

– concerning all the four procedures on access blocking, the trial judge, in the subsequent criminal or civil proceedings, should be able to review the necessity of maintaining the precautionary measure on access-blocking and to remove this measure immediately if he/she considers that the measure is not necessary in the light of the criminal/civil procedure. Decisions to maintain the access-blocking measure should be duly motivated;

– if the procedures under Articles 8A, 9 and 9A are maintained as fully-fledged, autonomous procedures through which substantive decisions on "access-blocking" are taken, then appropriate procedural guarantees should be provided under these procedures: the judge should be given sufficient time to make a thorough and reasoned proportionality assessment of the interference with the freedom of expression; should have the possibility to hold a hearing; and an appeal against the decisions on access blocking taken by the peace judgeship before a higher court, including the Court of Cassation, should be possible;

– the requirement that the restriction must be "necessary in a democratic society" should be introduced in the provisions concerning the four access-blocking procedures. The necessity of a fair balance between competing rights and interests when restricting the Internet freedoms should be the guiding principle for the administrative authorities and the courts; an appropriate notification procedure should be put in place in all the access-blocking procedures under the Law. The notification should contain information on the blocking measure and the reasons put forth by the authorities to justify the measure as well as existing remedies;

– a list of less intrusive measures than that of access-blocking/removal of content should be introduced in the Law, in order to allow the authorities and the courts to apply those less intrusive measures whenever they are sufficient to attain the legitimate aim pursued by the restriction (proportionality assessment); access-blocking measures should be measures of last resort;

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20. CDL-AD(2016)011, paragraph 28: "The amendment introduced a new Article 8(A), which provided for another access-blocking procedure ('Removal of content and/or blocking of access in circumstances where delay would entail risk') which starts at the initiative of the Office of the Prime Minister and the Ministry concerned with the protection of national security and public order for a number of reasons, including the protection of national security, public order etc., with *ex post* judicial control over the blocking measure". The Venice Commission has also learned that "the term 'obscenity' indicated in Article 8, para 1/a/5 and the term 'prostitution' indicated in Article 8, para. 1/a/6, are given a broad interpretation by the peace judgeships and the presidency of telecommunications when blocking access to LGBT related websites, as websites defending LGBT rights or homosexual dating sites". (CDL-AD(2016)011, paragraph 46).

21. Such as requirement of "explanation" from the interested party (content provider, web-site owner, etc.), "response", "correction", "apology", "content renewal", "access renewal", etc. (CDL-AD(2016)011, paragraph 36).

– the system of access-blocking by a decision of the Presidency of Telecommunication without prior judicial review (administrative measure) should be reconsidered. The balancing between competing rights and/or between the measure restricting the freedom of expression and the legitimate aims pursued by the measure should be carried out by a court and not by an administrative body.[22]

16.2. In its opinion on the Legal Framework for Curfews in Turkey,[23] prepared at the request of the Monitoring Committee, the Venice Commission stressed the absence of any clear legal basis, as "the curfews imposed since August 2015 have not been based on the constitutional and legislative framework which specifically governs the use of exceptional measures in Turkey, including curfews". It noted that:[24]

> *"The Turkish authorities chose not to declare a state of emergency to engage in the security operations they considered necessary in the areas concerned, whereas these operations and the related measures (such as curfews) inevitably entail restrictions to rights and freedoms, which sometimes have extremely serious consequences.*
>
> *To comply with this [constitutional and legislative] framework, any curfew measure should be associated with emergency rule, as provided for in Articles 119 to 122 of the Constitution. This would also be in keeping with the approach of the Commission, which has stressed that de facto emergency powers should be avoided and that it is better to declare them officially along with their accompanying lists of obligations and guarantees including the obligation to inform international organisations of any derogations from fundamental rights and the reasons for these, thus subjecting their application to the supervision of these organisations or to parliamentary debate and approval."*

17. The Venice Commission also considered that "the Provincial Administration Law, on which decisions imposing curfews were based, and the decisions themselves do not meet the requirements of legality enshrined in the Constitution and resulting from Turkey's international obligations in the area of fundamental rights".

18. The Venice Commission thus invited the Turkish authorities to implement the following recommendations in particular:

– to no longer use the provisions of the Provincial Administration Law as a legal basis for declaring curfews and to ensure that the adoption of all emergency measures, including curfews, is carried out in compliance with the constitutional and legislative framework for exceptional measures in force in Turkey, showing due regard for the relevant international standards and complying with national rules and international obligations with regard to the protection of fundamental rights;

– to review the legal framework on states of emergency to ensure that all exceptional decisions and measures such as curfews taken by the authorities when a state of emergency is formally declared are subject to an effective review of legality including, in particular, consideration of their necessity and proportionality;

– to introduce all the necessary amendments to the State of Emergency Law so that there is a clear description in the law of the material, procedural and temporal arrangements for the implementation of curfews, particularly the conditions and safeguards to which they must be subject (including parliamentary and judicial supervision).

19. As indicated in the draft resolution, the Monitoring Committee expects the Turkish authorities to implement the recommendations of the Venice Commission pertaining to the legal framework governing publications on the internet and combating crimes committed by means of such publication, as well as to the legal framework on curfews.

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22. CDL-AD(2016)011, paragraph 103.
23. Opinion on the Legal Framework Governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), CDL-AD(2016)010.
24. CDL-AD(2016)010, paragraphs 98-99.

4. Conclusions

20. During our committee meeting on 23 May 2016, we agreed, as co-rapporteurs, to discuss with the Chairperson of the Turkish delegation, Mr Talip Küçükcan, the remaining amendments that had been submitted but could not be discussed by the committee. At its meeting of 20 June 2016, the committee approved following compromise amendments to the draft resolution:

– Amendment 1: In paragraph 17, replace the first part of the first sentence by the following: "The Assembly is also worried about the unsatisfactory results of the political dialogue in the region …"

– Amendment 2: In paragraph 17, add the following sentence at the end of the paragraph: "Democratic political parties should condemn and take a firm stance against terrorism."

– Amendment 3: In paragraph 19, replace the third and fourth sentence by the following: "The Assembly remains concerned about the extensive interpretation of the Anti-Terror Law, which contradicts Council of Europe standards. It thus reiterates the call it made in 2013 for Turkey to further review its definitions of offences related to terrorism and membership of a criminal organisation, in line with the 'Action Plan on Prevention of Violations of the European Convention on Human Rights' adopted by Turkey in February 2014."

21. On the basis of the information provided in this addendum, we also propose the following amendment which was approved by the committee:

– Amendment 4: After paragraph 31, insert the following paragraph: "Finally, while the Assembly welcomes the establishment of regional courts, it notes that the draft law on the restructuring of the Court of Cassation and the Council of State raises questions. It therefore asks the Venice Commission for an opinion on this draft law, and the constitutional aspects of the appointments of members of high judicial bodies. The Assembly moreover invites the relevant authorities to seek the opinion of the Turkish Constitutional Court, and also to ensure that the adopted law takes into account the recommendations of the Venice Commission."