

**A REPORT ON THE RULE OF LAW AND  
RESPECT FOR HUMAN RIGHTS IN TURKEY  
SINCE DECEMBER 2013**

**BY**

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**JULY 2015**

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## **I. INTRODUCTION**

1. In December 2013, a major corruption scandal erupted in Turkey involving the inner circle of President Recep Tayyip Erdoğan (then Prime Minister), including four Cabinet ministers, three sons of Cabinet ministers, the head of the biggest public bank and high profile businessmen. Scores of arrests were carried out in December 2013. In response, the government immediately removed the prosecutors leading the investigations from their positions and reassigned 350 police officers, including many senior officers. On 25 December 2013 police refused to carry out orders for the arrest and detention of a further tranche of suspects and the prosecutor leading the second investigation was removed from the case. The same day the four Cabinet ministers who were accused resigned from the Cabinet. Thousands of police and hundreds of public prosecutors, judges and civil servants, perceived by the Turkish government to be followers of the Hizmet movement, have since been dismissed or reassigned, and in some cases arrested and detained in custody. In September 2014 all charges against the suspects in the corruption investigation were dropped by the newly appointed public prosecutors.
2. Mr Erdoğan attempted to deflect the accusations against him by ascribing them to Fethullah Gülen, and his followers in the state apparatus, mainly those in the police and the judiciary, and accusing them of an attempted coup d'état and of forming what he described as a "parallel structure" which had infiltrated the state to work on Mr Gülen's behalf.
3. Since December 2013, the government has taken unprecedented steps to exert executive control over Turkey's judiciary, to interfere with and derail the corruption investigation, to stifle criticism in the media and on the internet and to purge supporters of the Hizmet movement from public life and to obstruct their humanitarian and educational institutions and business and professional associations. The government has brought the main institution responsible for the judiciary, the High Council of Judges and Prosecutors, under its control by purging its members of anyone suspected of opposing the AKP government, including those believed to be supporters of the Hizmet movement and replacing them with loyal supporters. It has introduced a more restrictive internet law, and after leaked audio recordings supporting the corruption allegations emerged on Twitter and YouTube, blocked access to both sites throughout Turkey in the run up to local elections in March and April 2014 and the general election in 2015.

### **A. Scope of the Report**

4. On 20 January 2015 we were requested by solicitors to the Journalists and Writers' Foundation to conduct an independent desk-based inquiry into the actions of the Turkish government, its institutions and officials against supporters of the Hizmet movement. This report will seek to analyse the actions taken by the Turkish government, its institutions and officials against supporters of the Hizmet movement from the perspective of international human rights law and to seek to identify possible patterns of systematic violations of human rights against supporters of the Hizmet movement.

The report will also contribute to raising awareness of the current situation of human rights in Turkey.

This report covers the period from December 2013 to the present, but where appropriate, earlier events are also considered.

## **B. About the Authors**

5. The authors are entirely independent and experienced in carrying out investigations objectively and impartially.

*The Rt. Hon. The Lord Woolf C.H.*

Lord Woolf was called to the English Bar in 1955 and in 1974 was appointed first Treasury Counsel (Common Law), a post which he held for five years. He was appointed to the Queen's Bench Division of the High Court of Justice in 1979, as Lord Justice of Appeal in 1986 and a Lord of Appeal in Ordinary in 1992. Between 1996 and 2000 he held the position of Master of the Rolls, and in 2000 was appointed Lord Chief Justice of England and Wales, a position from which he retired in September 2005. Lord Woolf was President of the Civil and Commercial Court for Qatar and a member of the Hong Kong Final Court of Appeal. He has conducted inquiries into controversial issues on behalf of the Government of the United Kingdom, the European Court of Human Rights, an international company, a leading university, the International Cricket Council and others. He is an Independent Crossbench Member of the House of Lords, a qualified mediator and arbitrator. He is a Visiting Professor of University College London (UCL) and the Chinese University of Hong Kong, and has chaired the Council of UCL and was Pro Chancellor of the University of London. In June 2015 he was made a Companion of Honour.

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Professor Sir Jeffrey Jowell is the Director of the Bingham Centre for the Rule of Law, part of the British Institute of International and Comparative Law (BIICL). He is Emeritus Professor of Public Law at University College London where he was Dean of the Faculty in 1981-89 and 1998-2004 and Vice Provost in 1993-99. He is a leading authority on public law, on which subject he has written widely and is also a practising barrister at Blackstone Chambers in London. He appears in cases in the UK and overseas. He has been a visiting lecturer in a number of countries and has honorary degrees from the Universities of Cape Town, Ritsumeikan, UCL and Paris. He has assisted with the constitutions of a number of countries in Africa, Asia, Europe the Middle East and the Caribbean. Between 2000–2011 he served as the UK's member of the Council of Europe's Commission for Democracy through Law ("The Venice Commission") where he assisted with the constitutional and public law of a number of countries. He was knighted in 2011 (KCMG) for services to human rights, democracy and the rule of law in Europe.

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Sir Edward Garnier QC, MP is the Conservative Member of Parliament for Harborough and a practising barrister in One Brick Court chambers, London. Between 2010-2012 he served as Solicitor-General for England and Wales. He specialises in media and information law and related human rights law. As Solicitor-General he appeared in numerous sentencing appeals before the Court of Appeal and prosecuted cases in the Divisional Court involving common law and statutory contempt by jurors, criminal defendants and media organisations. He also advised in a wide range of cases involving international law and the ECHR, the law on armed conflict, terrorism, extradition, devolution, corporate and individual crime.

*Sarah Palin*

Sarah Palin is a practising barrister in One Brick Court chambers, London. She specialises in media and information law and related human rights law. Ranked as a leading junior in Chambers and Partners Guide to the Legal Profession and the Legal 500 directory, she has appeared in many important recent cases, including acting as junior counsel on behalf of the media interveners in the Supreme Court in *Spiller v Joseph* [2011] 1 AC 852. In 2011-2012 she was junior counsel for a key core participant in The Leveson Inquiry into the culture, practices and ethics of the press.

**C. Method of work and limitations**

6. In order to establish the facts and circumstances of the alleged human rights violations and abuses by the Turkish government, the authors conducted a desk review of the following: primary and secondary Turkish legislation and policies of the Turkish government; judgments of the domestic court and European Court of Human Rights (ECtHR); written statements provided by witnesses and victims with direct knowledge of the issues and incidents or who received the information directly from a person known to them; summaries of witness testimony contained in publications or in submissions by the European Commission, Council of Europe and United Nations, research institutes, human rights organisations and academics; summary descriptions of patterns of conduct contained in public reports, submissions, academic and newspaper articles, where the authors assessed the source to be credible and reliable and the information to be valid, for the purposes of corroborating information based on first-hand sources and providing the overall context to violations. The authors have personally checked a number of facts derived from newspaper reports and individual assertion with independent legal experts in Turkey.
7. The authors were also assisted by the report of the independent British Institute for International and Comparative Law on 'Human Rights and the Rule of Law in Turkey: A Scoping Report' (2015).
8. The authors have not heard evidence on oath. A significant investigative challenge faced by the authors was the fear of reprisals by witnesses who were afraid to give evidence, even on a confidential basis.

9. The Turkish Republic is party to the European Convention on Human Rights and most major international human rights treaties,<sup>1</sup> including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (OPCAT).<sup>2</sup> As a State party to the above treaties, the Turkish Republic is bound to respect, protect, promote and fulfil the human rights of all persons within its jurisdiction. This includes the responsibility of the State to provide victims with an effective remedy, including reparation, and to undertake prompt and impartial investigations.<sup>3</sup> In assessing the human rights situation, the authors have relied on the binding legal obligations that Turkey voluntarily assumed as a State Party to the above treaties.
10. In compiling this report, the authors were guided by the principles of independence, impartiality and objectivity.

#### **D. The Hizmet Movement**

11. The Hizmet movement is a civil society movement consisting of a network of loosely connected individuals and religious, humanitarian and educational institutions, inspired by the teachings of Fethullah Gülen, an Islamic scholar and former state preacher who was born in Turkey in 1941 and is currently living in the US.<sup>4</sup> Its participants and supporters include millions of Turkish citizens.<sup>5</sup> The chief characteristics of the Hizmet movement is a commitment to interfaith dialogue, community service, making education accessible to all and the need to create bridges between the Muslim world and the West.<sup>6</sup>
12. The movement began in Turkey at the end of the 1960s through Mr Gülen's teachings in Edirne in north-west Turkey, where he worked as a preacher employed by the state. The writings of Said Nursi (1876-1960) had an important influence on Mr Gülen's thinking.<sup>7</sup> From his base in Izmir, Mr Gülen organised summer camps for high school and university students where the tenets of Islam were taught and started a network of

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<sup>1</sup> For the list of human rights treaties to which Turkey is a party and the full text of reservations, see the analysis in 'Human Rights and the Rule of Law, A Scoping Report', the British Institute of International and Comparative Law (BIICL), 2015, pp. 109-116, available at: <http://www.biicl.org/index>

<sup>2</sup> Turkey has also made a number of reservations to some of the above treaties, in particular, limiting the individual complaint procedures: see *ibid* at pp. 99-109.

<sup>3</sup> Human Rights Committee, general comment No. 31 (CCPR/C/21/Rev.1/Add.13); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex).

<sup>4</sup> For further background on the Gülen movement, see M. Hakan Yavuz and John L. Esposito (eds.), *Turkish Islam and the Secular State. The Gülen Movement*, Syracuse University Press, 2003.

<sup>5</sup> Helen Rose Ebaugh in 'The Gulen Movement: A sociological analysis of a civil movement rooted in modern Islam', Springer, New York, 2010, p.4, estimates that 10–15% of the 70 million people in Turkey are associated with the movement and 8 to 10 million members worldwide, located in over 100 countries.

<sup>6</sup> *Ibid* at p.33.

<sup>7</sup> Bülent Aras, 'Turkish Islam's Moderate Face', *Middle East Quarterly*, September 1998.

student boarding houses known as “houses of light” (or *dershanes*). In 1971, as a result of a military coup, a number of prominent people in the region who had supported religious activities and lectures for the region’s youth were arrested, including Mr Gülen who was held for six months without charge.

13. The 1980s saw the rapid development of the movement, eased by liberal measures introduced by the Özal government in the 1980s. In 1982 the first two Gülen-inspired high schools opened in Izmir and Istanbul. Since 1982 more than 1000 schools, tutoring centres, colleges, hospitals and relief organisations in over 150 countries have been established, which are affiliated to the movement.<sup>8</sup> The movement schools endeavour “to lay the foundations for a more human, tolerant citizenry of the world where people expect to cultivate their own faith perspectives and also promote the well-being of others”.<sup>9</sup> At the World Economic Forum in Davos in 2000, Prime Minister Ecevit recognised in his speech the importance of Gülen-inspired schools all over the world, and how these schools contribute to the cultures and well-being of Turkey and other countries.<sup>10</sup> All the schools, as well as other Gülen-inspired institutions, are independently owned, funded and administered by local people.
14. The Hizmet movement is also associated with TUSKON, a business confederation of 120,000 companies, which has assisted in opening up markets for Turkey, notably in Africa. Kimse Yok Mu (‘Isn’t Anyone There?’), an international relief organisation with a YTL 200 million annual budget that has provided aid to more than 100 countries, is also associated with the Hizmet movement. Affiliated media include Samanyolu Media Group and *Zaman*, owned by the Feza Media Group, which is Turkey’s largest circulation newspaper and has an English language version, *Today’s Zaman*.<sup>11</sup> Fethullah Gülen was voted by *Time* magazine one of the 100 most influential people in the world in 2013.

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<sup>8</sup> Helen Rose Ebaugh, ‘The Gulen Movement: A sociological analysis of a civil movement rooted in modern Islam’, Springer, New York, 2010, p.4.

<sup>9</sup> Lester R. Kurtz, ‘Gulen’s Paradox: Combining Commitment and Tolerance’ *Muslim World*, Vol. 95, July 2005, p379–381.

<sup>10</sup> Helen Rose Ebaugh, ‘The Gulen Movement: A sociological analysis of a civil movement rooted in modern Islam’, Springer, New York, 2010, p.29.

<sup>11</sup> ‘Turkey: The Erdogan-Gulen showdown’, *Financial Times*, 18 March 2014, <http://www.ft.com/cms/s/0/1b1d4ea0-ab8e-11e3-8cae-00144feab7de.html?siteedition=uk#axzz3bFcoWELg>



## II. CONTEXTUAL BACKGROUND

### A. Overview of Turkey's key constitutional developments

15. National hero Mustafa Kemal Atatürk who became the first President of Turkey founded modern Turkey in 1923 from the Anatolian remnants of the defeated Ottoman Empire. He established the Turkish Grand National Assembly (TGNA), which was given both legislative and executive powers.<sup>12</sup> Atatürk's reform programme, which became known as Kemalism, aimed at establishing a secular, Europe-oriented state.<sup>13</sup>
16. The new Constitution adopted by the Assembly vested legislative and executive powers in the Assembly but the Assembly was to exercise its executive authority through the President elected by the Assembly and a Council of Ministers appointed by the President. The Assembly could instruct or change ministers at will, while the Council of Ministers had no power to dissolve the new Assembly to hold new elections.<sup>14</sup> Although the Constitution was democratic in spirit, it provided a convenient instrument for this regime and the authoritarian single-party rule of the Republican People's Party (1925-1946) which was to follow since it established no checks and balances against the power of absolute majorities.<sup>15</sup>
17. In the late 1950s tension increased greatly between the governing Democrats and the opposition Republicans. Overly authoritarian measures taken by the government in early 1960, facilitated by the unrestrained nature of the legislative power, created widespread unrest in the country. On 27 May 1960 units of the Turkish army, which considered itself the guardian of Atatürk's principle of a united, secular nation-state, overthrew the government.
18. Military interventions in 1960 and 1980 resulted in new Constitutions (those of 1961 and 1982 respectively). In their framing, the military committees that carried out the coups played a predominant part. This was particularly so with the (current) 1982 Constitution, which reflected the authoritarian, statist and tutelary mentality of its military founders. Although the 1982 Constitution was adopted by an overwhelming 'yes' vote in a popular referendum, the referendum was of dubious democratic legitimacy. Critical comments as well as campaigning for a 'no' vote were banned, and the referendum was combined with the election of the President of the Republic for seven years, in which General Kenan Evren, the former Chief of the General Staff who led the military takeover, was the sole candidate.<sup>16</sup>

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<sup>12</sup> Ergun Özbudun, Introduction to Turkish Law (2011), T. Ansay, D. Wallace (eds.), pp. 19-25.

<sup>13</sup> Library of Congress – Federal Research Division Country Profile: Turkey, August 2008, available at: <http://lcweb2.loc.gov/frd/cs/profiles/Turkey.pdf>.

<sup>14</sup> Ergun Özbudun, Introduction to Turkish Law (2011), T. Ansay, D. Wallace (eds.), pp. 19-25.

<sup>15</sup> Ergun Özbudun and Ömer F. Genckaya, Democratisation and the Politics of Constitution-Making in Turkey (2009), pp. 9-13.

<sup>16</sup> Ergun Özbudun and Ömer F. Genckaya, Democratisation and the Politics of Constitution-Making in Turkey (2009), pp. 9-13.

## B. The 1982 Constitution

19. The 1982 Constitution enshrined the principles of secularism, democracy<sup>17</sup>, human rights<sup>18</sup> and the separation of powers, but was met with severe criticisms almost from its inception for being too authoritarian, statist and tutelary. The framers of the Constitution approached their task from the standpoint that the political crisis of the 1970s was due to the erosion of state authority, and more specifically the weakness of the executive branch. The underlying objective of the framers of the 1982 Constitution was therefore to create a strong state and executive to protect the state from the actions of its citizens, rather than to protect individual liberties from encroachments by the state.<sup>19</sup> Consequently starting from 1987, the Constitution has undergone 17 amendments.<sup>20</sup> The constitutional amendments of the 1990s, 2001, 2004 and 2010 were achieved through a process of inter-party negotiations and adopted by strong majorities in the Assembly.
20. Despite significant amendment, the 1982 Constitution has been criticised for retaining many of the non-liberal and non-democratic elements of its original form. Following recommendations for revision to ensure that the Constitution does not restrict human rights, a number of key amendments were adopted in September 2010, in order to align it with European Union standards. However, as part of the 2015 Universal Periodic Review (UPR), the United Nations Country Team noted that further amendments were needed, such as in relation to the protection of personal data, military justice and affirmative action for gender equality.<sup>21</sup>
21. The Commissioner for Human Rights of the Council of Europe has commented that it is widely recognised in Turkey that the current constitution needs to be replaced by a more democratic one that reflects Turkey's new political maturity and promotes greater civil liberties.<sup>22</sup> As the latest (2014) EU Progress Report on Turkey's accession candidacy stated: "[a new constitution] would constitute the most credible avenue for advancing further democratisation of Turkey, providing for the separation of powers and adequate checks and balances guaranteeing freedom, democracy, equality, the rule

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<sup>17</sup> Art 2 describes the characteristics of the Republic as a "democratic, secular, and social state governed by the rule of law, in accordance with the concepts of social peace, national solidarity, and justice; respectful of human rights, committed to Atatürk nationalism, and based on the fundamental principles set forth in the Preamble".

<sup>18</sup> See 'Human Rights and the Rule of Law, A Scoping Report', the British Institute of International and Comparative Law (BIICL), 2015, (see n 1 above), pp. 69-74.

<sup>19</sup> Thus, the preamble to the 1982 constitution stresses that "no protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, reforms, and modernism of Atatürk." See Ergun Özbudun, Introduction to Turkish Law (2011), T. Ansay, D. Wallace (eds.), pp. 26-31.

<sup>20</sup> For an summary of the amendments to the 1982 Constitution, see 'Human Rights and the Rule of Law, A Scoping Report', the British Institute of International and Comparative Law (BIICL), 2015, (see n 1 above), pp. 8-9.

<sup>21</sup> Compilation of UN Information, 2015 Periodic Review, para 4.

<sup>22</sup> "It has been widely recognised that the letter and spirit of the present Turkish Constitution represent a major obstacle to the effective protection of pluralism and freedom of expression. The present Constitution, approved in the aftermath of the *coup d'état* of 12 September 1980, enshrines a state-centrist approach, based on the principle of the 'indivisible integrity of the state', and an apparent intolerance towards pluralism": 'Freedom of expression and media freedom in Turkey', Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 12 July 2011, CommDH(2011)25, para 11, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1814085>

of law and respect for human rights, including the rights of people belonging to minorities”.<sup>23</sup>

22. Despite the ruling Justice and Development Party’s (*Adalet ve Kalkınma Partisi* or AKP) promises that following its victory in the general election in June 2011 it would renew efforts to draft a new constitution with the broadest possible participation of all political parties and civil society, since December 2013, when the AKP dissolved the Assembly’s Conciliation Committee, the constitutional reform process has been on hold.<sup>24</sup>

## **B. The political structure of the Turkish Republic**

### *The President of the Republic and the Council of Ministers*

23. Under the Constitution, executive power rests with the President of the Republic and the Council of Ministers.<sup>25</sup> The President’s more significant powers include appointing the Prime Minister, the Chief of the General Staff, members of the Constitutional Court and members of the High Council of Judges and Prosecutors (*Hâkimler ve Savcılar Yüksek Kurulu* or HSYK)<sup>26</sup>; representing the office of the Commander-in-Chief on behalf of the Assembly; ordering the use of the Turkish armed forces when the Assembly is not in session; proclaiming martial law or a state of emergency in collaboration with the Council of Ministers; summoning the Assembly into extraordinary session when he deems it necessary; promulgating laws; submitting proposed constitutional amendments to popular referenda; and dissolving the Assembly and calling for new elections.<sup>27</sup>
24. Most of the President’s powers require the participation of the Prime Minister and the ministers concerned or may be exercised only on the proposal of another body or are circumscribed by clear conditions. Where the President may act alone, such presidential acts are excluded from judicial review, including review by the Constitutional Court.<sup>28</sup>
25. The Council of Ministers (*Bakanlar Kurulu*) is composed of the Prime Minister designated by the President from among the members of the Assembly and various ministers nominated by the Prime Minister and appointed by the President.<sup>29</sup> The President on the proposal of the Prime Minister can dismiss ministers from their duties. When the Council of Ministers is formed, the government’s programme is read before the Assembly and a vote of confidence is taken.<sup>30</sup> As the chairman of the

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<sup>23</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700), 8 October 2014, p. 6, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf)

<sup>24</sup> Ibid at p. 6.

<sup>25</sup> Art 8 of the Turkish Constitution.

<sup>26</sup> For the reorganisation of the HSYK in 2014, see paras 62-70, 78-83 below.

<sup>27</sup> Arts 101-106 of the Turkish Constitution.

<sup>28</sup> Art 105 of the Turkish Constitution.

<sup>29</sup> Art 109 of the Turkish Constitution.

<sup>30</sup> Arts 109-112 of the Turkish Constitution.

Council of Ministers, the Prime Minister ensures co-ordination among the ministries and supervises the implementation of the general policy of the government.<sup>31</sup>

26. The system of electing the President was changed in 2007 from being elected by the Assembly from among its own members. The President is now elected by direct popular vote for a term of five-years, with eligibility for one additional term.<sup>32</sup>

### *The changing role of the President*

27. In 2014, the former leader of the AKP, Recep Tayyip Erdoğan became the first directly elected President of the Republic with a small majority of 51.79% of the vote. The joint candidate of the Republican People's Party (*Cumhuriyet Halk Partisi* or CHP) and the Nationalist Movement Party (*Milliyetçi Hareket Partisi* or MHP) came second with 38.4% of the vote.<sup>33</sup> Voter turnout at 74.12% was considerably lower than in all recent parliamentary elections. President Erdoğan received criticism both from his political opponents and international observers for biased media coverage, the use of his official position as Prime Minister and the misuse of public resources to the benefit of the Prime Minister in his election campaign, giving him a "distinct advantage over the other candidates".<sup>34</sup> Mr Erdoğan was able to use government resources and facilities freely in his campaign, while the campaigns for the two opposition candidates were poorly financed. Furthermore, the state-owned Radio and Television Corporation (TRT) heavily concentrated on the Erdoğan campaign, granting almost no room to the opposition candidates.<sup>35</sup> Thus, the playing field was markedly "uneven" in the view of some observers.<sup>36</sup> Following the President Erdoğan's inauguration, a new government was appointed on 29 August 2014, led by Prime Minister Ahmet Davutoğlu who also succeeded Mr Erdoğan as leader of the AKP. In early 2015 there were reports of tension between Mr Davutoğlu and Mr Erdoğan in respect of issues ranging from corruption, to the Kurdish conflict and the proper role of the President.<sup>37</sup>
28. Mr Erdoğan made it clear in his campaign that, if elected, he would not be a passive or ceremonial president, but an active one who will use his constitutional powers to the maximum, such as his quasi-legislative powers to issue presidential orders, which are immune from judicial review.<sup>38</sup> Since his election he has transformed the nature of

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<sup>31</sup> Art 112 of the Turkish Constitution.

<sup>32</sup> Art 102 of the Turkish Constitution.

<sup>33</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700, 8 October 2014, (see n 23 above), p.7.

<sup>34</sup> 'International Election Observation Mission, Turkey - Presidential Election', Parliamentary Assembly of the OSCE and the Council of Europe, Preliminary Findings and Conclusions, available at: <http://www.osce.org/odihr/elections/turkey/122553?download=true>. For concerns about unequal television coverage, see 'Diminishing press freedom in Turkey', Rethink Institute, November 2014, p.15 available at: <http://www.rethinkinstitute.org/diminishing-press-freedom-turkey/>

<sup>35</sup> 'The 2014 Presidential Elections in Turkey: A post-election analysis', Ergun Özbudun, September 2014.

<sup>36</sup> Ibid.

<sup>37</sup> 'Rift widens between Turkey's Erdoğan and his successor', Financial Times, 24 March 2015, available at: <http://www.ft.com/cms/s/0/47185e58-d231-11e4-ae91-00144feab7de.html#axzz3ZBQxgQUH>

<sup>38</sup> 'Erdoğan's presidency and the Constitution', Prof Levent Köker, Turkish Review, 1 September 2014, available at [http://www.turkishreview.org/opinions/Erdoğan-s-presidency-and-the-constitution\\_540958](http://www.turkishreview.org/opinions/Erdoğan-s-presidency-and-the-constitution_540958); 'Turkey election: Erdoğan secures win in drive for power', The Telegraph, 10 August 2014, available at:

the role, including by exercising his constitutional right to chair meetings of the cabinet, which is the first time a President has done so in recent years.<sup>39</sup>

29. He and other party spokesmen also indicated that if they obtained the necessary three-fifths majority needed for a constitutional amendment in the general election in June 2015, they would change the system of government to a ‘super-presidential’ one and did not hide their intention of amending the constitution in order to create a more politically dependent and supine judiciary.<sup>40</sup> As Professor Dr Ergun Özbudun, a leading constitutional expert who led the group of academics invited by President Erdoğan to draft a new Constitution stated: “In the meantime, Erdoğan [has made] the system function in a semi-presidential fashion not by de jure but by de facto means, namely by appointing a loyal prime minister [Ahmet Davutoğlu] and cabinet.”<sup>41</sup> He further commented:

“The government’s proposal for a presidential system will lead to too much concentration of power in the President’s hands. What the AKP proposes is not an American style presidency, but more or less one man rule without the checks and balances of the US constitution. Under certain circumstances, the President would be allowed to run the country with decree laws, which is inconceivable in the US. It is a kind of ‘super-presidentialism’. With weak judicial independence, and with a unitary centralised system, that is exactly the opposite of the US. There will be a natural tendency toward the concentration of power in the hands of the President”.<sup>42</sup>

30. In the event, the AKP failed to secure a sufficient majority to implement constitutional change in the June 2015 general election. The election result has been widely seen as a rejection of Mr Erdoğan and the AKP’s plans to replace the existing parliamentary system with one in which more powers are concentrated in the presidency.<sup>43</sup>

### *The legislature*

31. The Turkey Constitution provides that the Turkish Grand National Assembly (“TGNA”) has sole authority to enact laws for application throughout Turkey. The unicameral 550-seat Assembly is elected for a four year term under a proportional representation system by direct universal adult suffrage.<sup>44</sup>

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<http://www.telegraph.co.uk/news/worldnews/europe/turkey/11024861/Turkey-election-Recep-Tayyip-Erdoğan-secures-win-in-drive-for-power.html>

<sup>39</sup> ‘Turkey’s Erdoğan to chair first cabinet meeting as president’, The Guardian, 29 December 2014, available at: <http://www.theguardian.com/world/2014/dec/29/turkey-president-Erdoğan-chair-cabinet-meeting>

<sup>40</sup> ‘The 2014 Presidential Elections in Turkey: A post-election analysis’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, September 2014, available at: [http://www.iai.it/sites/default/files/gte\\_pb\\_18.pdf](http://www.iai.it/sites/default/files/gte_pb_18.pdf)

<sup>41</sup> Ibid.

<sup>42</sup> Interview with Ergun Özbudun, Hürriyet, 2 March 2014, available at:

<http://www.hurriyetdailynews.com/akps-presidential-system-will-lead-to-one-man-rule.aspx?PageID=238&NID=79041&NewsCatID=341>

<sup>43</sup> ‘Turkey votes in election that could bolster president’s powers’, The Guardian, 7 June 2015, available at:

<http://www.theguardian.com/world/2015/jun/07/turkey-votes-election-could-bolster-presidents-powers-erdogan>.

<sup>44</sup> Art 75 of the Turkish Constitution.

32. The Assembly can amend the Constitution if the proposal is adopted by a two-thirds majority of the total number of members of the Assembly.<sup>45</sup> If a proposal receives less than the requisite two-thirds but over three-fifths of the total number of members of the Assembly, it is then submitted to popular referendum. A simple majority of votes is required for the adoption of constitutional amendments submitted to popular referendum. Proposals for constitutional amendment must be put forward by at least one-third of the total number of members of the Assembly.<sup>46</sup>

### *The rule of the AKP*

33. President Erdoğan co-founded the AKP in 2001. Since first coming to power in 2002 the party has established a clear political hegemony, with three consecutive victories in the 2002, 2007 and 2011 parliamentary elections, three local elections (2004, 2009 and 2014), two constitutional referendums (2007 and 2010) and the presidential elections of 2014.<sup>47</sup>
34. In the general election held on 7 June 2015 the AKP lost its parliamentary majority but remained the largest party in Parliament with 258 seats and 40.9% of the vote.<sup>48</sup> In 2008, the Constitutional Court narrowly rejected a petition by the chief prosecutor to ban the AKP and 71 of its officials, including President Gül and Mr Erdoğan, for allegedly seeking to establish an Islamic state.<sup>49</sup> While the AKP has overseen a period of economic growth and relative political stability in Turkey, it has also been widely criticised for compromising the separation of powers and undermining human rights.

### *The judiciary*

35. The basic principle of the independence of the judiciary is stated in Article 138:

“Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction in conformity with the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution”.

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<sup>45</sup> With the exception of Articles 1-3 which define the general characteristics of the state. The procedure is set down in Article 175 of the Constitution of Turkey.

<sup>46</sup> Art 175 of the Turkish Constitution.

<sup>47</sup> ‘Viewpoint: What now for Turkey's ruling party?’, BBC, 31 October 2012, available at: <http://www.bbc.co.uk/news/world-europe-20141894>; ‘The AKP years in Turkey: the third stage’, Open Democracy, 20 September 2011, available at: <https://www.opendemocracy.net/gunes-murat-tezcur/akp-years-in-turkey-third-stage>

<sup>48</sup> House of Lords, Parliamentary Briefing papers, “Parliamentary elections in Turkey, 2015”, 17 June 2015, available at: [www.parliament.uk/briefing-papers/CBP-7226](http://www.parliament.uk/briefing-papers/CBP-7226)

<sup>49</sup> BBC Country Profile on Turkey, BBC, 15 December 2014, available at: [http://news.bbc.co.uk/1/hi/world/europe/country\\_profiles/1023189.stm](http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1023189.stm)

36. Security of tenure for judges and public prosecutors is also recognised by the Constitution in Article 139, according to which:

“Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other personnel rights, even as a result of the abolition of a court or a post”.<sup>50</sup>

37. Personnel matters for judges and public prosecutors, such as appointments, promotions, transfers, disciplinary actions, and dismissals are within the exclusive jurisdiction of the High Council of Judges and Prosecutors (HSYK)<sup>51</sup>, itself composed mainly of judges. The method of selection of its members set out in the Constitution has been the subject of constitutional amendment in 2010 and the Law on the High Council of Judges and Prosecutors, of which the Constitutional Court subsequently found a number of provisions unconstitutional.<sup>52</sup> Despite the constitutional provisions, the independence of the judiciary is a highly controversial issue in Turkey.<sup>53</sup>

### *The judicial system*

38. Turkey has a tripartite judicial system, divided into judicial, administrative and military jurisdictions. Judicial courts deal with civil and criminal cases. Administrative and tax courts deal with cases brought against the executive branch of government in relation to implementation of legislation.<sup>54</sup>
39. The Constitutional Court, established in 1961, sits above these courts. It reviews the constitutionality of laws and decrees, on application by the President, parliamentary groups of the ruling party or parties and of the main opposition party, or a minimum of one-fifth of the total number of members of the TGNA.<sup>55</sup> It also has the power to review constitutional amendments, but on the grounds of form only.<sup>56</sup>
40. Following a constitutional amendment that came into effect on September 2010, individuals may apply to the Constitutional Court on the grounds that one of the human rights within the scope of the European Convention on Human Rights (ECHR) which are guaranteed by the Constitution has been violated by public authorities.<sup>57</sup> The Court comprises seventeen members, fourteen of which are appointed by the President from candidates nominated by lower courts and the Council of Higher Education, and three of which are elected by the Assembly.<sup>58</sup>

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<sup>50</sup> Art 141 sets forth the right to public hearing, limiting closed session to cases “absolutely necessitated by public morals or public security”, and ensuring the written justification of decisions. It also states that trials must be conducted “as quickly as possible and at minimum cost.” According to Art 144, the supervision of judicial services and public prosecutors is carried out by the Ministry of Justice.

<sup>51</sup> Art 159 of the Turkish Constitution.

<sup>52</sup> See paras 62-68 below.

<sup>53</sup> See paras 78-88 below.

<sup>54</sup> Ergun Özbudun, Introduction to Turkish Law (2011), T. Ansay, D. Wallace (eds.), pp. 214-215.

<sup>55</sup> Arts 148 and 150 of the Turkish Constitution.

<sup>56</sup> Art 148 of the Turkish Constitution

<sup>57</sup> Art 148 of the Turkish Constitution.

<sup>58</sup> Art 146 of the Turkish Constitution.

41. The Commissioner for Human Rights of the Council of Europe has noted that the Constitutional Court currently lacks the competence to assess the compatibility of Turkish laws with relevant international treaties, including the ECHR, in spite of Article 90 of the Constitution<sup>59</sup>. This has reportedly led to some confusion, and caused delays in the introduction of ECHR standards into the case-law of Turkish courts.<sup>60</sup>

## D. Demography

42. Turkey has a population of about 77.7 million<sup>61</sup>, covering approximately 783,562 km<sup>2</sup>.<sup>62</sup> While Ankara is its capital, Istanbul is the most populated city.<sup>63</sup> Turkish is the only official language. Kurds represent the only large linguistic minority group in Turkey (an estimated 10-15 percent of the population).<sup>64</sup> Bulgarian, Armenian, Balkan Gagauz Turkish, Domari, Ladino, and Romany are also spoken by significant numbers of people.<sup>65</sup>

## E. Economy

43. With a Gross Domestic Product of \$786 billion, Turkey is the 18<sup>th</sup> largest economy in the world. In the last decade, per capita income in the country nearly tripled and now exceeds \$10,000.<sup>66</sup> However, according to Financial Times, many investors have come to see the Turkish economy as fragile and that the economy is not performing as well as it once did. Growth was 2.9 per cent in 2014 and has slowed further in 2015, while consumer confidence is at a six year low. The lira has lost 10 per cent of its value against the dollar in 2015.<sup>67</sup> Perceptions about corruption have also worsened sharply, with Turkey dropping 11 places to rank 64th globally, according to Transparency International's latest Corruption Perception Index.<sup>68</sup> A 2014 survey of

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<sup>59</sup> Article 90 stipulates that in the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect, and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements prevail. As such, the provisions of international human rights treaties ratified by Turkey may be directly invoked before Turkish courts. See 'Human Rights and the Rule of Law, A Scoping Report', the British Institute of International and Comparative Law (BIICL), 2015, (see n 1 above), pp. 60-61.

<sup>60</sup> 'Freedom of expression and media freedom in Turkey', Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 12 July 2011, CommDH(2011)25, (see n 22 above), para 14.

<sup>61</sup> <http://www.officialstatistics.gov.tr>

<sup>62</sup> UN Data, Country profile for Turkey 2012, available at: <https://data.un.org/CountryProfile.aspx?crName=TURKEY>

<sup>63</sup> <http://www.citypopulation.de/Turkey-RBC20.html>

<sup>64</sup> Ergun Özbudun and Ömer F. Genckaya, *Democratisation and the Politics of Constitution-Making in Turkey* (2009), p25

<sup>65</sup> Library of Congress – Federal Research Division Country Profile: Turkey, August 2008 (see n 13 above).

<sup>66</sup> World Bank, Turkey Overview, available at: <http://www.worldbank.org/en/country/turkey/overview>; The World Bank's World Development Indicators show that Turkey's GNI per capita in 2013 was US\$10,970, available at: <http://data.worldbank.org/country/turkey>

<sup>67</sup> 'Turkish president tightens grip on state', Financial Times, 15 April 2015, <http://www.ft.com/cms/s/0/f89a7b74-c747-11e4-8e1f-00144feab7de.html#axzz3ZBQxgQUH>; 'Critics blame Erdoğan 'hubris' for currency weakness', Financial Times, 9 March 2015, available at: <http://www.ft.com/cms/s/0/ec91b45e-c64e-11e4-add0-00144feab7de.html#axzz3bk2gNDMM>; 'Why Turks should vote Kurd', The Economist, 30 May 2015, available at: <http://www.economist.com/topics/turkey>

<sup>68</sup> 'Rolling back reform has led to malaise in Turkey', Financial Times, 15 April 2015, available at: <http://www.ft.com/cms/s/0/681a81d6-c74a-11e4-8e1f-00144feab7de.html?siteedition=uk#axzz3ZBQxgQUH>



801 Turkish executives for TUSIAD, the country's biggest business confederation, found that corruption was "frequent and large-scale" and was increasing, especially in the construction sector.<sup>69</sup>

## F. Ethnic Minorities

44. Approximately 80 per cent of the population is Turkish, and an estimated 18 per cent, concentrated in the south-east and metropolitan areas, is Kurdish.<sup>70</sup> Smaller minority groups include Arabs, Armenians, Greeks and Jews. Since the beginning of the 1990s, two issues have dominated Turkey's political agenda: the place of a substantial ethnic Kurdish minority and the role of Islam in an overwhelmingly Muslim though officially secular country. A separatist insurgency begun in 1984 by the Kurdistan Workers' Party (*Apartia Karkaren Kurdistan* or PKK), now known as the Kurdistan People's Congress (*Kongra-Gel* or KGK), has claimed more than 30,000 lives. The conflict, which reached a peak between 1992-1995, has been characterised by severe human rights abuses by both the security forces and the PKK. After the capture of Abdullah Öcalan, the group's leader, in 1999, the insurgents largely withdrew from Turkey mainly to northern Iraq. In 2013, the KGK and the Turkish Government agreed to a ceasefire that continues despite slow progress in on-going peace talks. In June 2014, the Assembly adopted a law to 'bring a stronger legal foundation to the settlement process', encompassing measures to eliminate terrorism, strengthen social inclusion and reintegrate former members of the PKK.
45. More than 99 per cent of the population is Muslim, mostly Sunni. Christianity and Judaism are the other religions practised. Since the 1980s, the role of religion in the state has been a divisive issue as influential factions challenged the complete secularisation called for by Kemalism. In the early 2000s, Islamic groups challenged the concept of the secular state with increasing vigour. The Alevi community, which make up 10–25 per cent of the population, has suffered systematic discrimination from the state and severe human rights abuses.

## G. Education and literacy

46. Under Article 42 of the Constitution, Turkish is the official, but not exclusive, language of instruction. One of the main demands of the Kurdish political opposition is the recognition of the right to education in one's mother tongue. University-level language courses in Kurdish and other minority languages were introduced in 2009.<sup>71</sup> In the academic year 2012/2013 the teaching of elective Kurdish courses was permitted in public schools, and in March 2014 legislation was adopted permitting education in a mother tongue other than Turkish in private primary and secondary

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<sup>69</sup> 'Turkish court drops high-profile corruption investigation', Financial Times, 16 December 2014, available at: <http://www.ft.com/cms/s/0/9d5c63bc-8525-11e4-ab4e-00144feabdc0.html#axzz3ZBQxgQUH>

<sup>70</sup> No accurate up-to-date figures are available for the Kurdish population because the Turkish government has outlawed ethnic or racial censuses. An estimate by the CIA World Factbook place their proportion of the population at approximately 18%: CIA World Fact Book, Country profile for Turkey, March 2011, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>

<sup>71</sup> Ergun Özbudun, 'The Turkish Democratisation Package', October 15, 2013, available at: <http://www.mei.edu/content/turkish-democratization-package>; 'Kurdish can be taught in Turkey's schools, Erdogan says', BBC, 12 June 2012, available at: <http://www.bbc.co.uk/news/world-europe-18410596>

schools.<sup>72</sup> However, since September 2014, there have been reports of the police closing down these private schools.<sup>73</sup>

47. In 2012, Turkey's overall literacy rate was 95 percent.<sup>74</sup> By 2012, 15 percent of 25 to 64 year olds in Turkey had attained a tertiary education, an increase from 13 percent in 2010. Participation in secondary education has increased in recent years. During the 2013-2014 academic year, the schooling rate was 99.57% in primary schools, 94.52% in middle schools and 76.65% in high schools.<sup>75</sup> Upper secondary education became compulsory (to 17.5 years of age) in the 2012-2013 school year.<sup>76</sup>
48. In Turkey, many education facilities are established by followers of the Hizmet movement.<sup>77</sup> In November 2013 legislation was adopted to close down private preparatory schools for university entrance exams (*dershanes*) by 1 September 2015.<sup>78</sup>

## H. External dynamics

49. Turkey joined the UN in 1945. It became a full member of NATO in 1952, entered the OEEC and the Council of Europe and became an associate member of the European Common Market in 1963. In 1964, Turkey became an associate member of the European Community and applied for full European Economic Community (EEC) membership in 1987. In 1995, it entered the EU Customs Union. It began accession membership talks with the European Union in 2005.
50. In 2012, a EU Commission report on its progress towards EU membership contained concerns about democracy and human rights; concerns which were reiterated in 2013 as a result of the government's response to the Gezi Park protests. In 2013, membership talks with Turkey were put on hold by the EU. In September 2014, the Ministry of EU affairs presented a 'European Union Strategy' intended to reinvigorate Turkey's accession process.<sup>79</sup> Relations between Turkey and some its neighbours remain tense. Turkey intervened militarily on Cyprus in 1974 to prevent a Greek takeover of the island and has since acted as patron state to the "Turkish Republic of Northern Cyprus," which only Turkey recognises. Syrian-Turkish relations have also long been strained as a result principally of territorial disputes and Syria's support for the PKK.<sup>80</sup> Although the AKP had cultivated closer relations with Syria in the last decade, tensions significantly worsened after Syrian forces shot down a Turkish

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<sup>72</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700, 8 October 2014, (see n 23 above), p. 62; OECD Country Note on Turkey, Education at a Glance 2014, available at: <http://www.oecd.org/edu/Turkey-EAG2014-Country-Note.pdf>

<sup>73</sup> 'Kurdish identity becomes more acceptable in Turkish society', Al-Monitor, 22 September 2014, available at: <http://www.al-monitor.com/pulse/originals/2014/09/turkey-krg-iraq-kurds-anti-kurdish-discourse-hdp.html#>.

<sup>74</sup> The World Bank's education indicators are available at: <http://data.worldbank.org/indicator/SE.ADT.LITR.ZS/countries/TR-7E-XT?display=graph>

<sup>75</sup> Report of the Working Group on the Universal Periodic Review, Turkey, 19-30 January 2015, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>

<sup>76</sup> OECD Country Note on Turkey, Education at a Glance 2014, (see n 71 above).

<sup>77</sup> For background, see paras 11-14 above.

<sup>78</sup> A challenge to this legislation is currently before the Constitutional Court.

<sup>79</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700, 8 October 2014, (see n 23 above), p. 3.

<sup>80</sup> 'Syria and Turkey: A Complex Relationship', PBS, 15 November 2012, available at: <http://www.pbs.org/newshour/rundown/syria-and-turkey/>

fighter jet in June 2012 and border clashes in October 2012.<sup>81</sup> In 2014, the Parliament authorised possible Turkish military operations against militants in Iraq and Syria who threaten Turkey.<sup>82</sup> The Syrian crisis has led to a significant increase in the number of Syrian refugees in Turkey, whose total number is estimated at more than one million.<sup>83</sup>

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<sup>81</sup> 'Turkey goes to Nato over plane it says Syria downed in international airspace', The Guardian, 24 June 2012, available at: <http://www.theguardian.com/world/2012/jun/24/turkey-plane-shot-down-syria>

<sup>82</sup> 'Turkey OKs military action in Iraq, Syria', Times Union, 2 October 2014, available at: <http://www.timesunion.com/local/article/Turkey-OKs-military-action-in-Iraq-Syria-5797946.php>

<sup>83</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700, 8 October 2014, (see n 23 above), p. 65.

### III. EVENTS SINCE THE CRISIS OF DECEMBER 2013

51. In December 2013 the Erdoğan government was embroiled in a major political crisis with the revelation of a corruption scandal involving the inner circle of President Erdoğan (then Prime Minister), including four Cabinet ministers, members of their families and several high-profile businessmen. In the wake of the scandal the AKP government has taken sustained action to establish executive control over the judiciary. This section of the report will consider what impact the measures adopted by the AKP since December 2013 have had on the independence and impartiality of the judiciary and the rule of law.

#### A. The December 2013 crisis and the government's response

52. On 17 December 2013 Istanbul police detained 52 suspects, including three sons of Cabinet ministers, a municipal mayor from the AKP, the general manager of the largest state-owned bank and a high-profile construction tycoon, as part of an investigation into alleged bribery to win public tenders and the smuggling of gold into Iran.<sup>84</sup> Video footage of the police searching houses and offices belonging to the suspects revealed millions of dollars' worth of cash stashed in shoe boxes and safes and it was reported that more than \$4.5 million (US) had been seized.<sup>85</sup> Covert audio recordings were also leaked to the media supporting the corruption allegations.<sup>86</sup> The BBC published a transcript of a telephone conversation in which Mr Erdoğan allegedly instructed his son to hide large amounts of cash from investigators after police carried out searches of other ministers' homes.<sup>87</sup>
53. Confronted with mounting corruption charges, the government alleged that the December 2013 investigation was an attempted judicial coup instigated by a 'parallel structure' within the state, consisting of followers and supporters of Fethullah Gülen. Claiming the existence of a vast clandestine network that had infiltrated deep into the state apparatuses and abused state power for its own purposes, Mr Erdoğan referred to the movement as a "terrorist organisation acting on the orders of foreign powers" and vowed to "enter into their lairs and destroy them".<sup>88</sup>

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<sup>84</sup> 'Turkey's Erdogan replaces 10 ministers as inner circle cracks', 25 December 2013, Financial Times, available at: <http://www.ft.com/cms/s/0/eb85fc80-6d5a-11e3-9d9b-00144feabdc0.html?siteedition=uk#axzz3ZBQxgQUH>; 'Two ministers' sons arrested in Turkey's corruption probe', Hürriyet, 20 December 2013, available at: <http://www.hurriyetdailynews.com/one-ministers-son-released-demand-for-arrest-of-two-others-in-turkeys-corruption-probe.aspx?pageID=238&nid=59936>. The investigation was closed on 16 December 2014 after the Istanbul Chief Prosecutor's Office rejected an appeal against earlier decisions not to prosecute 96 suspects implicated in the December 2013 corruption case, see n 148 below.

<sup>85</sup> 'Turkey ministers resign amid scandal', BBC, 25 December 2013, available at: <http://www.bbc.co.uk/news/world-europe-25514579>

<sup>86</sup> Mr Erdogan dismissed a recording, which emerged on the internet, in which he appeared to instruct his son to hide large amounts of money from investigators, as the product of Gülenist "editing" and "dubbing".

<sup>87</sup> 'Turkey's Erdogan battles parallel state', BBC, 17 December 2014, available at: <http://www.bbc.co.uk/news/world-europe-30492348>.

<sup>88</sup> 'Erdogan'a göre medya casus, herşey komplo' ['According to Erdogan, the media is a spy, everything is a conspiracy'], Taraf, 26 December 2013.

54. On 18 December 2013 tens of senior police officers, including the police chief of Istanbul, were immediately removed from their posts.<sup>89</sup> On 21 December 2013, the government imposed new obligations on members of the judicial police to inform the Ministry of Justice of their investigations in advance.<sup>90</sup> On 25 December 2014 newly installed Istanbul police officers refused to act upon search and arrest warrants issued by prosecutors and judges in respect of a further 30 suspects, including, according to the Turkish media, Mr Erdoğan's son. One of the prosecutors leading the investigation, Muammer Akkaş, publicly accused the government of exerting pressure and obstructing his task.<sup>91</sup> He was immediately removed from the case.<sup>92</sup>
55. In addition to the purge of police officers and prosecutors, key changes to legislation relating to criminal procedure, the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* or HSYK) and regulation of the internet<sup>93</sup> were drafted and adopted in haste and without adequate consultation.
56. On 25 December 2013 the four ministers who were accused of accepting bribes resigned from the Cabinet and ten out of twenty-five ministers were replaced in a Cabinet reshuffle.<sup>94</sup>

## B. Reassignment of public prosecutors

57. On 25 January 2013 the newly-appointed Minister of Justice automatically became the *ex officio* President of the HSYK.<sup>95</sup> In the first session of the plenary of the HSYK on 15 January 2014, the Minister proposed (and the majority agreed to) changes to the composition of the three chambers. The plenary re-evaluated each member one by one and decided whether to leave him or her in the current position or transfer him or her to another chamber. As a result, two members of the First Chamber<sup>96</sup> were exchanged, one with a member of the Second Chamber and the other one with a member of the

<sup>89</sup> 'Istanbul police chief sacked over graft probe', Al Jazeera, 19 December 2013, available at: <http://www.aljazeera.com/news/europe/2013/12/istanbul-police-chief-sacked-over-graft-probe-2013121912132888839.html>

<sup>90</sup> See paras 59-61 below.

<sup>91</sup> 'Turkish corruption probe row deepens', BBC, 7 January 2014, available at: <http://www.bbc.co.uk/news/world-europe-25637710>. On 8 January 2014 the European Commission expressed concern that government moves to remove, reassign and fire police officers and investigators "could undermine the current investigations and capacity of the judiciary and the police to investigate matters in an independent manner": 'European Commission criticises police moves in Turkey', Financial Times, 8 January 2014, available at: <http://www.ft.com/cms/s/0/3915188c-903c-11e4-b55d-00144feabdc0.html#axzz3ZBQxgQUH>

<sup>92</sup> Muammer Akkaş, along with another prosecutor and the judge who ordered that the suspects' assets be frozen, has since been disbarred and indicted on criminal charges of "malpractice": see para 78 below.

<sup>93</sup> The AKP government also proposed legislation in January 2015 that would further curtail internet access and privacy in Turkey, discussed at paras 159-160 below.

<sup>94</sup> In January 2015 the AKP secured a parliamentary vote not to send the four former ministers embroiled in the corruption scandal for trial at the Supreme Court of Appeals. According to the Turkish press, up to 50 of the AKP's 312 deputies declined to support at least one of the four in the secret ballots: 'Turkish parliament votes against graft trial for former ministers', Financial Times, 21 January 2015, available at: <http://www.ft.com/cms/s/0/7f805574-a14a-11e4-8d19-00144feab7de.html?siteedition=uk#axzz3ZBQxgQUH>

<sup>95</sup> In the aforementioned Cabinet overhaul of 25 December 2013, the Minister of Justice was also replaced. The new Minister also selected a new under-secretary who thereby automatically became an *ex officio* member of the First Chamber of the HSYK.

<sup>96</sup> The First Chamber is considered as the most important chamber since it exercises the appointment and transfer power affecting the vast majority of judges and public prosecutors and their families.

Third Chamber. On the following day, the newly-composed First Chamber issued a decree by a majority of six (including the two new members) to one transferring to other locations the prosecutors responsible for the December 2013 investigations. As a consequence, by the end of January 2014 thousands of policemen and prosecutors were reassigned from their posts, including the Istanbul chief public prosecutor, his deputy and three other prosecutors leading the corruption probe.<sup>97</sup> The reason given was that there had been irregularities in those investigations and that the timing indicated a coordinated attack on the government by a “parallel structure.”<sup>98</sup>

58. The disciplinary power over judges and prosecutors was in fact vested in the Second and Third Chambers, however, the majority of the First Chamber considered that there was no time to follow regular procedure and that the transfers had to be made immediately to avoid “irreparable damage” to the judiciary.<sup>99</sup>

### C. The independence of the judicial police

59. On 21 December 2013, the government amended the regulation on the judicial police to require officers, when acting upon instructions of prosecutors, to notify their superiors, in effect the Ministry of Justice and Ministry of the Interior, of any ongoing investigations<sup>100</sup>, enabling the government to be immediately informed of ongoing investigations such as the 17 and 25 December probes, which had been underway in secret since 2012. As referred to above, the government also transferred hundreds of police officers who were subordinates of the Ministry of the Interior.
60. Fifteen members of the HSYK protested at this change in a public declaration on 26 December 2013 as being against the spirit of a “judicial police”, destroying the secrecy of investigations, and weakening the independence of the judiciary.<sup>101</sup> On 27 December 2013, the Council of State suspended implementation of the amendment considering it to be contrary to the Code of Criminal Procedure (CMK)<sup>102</sup>.

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<sup>97</sup> ‘Graft probe prosecutors purged with 115 others’, Today’s Zaman, 29 January 2014, available at: [http://www.todayszaman.com/latest-news\\_graft-probe-prosecutors-purged-with-115-others\\_337921.html](http://www.todayszaman.com/latest-news_graft-probe-prosecutors-purged-with-115-others_337921.html). The four prosecutors who led the corruption investigation were suspended in late 2014 and disbarred on 12 May 2015. Two of the prosecutors and a judge who made seizure orders against the suspects face criminal investigation, see para 78 below.

<sup>98</sup> Professor Dr. iur. Thomas Giegerich, Peer Review Mission on the High Council of Judges and Prosecutors (6 – 8 May 2014), ‘Report on the Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014’, 18 December 2014 at p. 7: [http://www.avrupa.info.tr/fileadmin/Content/Downloads/PDF/2014\\_Peer\\_Review\\_report\\_by\\_Thomas\\_Giegerich.pdf](http://www.avrupa.info.tr/fileadmin/Content/Downloads/PDF/2014_Peer_Review_report_by_Thomas_Giegerich.pdf).

<sup>99</sup> The Third Chamber was responsible for investigations with the help of the Inspection Board, subject to the approval of the Minister in his capacity as the *ex officio* President of the HSYK, and the Second Chamber was responsible for deciding on whether the results of those investigations warranted disciplinary action or even prosecution: *ibid* at p. 7.

<sup>100</sup> Art 5c of Turkish Code of Criminal Procedure (CMK).

<sup>101</sup> ‘Prosecutor in second graft investigation says case ‘taken out of his hands’, Hürriyet, 26 December 2013, available at: <http://www.hurriyetdailynews.com/prosecutor-in-second-graft-investigation-says-case-taken-out-of-his-hands.aspx?pageID=238&nID=60187&NewsCatID=341>

<sup>102</sup> ‘Turkish Parliamentary Speaker Çiçek deplores end of court independence’, Hürriyet, 4 January 2014, available at: <http://www.hurriyetdailynews.com/turkish-parliamentary-speaker-cicek-deplores-end-of-court-independence.aspx?pageID=238&nID=60549&NewsCatID=338>

61. Mr Erdoğan reacted by accusing the HSYK signatories of being guilty of violating the constitution, stated that he would have put them on trial if he had the power to do so and that it was a mistake in 2010 to strengthen the autonomy of the HSYK and weaken the role of the Minister of Justice within its Council.<sup>103</sup> In response, the Minister of Justice, in his capacity as President of the HSYK, decided on 30 December 2013 that any HSYK public statement should receive his prior approval. In early January 2013 the government first put forward plans to pass a constitutional amendment to reshape the HSYK, but lack of the necessary two-thirds majority in the Assembly needed to make a constitutional amendment prompted it to withdraw the bill, forcing the alternative route of making amendments to the HSYK's judicial legislation.

#### **D. Reorganisation of the High Council of Judges and Prosecutors**

62. The HSYK is the keystone of the Turkish judicial architecture because it plays a crucial role in the appointment and promotion of judges and public prosecutors and disciplinary proceedings against them, including their removal from office. As Professor Dr. Thomas Giegerich stated in his 2014 report, “when the independence and impartiality of the HSYK is jeopardised, so is the independence and impartiality of the Turkish judiciary as a whole”.<sup>104</sup>
63. In February 2014 the government passed new legislation to transfer to the Minister of Justice the power to appoint judges, the management of judicial disciplinary investigations and the selection of judicial training personnel and HSYK staff.<sup>105</sup> The primary stakeholders, the HSYK and the Justice Academy, were not officially consulted.<sup>106</sup> These provisions gave the Minister of Justice, in his capacity as *ex officio* President of the HSYK almost unlimited authority to reorganise the HSYK.
64. One of the most important changes brought about by Law No.6524 was to transfer the responsibility for the Inspection Board to the Minister of Justice in his capacity as the *ex officio* President of the HSYK. Moreover, the new Law provided that the Inspection Board perform their duties on behalf of the Council, but under the supervision of the Minister. It was also stated that the President of the Inspection Board was responsible to the Minister. The influence of the Minister was further increased in another respect, namely the Minister could now both prevent the Third Chamber from instigating and compel it to instigate inspections, examinations and investigations against judges and prosecutors.

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<sup>103</sup> ‘Bir yanlışlık yaptık’ [‘We made a mistake’], Taraf, 30 December 2013.

<sup>104</sup> Professor Dr. iur. Thomas Giegerich, Peer Review Mission on the High Council of Judges and Prosecutors, ‘Report on the Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014’, 18 December 2014, (see n 98 above) at p. 4:

<sup>105</sup> These amendments were part of the Omnibus Law No. 6524 on the Amendment of Certain Laws, adopted on 15 February 2014, available in Turkish at: <http://www.tbmm.gov.tr/kanunlar/k6524.html>. An explanation of the key elements of the legislation is available at:

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6c6da94a-975f-44cf-8da4-ede718ffee61>; ‘Turkish law ‘strikes at judicial independence’’, Financial Times, 26 February 2014, available at: <http://www.ft.com/cms/s/0/83b3a3d2-9f05-11e3-a48e-00144feab7de.html#axzz3PSol1yhoX>

<sup>106</sup> In fact, the plenary of the HSYK had published proposals in the opposite direction: Professor Dr. iur. Thomas Giegerich, Peer Review Mission, ‘Report on the Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014’, 18 December 2014, (see n 98 above) at p. 13.

65. Further, the entire staff of the HSYK were automatically dismissed with the entry into force of the law. New personnel were to be appointed or elected within ten days. As a consequence, with the entry into force of the Law on 27 February 2014, and before the Constitutional Court could order a stay of execution, all staff working for the HSYK were dismissed, including the Secretary General, Assistant Secretaries-General, the President and Deputy Presidents of the Inspection Board, council inspectors, reporting judges and administrative staff. Some were immediately re-appointed, but the majority of staff were replaced by staff nominated by the Minister of Justice.<sup>107</sup>
66. This was followed by a large-scale reassignment operation removing judges and public prosecutors involved in the December 2013 corruption investigation to less sensitive posts, and replacing them with pro-government colleagues.<sup>108</sup> In June 2014, the government issued a decree, replacing approximately 2500 prosecutors and judges, including the deputy chief prosecutor in Ankara and a number of chief prosecutors across Anatolia.<sup>109</sup> Teoman Gökçe, a member of the 1st Chamber of the HSYK who resigned his membership of the 1st Chamber the same day, stated: “I have to express with sadness that with the 2014 Summer Decree, debates, which will go down in Turkish judicial history as ‘The Decree of Injustice,’ assignments similar to the ones in the decrees following 16 January have been carried out. However, these [11 June] assignments are more unlawful, more unprincipled and more inconsistent”.<sup>110</sup>
67. The unconstitutionality of many provisions and their potential effect on the independence of the judiciary and the separation of powers gave rise to strong objections by all opposition parties and a great majority of lawyers and legal academics.<sup>111</sup> Nils Muižnieks, Commissioner for Human Rights at the Council of Europe said in a statement that: “Proposals to curb powers of [the] High Council of Judges and Prosecutors represent [a] serious setback for the independence of the judiciary in Turkey”.<sup>112</sup>
68. In April 2014 the Constitutional Court found most of the new provisions of HSYK Law No. 6524 unconstitutional and gave the legislature a deadline of three months to

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<sup>107</sup> Law No. 6524 also increased the executive’s control over the Justice Academy, which not only elects one HSYK member, but is entrusted with the pre-service and in-service training of all judges and public prosecutors: see *ibid* at p. 4.

<sup>108</sup> ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015. By May 2014 sixty judges and prosecutors who had previously worked in the Ministry of Justice and replaced by new personnel: Professor Dr. iur. Thomas Giegerich, Peer Review Mission, ‘Report on the Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014’, 18 December 2014, (see n 98 above) at p. 6.

<sup>109</sup> ‘Gov’t replaces more than 2,500 judges and prosecutors in latest mass purge’, *Hurriyet*, 12 June 2014, available at: <http://www.hurriyetdailynews.com/govt-replaces-more-than-2500-judges-and-prosecutors-in-latest-mass-purge.aspx?pageID=238&nID=67702&NewsCatID=338>

<sup>110</sup> *Ibid*.

<sup>111</sup> ‘Turkish gov’t likely to bypass Constitutional Court for more control over judiciary’, 10 January 2014, <http://www.hurriyetdailynews.com/turkish-govt-likely-to-bypass-constitutional-court-for-more-control-over-judiciary.aspx?pageID=238&nID=60827&NewsCatID=338>. Professor Bulent Çiçekli, a former HSYK member said that if the law was approved, Turkey would “bid farewell to the separation of powers and the rule of law. The new law is against the [Turkish] Constitution and EU norms. Furthermore, it represents a regression from our standards of the rule of law and spells an end to law and justice in the country.” See also ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.

<sup>112</sup> ‘European Commission criticises police moves in Turkey’, 8 January 2014, available at: <http://www.ft.com/cms/s/0/258999bc-7893-11e3-831c-00144feabdc0.html?siteedition=uk#axzz3ZBQxgQUH>



adopt revised legislation.<sup>113</sup> The court held that the new powers given to the Minister of Justice “transformed the [HSYK] into a Directorate General factually affiliated and dependent upon the Ministry of Justice” and was contrary to the principle of the independence of the HSYK set out in Article 159”.<sup>114</sup> However, the Constitutional Court’s decision did not have retroactive effect, and therefore the members of staff who had been dismissed were not re-appointed and the new appointments were not rescinded.

## **E. The 2014 High Council of Judges and Prosecutors elections**

69. In Autumn 2014 new elections for the HSYK were held. Following a constitutional amendment in 2010<sup>115</sup>, nearly half of the Council’s members are elected by 13,000 first-degree judges and public prosecutors from the civil, criminal and administrative courts. Although the five members elected by the two high courts were not pro-government, the election of ten members by more than 13,000 of their peers represented a clear victory for the pro-government “Unity in the Judiciary Platform” (YBP) group. These members, together with the *ex-officio* members and the four members appointed by the President of the Republic, provided the government with a clear majority on the new HSYK and, through it, the power to control the entire judiciary.
70. It was reported that throughout the election process, the government put its weight behind the “Unity in the Judiciary Platform” (YBP). Even though this group was ostensibly a coalition of conservative, nationalist, and social democrat judges, they publicly declared that, if elected, they would “work in harmony with the legislative and the executive branches.”<sup>116</sup> It was reported that Justice Minister Bekir Bozdağ travelled across Turkey during the campaign to ask for support for HSYK candidates who were close to the AKP government.<sup>117</sup> In September 2014 a TL 1,155 raise in

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<sup>113</sup> On 28 June 2014 Law No. 6545 restored the legal situation before the entry into force of the Law No. 6524 to the extent that the Constitutional Court had found that law to be unconstitutional.

<sup>114</sup> Constitutional Court Decision No. 2014/81, 10 April 2014, see summary available in English, p. 3, available at: <http://www.anayasa.gov.tr/en/News/Detail/judgment/2014-57.pdf>.

<sup>115</sup> According to Art 159 of the Constitution, as amended by the 2010 constitutional reforms, the new Council has 22 (instead of 7) regular and 12 (instead of 5) substitute members. Nearly half of the Council’s regular members (10 out of 22) are elected by all general and administrative courts judges and public prosecutors. Four members are directly appointed by the President. Two members are appointed by the Minister of Justice and the undersecretary to the Ministry of Justice, who serve as President of the Council and his deputy respectively, while the rest (6 out of 22) are appointed by the two high courts and the Justice Academy. Thus, the judge members elected by their peers constitute an almost two-thirds majority of the Council. The constitutional amendments were strongly supported by the relevant European institutions in 2010 as an attempt to make the judicial appointment process more representative, independent and democratic, however, the amendments also raised new concerns about the extent to which the executive was involved in the appointment of members of the Council.

<sup>116</sup> ‘Turkish judiciary battle’, Al-Monitor, 14 October 2014, available at: <http://www.al-monitor.com/pulse/originals/2014/10/turkey-judiciary-battle-hsyk-akp-gulen.html>.

<sup>117</sup> ‘HSYK elections a litmus test for independence of judiciary’, Today’s Zaman, 28 September 2014, , available at: [http://www.todayszaman.com/anasayfa\\_hsyk-elections-a-litmus-test-for-independence-of-judiciary\\_360067.html](http://www.todayszaman.com/anasayfa_hsyk-elections-a-litmus-test-for-independence-of-judiciary_360067.html); ‘HSYK election results raise fears of gov’t control over judiciary’, Today’s Zaman, 12 October 2014, available at: [http://www.todayszaman.com/national\\_hsyk-election-results-raise-fears-of-govt-control-over-judiciary\\_361394.html](http://www.todayszaman.com/national_hsyk-election-results-raise-fears-of-govt-control-over-judiciary_361394.html)

salaries was promised to judges and prosecutors.<sup>118</sup> During the election process, AKP parliamentary group deputy chairman, Mahir Ünal, stated in a television interview that if a certain group, implying the supporters of the Hizmet movement, won the election, the government were ready to declare the result “illegitimate”.<sup>119</sup> Similarly, the deputy Prime Minister, Yalçın Akdoğan, indicated that in such an event the government could opt for a national referendum to elect HSYK members.<sup>120</sup> The former Constitutional Court chairman, Haşim Kiliç, in an interview in February 2015 complained about the elections, suggesting members of the judiciary were elected based on their political views: “The judicial elections are making the judiciary corrupt. The procedure for these elections should be revised”.<sup>121</sup>

## F. Criminal Judges of the Peace (Law No. 6545)

71. The AKP government’s attempts to create a more supine judiciary were not limited to reforming the HSYK. Law No. 6545 (“Law amending the Turkish Criminal Code and other laws”) adopted on 18 June 2014 created Criminal Judges of the Peace (*Sulh Ceza Hakimliği*) with extensive powers to take all decisions relating to the conduct of criminal investigations, such as detention, arrest, release, and seizure of property.<sup>122</sup> An appeal against the decision of a Criminal Judge of the Peace can only be made before another Criminal Judge of the Peace, in disregard of the normal hierarchy of appeals in the judicial system.<sup>123</sup> The appointment of these judges are limited, normally only one in each province. Thus, in the Istanbul courthouse, the most populous province, there are only six of them (subsequently increased to ten) among a total of 93 criminal judges who previously were in a position to decide on appeals against such measures.

<sup>118</sup> ‘Promise on judicial salaries sparks bribery debate ahead of HSYK vote’, Today’s Zaman, 9 September 2014, available at: [http://www.todayszaman.com/anasayfa\\_promise-on-judicial-salaries-sparks-bribery-debate-ahead-of-hsyk-vote\\_358232.html](http://www.todayszaman.com/anasayfa_promise-on-judicial-salaries-sparks-bribery-debate-ahead-of-hsyk-vote_358232.html)

<sup>119</sup> ‘HSYK elections a litmus test for independence of judiciary’, Today’s Zaman, 28 September 2014, available at: [http://www.todayszaman.com/anasayfa\\_hsyk-elections-a-litmus-test-for-independence-of-judiciary\\_360067.html](http://www.todayszaman.com/anasayfa_hsyk-elections-a-litmus-test-for-independence-of-judiciary_360067.html)

<sup>120</sup> ‘Turkey rolling back the 2010 reforms’, Oya Yegen, Boston University, 24 October 2014, available at: <http://www.iconnectblog.com/2014/10/turkey-rolling-back-the-2010-reforms>; Utku Çakırözer, [‘B Planı: Referendum’], Cumhuriyet, 25 September 2014; ‘Kazanani Gayrimeşru Sayarız’ [‘We will consider the winners as illegitimate’], Hürriyet, 25 September 2014.

<sup>121</sup> ‘Turkish courts being turned into ‘revenge’ instruments says outgoing top judge’, The Guardian, 11 February 2015, available at: <http://www.theguardian.com/world/2015/feb/11/turkish-courts-being-turned-into-revenge-instruments-says-outgoing-top-judge>; ‘Top judges blast intervention in judiciary as they leave posts’, Today’s Zaman, 10 February 2015, available at: [http://www.todayszaman.com/anasayfa\\_top-judges-blast-intervention-in-judiciary-as-they-leave-posts\\_372287.html](http://www.todayszaman.com/anasayfa_top-judges-blast-intervention-in-judiciary-as-they-leave-posts_372287.html)

<sup>122</sup> including decisions related to the Internet Law. The offence of seeking to wrongfully influence a member of the judiciary in performance of his duties (TCK Art. 277) provided custodial sentences for those who gave directions to the members of judiciary or tried to wrongfully influence them. In June 2014 the AKP passed legislation which stopped such acts constituting an offence. Immediately before the enactment, the Izmir Chief Public Prosecutor had filed a criminal complaint about the Minister of Justice and his chief adviser for contacting him about an ongoing criminal investigation involving AKP members and ministers and telling him to close the file. See ‘Justice minister admits calling prosecutors about graft probe’, Today’s Zaman, 6 February 2014, available at: [http://www.todayszaman.com/national\\_justice-minister-admits-calling-prosecutors-about-graft-probe\\_338694.html](http://www.todayszaman.com/national_justice-minister-admits-calling-prosecutors-about-graft-probe_338694.html).

<sup>123</sup> Such powers used to belong to single judges sitting in the *Sulh Ceza Mahkemesi* (SCM). Any decision given by the SCM was subject to appellate review by a higher criminal court called *Asliye Ceza Mahkemesi* (or Criminal Courts of First Instance), decisions of which could be appealed to the *Ağır Ceza Mahkemesi*. Such a layered structure meant various judges could be involved in a pre-trial matter if necessary.

72. Opposition parties, bar associations and academics have criticised these courts as being unconstitutional<sup>124</sup> and claim that they are instruments designed to enforce the government's wishes by instigating arrests based on what they say are trumped up charges. Former Constitutional Court President Haşim Kılıç said in March 2015 that the new Criminal Judges of the Peace are unlawful.<sup>125</sup> The political circumstances in which these courts were created heighten concerns. Mr Erdoğan reportedly admitted to reporters on 22 June 2014: “We are developing a project that will allow us to file thousands of cases and lawsuits” in a reference to the Criminal Judges of the Peace. In 2014 deputy chairman of the Grand Unity Party (*Büyük Birlik Partisi* or BBP) said that Mr Erdoğan informed him on 25 June 2014: “We have made a regulation about the Criminal Judges of the Peace. When this law is approved, within a week or ten days, I will do away with these people”, referring to supporters of the Hizmet movement.<sup>126</sup> Further, these judges are appointed by the First Chamber of HSYK, now dominated by pro-government members.<sup>127</sup> Their conduct in office has largely justified these concerns.<sup>128</sup>
73. Many recent operations against police officers and journalists have been carried out by Criminal Judges of the Peace. Starting on 22 July 2014, four days after the HSYK's 1st Chamber appointed six Criminal Judges of the Peace, hundreds of high-ranking police officers were detained in a series of coordinated raids. These officers were involved in the December 2013 anti-corruption operation, as well as investigations into the Balyoz (Sledgehammer), Ergenekon, Kurdistan Communities Union (KCK) and Tawhid-Salam cases. The operations against the police, which prosecutors say were launched based on allegations of spying and illegal wiretapping, are widely believed to be an act of retribution by Erdoğan's administration for the anti-corruption investigations.

## G. The enactment of Law No. 6572

74. On 2 December 2014 the Assembly approved a controversial package of legislation expanding police powers and reforming the court system. Among the highly questionable provisions of the new law was the addition of new chambers and new members to the two high courts. The Court of Cassation was enlarged to 23 civil law and 23 criminal chambers and a total of 129 new judges were to be appointed.<sup>129</sup>

<sup>124</sup> It has been convincingly argued that the creation of such Criminal Judges of the Peace is incompatible with Arts 37 and 142 of the Constitution, which explicitly prohibit the establishment of exceptional courts after the time of the commission of the crime: see Kemal Gözler, ‘Sulh Ceza Hâkimlikleri ve Tabîî Hâkim İlkesi’ [‘Criminal Judgeships and the Principle of Natural Judge’], in *Türk Anayasa Hukuku Sitesi*, 29 August 2014, cited in ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.

<sup>125</sup> See Hasim Kılıç’s remarks at a conference in Ankara in March 2015, reported in Today’s Zaman, 13 March 2015, available at: [http://www.todayszaman.com/national\\_former-head-of-aym-says-criminal-courts-of-peace-are-illegal\\_375205.html](http://www.todayszaman.com/national_former-head-of-aym-says-criminal-courts-of-peace-are-illegal_375205.html)

<sup>126</sup> ‘BBP: Erdoğan admitted Penal Courts of Peace created to fight Hizmet’, Cihan, 15 March 2015, available at: [https://en.cihan.com.tr/en/video/BBP-Erdogan-admitted-Penal-Courts-of-Peace-created-to-fight-Hizmet\\_5257-CHMTcwNTIINy8v](https://en.cihan.com.tr/en/video/BBP-Erdogan-admitted-Penal-Courts-of-Peace-created-to-fight-Hizmet_5257-CHMTcwNTIINy8v); ‘Our country will be the winner with Mehmet Baransu and Hidayet Karaca’, Today’s Zaman, 15 March 2015, available at: [http://www.todayszaman.com/national\\_our-country-will-be-the-winner-with-mehmet-baransu-and-hidayet-karaca\\_375332.html](http://www.todayszaman.com/national_our-country-will-be-the-winner-with-mehmet-baransu-and-hidayet-karaca_375332.html).

<sup>127</sup> See paras 57, 62-68 above.

<sup>128</sup> See paras 78-83 below.

<sup>129</sup> Art 21 of Law No. 6572.

Likewise, two new chambers were created in the Council of State with the addition of 39 new judges. The President of the Court of Cassation, Ali Alkan, strongly protested against the new law as an undue interference in the functioning of the Court. When the law entered into force in December 2014, the new HSYK, now dominated by pro-government members, carried out the appointments immediately and before the Constitutional Court could consider a stay of execution. The Minister of Justice also announced that 3,500 new judges would be appointed in 2015, and another 5,000 in 2016.

75. The law also contained other controversial provisions. The law amended Article 116 of the Code of Criminal Procedure to expand police powers of search and seizure by lowering the standard to conduct a police search from “strong doubt based on concrete evidence” to “reasonable doubt.”<sup>130</sup> This represented a sudden reversal of the AKP government as the original text of the Code of Criminal Procedure had used the term “reasonable doubt” and a law introduced in February 2014 had changed it to “strong doubt based on concrete evidence”. As Professor Ergun Özbudun, the leading constitutional lawyer, has commented, “The political motivation behind such frequent turnabouts are obvious. The February 2014 law was passed in order to make the investigation of corruption charges against ministers more difficult. The December 2014 law was passed when the government was engaged in an all-out war with the Gülen movement, and was anxious to speed up and facilitate criminal proceedings against its sympathisers”.<sup>131</sup>
76. A similar sudden reversal took place in relation to the law relating to access by lawyers to their clients’ case files. When during the December 2013 criminal investigations the lawyers of the AKP politicians had difficulty in accessing their clients’ files, Article 153 which restricts access by legal representatives, was swiftly amended to ease off such restrictions.<sup>132</sup> When most of the senior police officers who carried out the corruption investigations were arrested later in July 2014, the government re-amended Article 153 back to its original position.
77. Other disquieting provisions of the Law No. 6572 are articles permitting such radical measures in the course of a criminal investigation as the seizure of allegedly crime-related property, eavesdropping on communications and inspection for serious crimes<sup>133</sup> and crimes “against the constitutional order and its functioning”.<sup>134</sup> Given the fact that the AKP government describes many kinds of activities, from the Gezi Park demonstrations in June 2013 to the corruption investigations in December 2013 as “coup attempts” against it, such severe measures have raised concerns that they

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<sup>130</sup> Art 40 of Law No. 6572.

<sup>131</sup> ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.

<sup>132</sup> Under Art 153 of the Code of Criminal Procedure (CMK) a prosecutor may apply to court for an restriction order where he believes access by legal representatives to a particular file would jeopardise the safety of an investigation. A further example is the amendment on 21 December 2013 requiring police officers to notify their superiors, in effect the Ministry of Justice and Ministry of the Interior, of any ongoing investigations, enabling the government to be immediately informed of ongoing investigations such as the 17 and 25 December probes: see para 54 above.

<sup>133</sup> Arts 41, 42, and 43 amended Arts 128, 135, and 140 of the Turkish Code of Criminal Procedure (CMK).

<sup>134</sup> Arts 309, 311-316 of the Turkish Criminal Code (TCK).

may well be used by pro-government judges and public prosecutors to intimidate and silence the opposition.<sup>135</sup>

#### H. “We are where words fail”

78. Following the government’s victory in the HSYK elections, the four public prosecutors (Zekeriya Öz, Celal Kara, Mehmet Yüzgeç and Muammer Akkaş) who led the December 2013 corruption investigations were suspended in late December 2014. On 3 March 2015 the HSYK sanctioned an investigation into two of the four prosecutors and one of the judges who ordered the detention, seizure and arrest warrants against those implicated in the December 2013 corruption investigation. On 29 April 2015 Bakırköy 16<sup>th</sup> Court of Serious Crimes accepted an indictment against the two prosecutors on criminal charges of “malpractice” and a charge of “negligence” against Judge Süleyman Karaçol, who is accused of freezing suspects’ assets despite a lack of evidence.<sup>136</sup> On 12 May 2015 the prosecutors and judge were disbarred.<sup>137</sup>
79. The HSYK a week later recommended the arrest of another four prosecutors (Süleyman Bağrıyanık, Ahmet Karaca, Aziz Takçı and Özcan Şişman) who had served in Adana and who ordered the search and seizure of National Intelligence Organisation (MIT) vehicles in January 2014 after suspecting them of carrying weapons to Syria. The Tarsus High Criminal court ruled that the four should also be detained while under criminal investigation for “attempting to topple or stop it [the Turkish government] partially or completely from doing its duty by using force and violence”, plus obtaining and revealing information pertaining to state security.<sup>138</sup> One of former Adana prosecutors, Özcan Şişman had his request for documentation relating to the case rejected by the HSYK on the grounds of confidentiality, effectively denying Mr Şişman, who has been summoned to testify as to what had happened during the seizure of the vehicles, the knowledge of what he is charged with.<sup>139</sup>
80. The most notorious example concerns the order for the release of Hidayet Karaca, the chief executive of Samanyolu Media Group, who was arrested on the dubious

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<sup>135</sup> ‘HRW says security bill would reverse reforms, should be rejected’, Today’s Zaman, 22 October 2014, available at: [http://www.todayszaman.com/national\\_hrw-says-security-bill-would-reverse-reforms-should-be-rejected\\_362377.html](http://www.todayszaman.com/national_hrw-says-security-bill-would-reverse-reforms-should-be-rejected_362377.html)

<sup>136</sup> ‘Indictments accepted against massive graft probes’ judge and prosecutors’, Hurriyet Daily News, 29 April 2015, available at: <http://www.hurriyetdailynews.com/indictments-accepted-against-massive-graft-probes-judge-and-prosecutors.aspx?pageID=238&nID=81734&NewsCatID=509>

<sup>137</sup> Zekeriya Öz, Celal Kara, Muammer Akkaş and Mehmet Yüzgeç, and Judge Süleyman Karaçol were expelled for “undermining the honour of their profession” and “damaging the influence and reputation of their public post”.

<sup>138</sup> ‘Four prosecutors, one commander detained in Syria-bound intelligence trucks case’, Hurriyet, 7 May 2015, available at: <http://www.hurriyetdailynews.com/four-prosecutors-one-commander-detained-in-syria-bound-intelligence-trucks-case.aspx?pageID=238&nID=82098&NewsCatID=509>

<sup>139</sup> On 1 January 2014 a lorry with an alleged cargo of arms and humanitarian aid, en route to Syria and escorted by Turkish intelligence officers, was stopped by police between the provinces of Adana and Hatay. The local governor ordered security forces to stop executing a search warrant ordered by prosecutors. The prosecutors were suspended by the HSYK on 15 January 2014 for investigating claims that the Turkish intelligence agency had illegally shipped arms to opposition groups in Syria: ‘Under iron grip of Erdoğan, HSYK renders rule of law in Turkey obsolete’, Today’s Zaman, 2 May 2015, available at: [http://www.todayszaman.com/national\\_under-iron-grip-of-erdogan-hsyk-renders-rule-of-law-in-turkey-obsolete\\_379592.html](http://www.todayszaman.com/national_under-iron-grip-of-erdogan-hsyk-renders-rule-of-law-in-turkey-obsolete_379592.html)

allegation of establishing a “terrorist organisation” contrary to Article 314 of the Turkish Penal Code (TCK) in December 2014.<sup>140</sup> On 25 April 2015 an order was made by the Istanbul 32<sup>nd</sup> Court of First Instance for the release on bail of Mr Karaca and 63 police officers, however, after apparent government intervention, public prosecutors refused to apply the court order. The 2nd Chamber of the HSYK announced on 27 April 2015 that the judges responsible for the order for release had been suspended from their posts. The most extraordinary aspect of all this, and that causing the most concern, is that allegations that the two judges had exceeded their authority rapidly turned into a criminal investigation on charges that the judges had acted against the government itself. On 1 May 2015 the judges were arrested and detained in custody by the Bakırköy 2nd High Criminal Court on charges of “attempting to overthrow the Turkish government or hindering the government's operation in part or full” and “being a member of an armed organisation”.<sup>141</sup> Investigators from the HSYK reportedly recommended the arrest of the judges without even hearing their defence statements.

81. The prosecutors’ defiance of a court order and the detention of the judges has justifiably led to public outcry in Turkey and internationally. The former Supreme Court of Appeals President Sami Selçuk said: “I have always been proud of being a Turk. However, they are destroying this pride. I am disturbed by the existence of such a judicial system on behalf of the public. We are approaching the Turkish Republic's 100th anniversary, but we have still not established a proper judiciary in the country”.<sup>142</sup> Former Justice Minister Professor Hikmet Sami Türk stated that the arrest of the judges “shows that Turkey has entered a period during which judges will no longer be able to give verdicts independently in line with the Turkish Constitution, the law and their personal conviction. No judge can be arrested - and they should not have been arrested - for the verdicts they give”. On 16 May 2015 the European Association of Judges (EAJ) issued a statement condemning the judges’ arrest and called for their immediate release: “Any attempt to undermine the freedom of a judge to establish facts and apply the law in a particular case constitutes a clear breach of judicial independence”. The Judges and Prosecutors’ Association (YARSAV) also condemned the arrest of the judges, stating that the fact that two judges were arrested over the decisions they had given is an “intimidation message” from the government to all Turkish judges.<sup>143</sup> The deputy head of the Turkish Bar Association stated that the failure to observe a court ruling represents a blatant violation of the rule of law: “The non-compliance with this verdict represents the best indication that the security of law has been done away with in this country. A court is ruling for release, while another is objecting. Such chaos reveals that the reliability of law has been eliminated in a major way. We are where words fail”.<sup>144</sup>
82. On 20 June 2015 the Venice Commission issued a ‘Declaration on Interference with Judicial Independence in Turkey’:

<sup>140</sup>The case of Hidayet Karaca is more fully discussed at paras 91-108 below.

<sup>141</sup> This case is more fully discussed at para 106 below.

<sup>142</sup> ‘Jurists: Arrest of judges leaves black mark on Turkish judiciary’, Today’s Zaman, 3 May 2015, available at: [http://www.todayszaman.com/national\\_jurists-arrest-of-judges-leaves-black-mark-on-turkish-judiciary\\_379672.html](http://www.todayszaman.com/national_jurists-arrest-of-judges-leaves-black-mark-on-turkish-judiciary_379672.html)

<sup>143</sup> Ibid.

<sup>144</sup> ‘Bar associations criticize noncompliance of public prosecutors with court order for release of Karaca’, Today’s Zaman, 27 April 2015, available at: [http://www.todayszaman.com/national\\_bar-associations-criticize-noncompliance-of-public-prosecutors-with-court-order-for-release-of-karaca-policemen\\_379122.html](http://www.todayszaman.com/national_bar-associations-criticize-noncompliance-of-public-prosecutors-with-court-order-for-release-of-karaca-policemen_379122.html)

“The Venice Commission was contacted by judges and prosecutors from Turkey, bringing to its attention several cases<sup>145</sup> of apparent serious interference with the work of judges and prosecutors in politically sensitive cases. These cases point to a pattern of interference with the independence of the judiciary in clear violation of European and universal standards:

- Judicial decisions and requests from prosecutors were not executed in violation of the law;
- Prosecutors were suddenly removed from cases prepared by them over a long period;
- Judges and prosecutors allegedly were arbitrarily transferred to other courts;
- Judges were dismissed for decisions taken by them;
- Alarming judges and prosecutors were even arrested for decisions taken by them.

The Venice Commission stresses that measures against judges for their decisions can only be taken if there is sufficient proof that they did not act impartially but for improper reasons. The Venice Commission is particularly concerned that the High Council of judges and prosecutors took immediate and direct action against judges and prosecutors on account of their decisions in pending cases. This practice of the High Council contradicts basic principles of the rule of law.

The Venice Commission notes that on 15 February 2014 the law on the High Council of Judges and Prosecutors was amended, strengthening the powers of the Minister of Justice within the High Council. This step reversed the positive achievements of the reform carried out in 2010 following the constitutional referendum. While many of these amendments were declared unconstitutional by a decision of the Constitutional Court of 10 April 2014, prior to this decision the Minister of Justice had already replaced key members of the administrative staff of the High Council and reassigned members of the Council to other chambers. These decisions were not reversed since the judgment of the Constitutional Court had no retroactive effect. The facts described above clearly demonstrate that there are insufficient guarantees for the independence of the judiciary in Turkey. The Venice Commission calls on the Turkish authorities

- To review the measures taken against the judges and prosecutors concerned;
- To further revise the Law on the High Council of Judges and Prosecutors to reduce the influence of the executive power within the Council;
- To outlaw any interference by the High Council of Judges and Prosecutors with pending cases;

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<sup>145</sup> The first group of cases concerns prosecutors Zekeriya Öz, Celal Kara, Mehmet Yüzgeç and Muammer Akkaş and judge Süleyman Karaçöl, who were dealing with investigations into high level corruption. Responsibility for these investigations was suddenly taken away from these prosecutors in December 2013 and their decisions, although they were legal and valid, were not executed. The four prosecutors and judge Karaçöl were transferred outside the normal procedure to other jurisdictions in early 2014, suspended from office by the High Council of Judges and Prosecutors (HSYK) in December 2014 and dismissed by the High Council on 12 May 2015. The second group of cases concerns judges Metin Özçelik and Mustafa Başer, who granted on 25 April 2015 a request for the release of media representatives and police officers, who were detained on remand due to their involvement in the anti-corruption investigations. In their decisions the judges referred to the respective case law of the European Court of Human Rights. Not only were these release orders, although they were legal and valid, not implemented but, two days later, on 27 April 2015 the judges were suspended by the High Council of Judges and Prosecutors, which authorised their arrest. The President of the second chamber of the HSYK stated: “I apologise to the public. Our ruling was delayed due to the weekend.” The third group of cases concerns prosecutors Süleyman Bağrıyanık, Ahmet Karaca, Aziz Takçı and Özcan Şişman, who gave orders in January 2014 to stop and search Syria-bound trucks allegedly carrying weapons. Following their decisions the prosecutors were transferred to other posts. In January 2015 they were suspended from office by the HSYK and in May 2015 the HSYK authorised post factum their arrest: see the appendix to the Declaration at: <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>

- To provide judges with legal and constitutional guarantees against transfer against their will, except in cases of reorganisation of the courts”.<sup>146</sup>

83. On 12 June 2015 the Bureau of the Consultative Council of European Judges (CCJE) issued the following statement after receiving an “unprecedented number of complaints”:

“the CCJE has concluded that it must express its grave and sincere concern with respect to the proceedings and decisions leading to the suspension and arrest of Judge Özçelik and Judge Başer. The uncontested facts, as they appear to the bureau, lead to the clear inference that these judges may have been removed only or predominantly because of their (intended) decision-making. This in turn would cast great doubts on whether the guarantees of personal and institutional independence of the judiciary have been sufficiently observed in Turkey. In addition, these events must be seen against a background of reports that a substantial number of judges in Turkey have, in recent months, against their will been removed from their offices and transferred to other posts. The extent of such transfers gives rise to additional doubts with respect to their causes. Regardless of whether they were justified by necessities of providing judicial services to all regions of the country, in the eyes of society and of the members of the judiciary concerned these moves might lead to the conclusion that judges may have in fact undergone such transfers because of their decision-making. This in turn would endanger and possibly undermine confidence in the impartiality and independence of the judiciary and the fundamental principles recalled under IV, above. To sustain and widen such confidence, however, must be the paramount aim of all concerned with the administration of justice”.<sup>147</sup>

## **I. Conclusions on the independence of the judiciary and the rule of law**

84. Since the eruption of the December 2013 corruption scandal, the government’s actions have seriously undermined the independence of the judiciary in Turkey and the already fragile rule of law. Whatever the merits of the December 2013 corruption charges, the government has given the impression that it is more interested in punishing the investigators than rooting out corruption.<sup>148</sup>
85. These observations are generally shared by many Turkish and foreign observers. According to Professor Özbudun, the government’s actions are “generally viewed as an effort to interfere with the ongoing judicial process in order to cover up the corruption charges”.<sup>149</sup> The former chairman of the Constitutional Court, Haşim Kiliç, has stated that judges today are in constant fear of being relocated and thus cannot be

<sup>146</sup> <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>. The Venice Commission is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law. The Commission’s official name is the European Commission for Democracy through Law.

<sup>147</sup> [http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments%20of%20the%20CCJE%20Bureau%20on%20Turkey\\_2015.pdf](http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments%20of%20the%20CCJE%20Bureau%20on%20Turkey_2015.pdf)

<sup>148</sup> The investigation was closed on 16 December 2014 after the Istanbul Chief Prosecutor’s Office rejected an appeal against earlier decisions in May and September 2014 not to prosecute the 96 suspects allegedly involved in the December 2013 corruption case. In January 2015 the AKP secured a parliamentary vote not to send the four former ministers implicated in the scandal for trial at the Supreme Court of Appeals. According to the Turkish press, up to 50 of the AKP’s 312 deputies declined to support at least one of the four in the secret ballots: ‘Turkish parliament votes against graft trial for former ministers’, Financial Times, 21 January 2015, available at: <http://www.ft.com/cms/s/0/7f805574-a14a-11e4-8d19-00144feab7de.html?siteedition=uk#axzz3ZBQxgQUH>.

<sup>149</sup> ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.



expected to render fair judgments: “This will have a price and someone has to pay the price so that we can pass down a free and independent judiciary to future generations. Otherwise [the judiciary] will remain subordinate [to the executive], as it is now.” The European Commission stated in its 2014 Progress Report:

“the government’s response to allegations of corruption targeting high-level personalities, including members of the government and their families, raised serious concerns over the independence of judiciary and the rule of law. This response consisted in particular in amendments to the Law on the High Council of Judges and Prosecutors and subsequent numerous reassignments and dismissals of judges and prosecutors, as well as reassignments, dismissals, or even detention, of a large number of police officers. This raised concerns with regard to the operational capabilities of the judiciary and the police and cast serious doubts on their ability to conduct the investigations into corruption allegations in a non-discriminatory, transparent and impartial manner. The Constitutional Court found a number of provisions of the Law on the High Council of Judges and Prosecutors unconstitutional, following which parliament amended the legislation and brought back previous provisions. ...Overall, the government response to corruption allegations, which amounted to interfering of the executive into the independence, impartiality and efficiency of the judiciary, raised serious concerns”.<sup>150</sup>

86. The recent downward trend in Turkey’s democracy record is also observed in the 2014 Freedom in the World report of Freedom House which place Turkey in the ‘partly free’ category with “a downward trend arrow” for 2014.<sup>151</sup>
87. Currently, the Constitutional Court appears to be the sole institutional check on executive power.<sup>152</sup> In 2014 the court took a number of important decisions which demonstrated the resilience of Turkey’s constitutional system, for example, rulings concerning the HSYK, arbitrary detention periods and access to social media.<sup>153</sup> The introduction of individual complaints to the Constitutional Court in respect of infringement of rights under the Constitution which fall within the scope of the ECHR by a public authority has also served as an important instrument in the protection of individual rights and freedoms.<sup>154</sup> However, recent observers have criticised the readiness of the court to deal with critical issues and the court’s delay in reaching decisions. Outstanding cases before the Constitutional Court include challenges to the legislation passed in April 2014 relating to the National Intelligence Organisation (MIT) which gave the agency sweeping powers for the surveillance and monitoring of

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<sup>150</sup> Turkey 2014 Progress Report, European Commission Staff Working Paper, COM (2014) 700), 8 October 2014, (see n 23 above) at pp. 2-3.

<sup>151</sup> Freedom House rates countries’ democratic performance on two scales: political rights and civil rights. Countries are rated on a scale from 1 to 7 with 1 indicating the best and 7 the worst scores. Countries that score between 3 and 5.5 are rated as ‘partly free’. Turkey is rated “not free” as regards freedom of the press: Freedom House in the World 2014, available at: [www.freedomhouse.org/report/freedom-word/freedom-word-2014](http://www.freedomhouse.org/report/freedom-word/freedom-word-2014), and n 368 below.

<sup>152</sup> “In this dark picture, the Constitutional Court seems the only beacon of hope”: ‘Pending challenges in Turkey’s judiciary’, Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.

<sup>153</sup> Another piece of controversial legislation that prevented high-level civil servants who were removed from their posts unjustly from returning to their posts for two years was found unconstitutional: see ‘The Turkish Constitutional Court’s Struggle for Democracy and The Rule of Law’, Rethink Institute, October 2014, available at: <http://www.rethinkinstitute.org/turkish-constitutional-courts-struggle-democracy-rule-law/>

<sup>154</sup> Art 148 of the Constitution, as amended on 12 September 2010; ‘Individual Application (Constitutional Complaint)’, available at: <http://www.anayasa.gov.tr/index.php?l=content&id=402&lang=1>.

citizens<sup>155</sup>; the June 2014 legislation establishing the controversial new Criminal Judges of the Peace<sup>156</sup>; the law on forcibly closing privately funded preparatory schools (or *dershanes*); amendments to the Internet Law<sup>157</sup> and the refusal by prosecutors in April 2015 to comply with a court order for the release of Mr Karaca and others.

88. The AKP government has not disguised its intention to change the composition of the Constitutional Court, whereby its members would be elected partly by the legislature and partly by the President of the Republic.<sup>158</sup> However, this requires a constitutional amendment and the AKP currently lacks the minimum three-fifths majority of the entire membership of the Assembly to make a constitutional amendment.

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<sup>155</sup> See para 164 below.

<sup>156</sup> See paras 71-73 above.

<sup>157</sup> See para 152 below.

<sup>158</sup> The Constitutional Court currently comprises seventeen members, fourteen of which are appointed by the President from candidates nominated by lower courts and the Council of Higher Education, and three of which are elected by the TGNA: Art 146 of the Turkish Constitution.

## IV. ACTIONS AGAINST SUPPORTERS OF THE HIZMET MOVEMENT

### A. THE RIGHT TO LIBERTY AND SECURITY, THE RIGHT TO A FAIR TRIAL AND THE PROHIBITION ON TORTURE AND INHUMAN OR DEGRADING TREATMENT

#### *The July 2014 operations*

89. Commencing in July 2014, hundreds of high-ranking police officers involved in the December 2013 anti-corruption operation<sup>159</sup> were detained in a series of coordinated raids.<sup>160</sup> The operations are widely believed in Turkey to be an act of retribution by Erdoğan's government for the December 2013 corruption investigation.<sup>161, 162</sup>
90. Legal representatives for the police officers have made a number of complaints in relation to their clients' arrest and the conditions of their detention, which deserve to be investigated, including the following<sup>163</sup>:
- the defendants' homes were searched at 01:30 at night in violation of Article 118 of the Code of Criminal Procedure (CMK) which forbids searching of residences, workplaces or of any other private property at night;
  - the public prosecutor failed to conclude the questioning of the defendants in the time prescribed by the arrest warrants. One of the defendants, Erkan Ünal was still being questioned at 02:30 despite the fact that the warrant for his arrest stipulated a deadline of 01:30;
  - applications by the defendants for their immediate release on the grounds that the maximum time limit had expired by which the defendants must be either charged or brought before a court were unlawfully rejected.<sup>164</sup> The court refused to release the

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<sup>159</sup> as well as investigations into the Balyoz (Sledgehammer), Ergenekon, Kurdistan Communities Union (KCK) and Tawhid-Salam cases.

<sup>160</sup> In a statement to the media on 22 July 2014, İstanbul Chief Public Prosecutor Hadi Salihoğlu said arrest warrants had been issued for the questioning of 115 police officers over allegations that included espionage and wiretapping. In the latest wave of arrests on 11 May 2015 the Ankara Prosecutor's Office ordered the detention of 34 officers, including police chiefs, in 16 provinces across Turkey.

<sup>161</sup> The political background to the July arrests is discussed at para 73 above. Hours before the pre-dawn raids on 22 July 2014, Mr Erdoğan said in a television interview that “we have to fight together against the parallel structure”. On 20 July 2014 Mr Erdoğan stated that the operations against the “parallel structure” will be carried out soon by the new “Criminal Judges of the Peace”.

<sup>162</sup> There are also concerns over the use of the courts by the AKP to diminish the influence of other opponents. The most high profile case which has been the object of such concerns are the so-called ‘Ergenekon’ trials, which followed an investigation into an alleged ‘terrorist organisation’. By the time the trials ended, 254 individuals had been convicted. While many of those convicted were military officers, at least 20 journalists received prison terms. Some of the sentences were particularly heavy, including life imprisonment for İlker Başbuğ, a former general of the armed forces chief, however, in 2014, the Constitutional Court ruled that his rights had been violated. See ‘Journalists sentenced in alleged Ergenekon plot’, Committee to Protect Journalists, 7 August 2013, available at: <https://cpj.org/2013/08/journalists-sentenced-in-alleged-ergenekon-plot.php#more>.

<sup>163</sup> Statement by Av. Kemal Şimşek, the legal representative of a number of police officers held in Silivri Prison.

<sup>164</sup> The maximum authorised period of police custody is generally 24 hours. In the case of terrorism-related offences, the custody period can be extended by a court to a maximum of four days: Art 91, paras 1, 3; Art 251, para 5 of the CMK and ss. 13, 14 of the 2005 Regulation on Apprehension, Detention and the Taking of Statements.

suspects for their own protection despite the fact that the defendants had not made any such application and there was no real reason to apprehend physical attack.

- on arrest the suspects were handcuffed and paraded before the media as if they were convicted criminals “in an attempt to undermine their credibility in the eyes of the public and cause them to be perceived as guilty”,<sup>165</sup>;
- when being interviewed by the public prosecutor, the defendants were asked to give statements about the “crimes” they had allegedly committed without first being shown any documents concerning the alleged evidence against them;
- the defendants were forced by interrogating police officers to sign typewritten documents which said that the defendants wanted to exercise their right to silence when the defendants had not made any such election;
- the defendants' lawyers on numerous occasions were unable to find a duty judge in the Istanbul courthouse;
- the defendants' requests to Criminal Judge of the Peace İslam Çiçek for audio and video recording of their questioning were unjustifiably dismissed on the grounds of “technical impossibility”, notwithstanding that there are large numbers of recording facilities in the Istanbul courthouse;
- Judge Çiçek on one occasion had the defendants' lawyers removed from the courtroom in violation of the defendants' right to a fair hearing;
- on 28 July 2014 the chief of the police officers who took part in the police operation when the defendants were taken into custody was discovered by the defendants' lawyers holding a meeting with Judge Çiçek in the judge's office. When the lawyers, accompanied by Republican People's Party (CHP) deputy, Mahmut Tanal, entered Judge Çiçek's chamber and enquired about the identity of those present in the room, Judge Çiçek reportedly told an unidentified man to "Run, İsmail, run!" The unidentified man then fled the courthouse.
- when the defendants when taken into custody they were forced to stay in cells which were far below the standards required by law. The defendants were forced to sleep in over-crowded cells, and in some instances with two defendants having to share a single bed. They were prevented from eating *suhur* (pre-dawn) meals during Ramadan. Heaters and air-conditioning systems were left turned on or off for hours and temperatures inside the cells were left to reach unbearable conditions. Suspects were denied washing facilities even when the heat was overwhelming. Lighting was continuously kept on depriving the defendants of adequate rest before their interrogations. Insufficient and very poor quality food was provided. Defendants who wore glasses had their glasses taken away from them. Personal items which were removed from the defendants were either damaged or incomplete when later returned to them. The defendants were subject to insults by investigating officers, for example, referring to them ‘terrorists’.
- Conditions at Silivri prison in respect of the officers who continue to be held on remand are degrading and inhumane. Security measures are applied unreasonably without credible justification. The defendants are unlawfully denied access to their lawyers. Although they are held on remand and must be presumed innocent, they are forced to

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<sup>165</sup> Statement by Av. Kemal Şimşek.

wear identification badges which read “guilty of...”. Prescription medicines have been replaced by substitutes without proper medical examination and defendants have been given out of date medicines. The defendants are denied adequate laundry facilities. Food and drinks on the prison menu are arbitrarily denied, for example, the defendants were denied tea for three months. Petitions to the office of the governor are not recorded in breach of the requirement that such correspondence must be dated and numbered by the office of the governor upon receipt. Petitions are either ignored or, if answered, contain no identification of the person issuing the response. Letters addressed to the defendants from outside of the prison are returned stating “the addressee declined to receive” without being shown to the defendants. Visiting bans are issued, in some instances for up to 6 months, without jurisdiction. Families arriving for prison visits, are made to wait for unreasonable amounts of time, and conversations with visitors are illegally recorded and subsequently used as grounds for issuing visiting bans.

### ***The arrest and detention of Hidayet Karaca***

91. On 14 December 2014 the office of the public prosecutor of Istanbul raided the offices of the *Zaman* newspaper and several other addresses and detained 27 individuals, including prominent media figures and high-ranking police officers, all said to be associated with the Hizmet movement.<sup>166</sup> Among those detained were Ekrem Dumanlı, the editor-in-chief of *Zaman*, Hidayet Karaca, the chief executive of Samanyolu Media Group,<sup>167</sup> the former heads of the anti-terrorism and organised crime units in the Istanbul police department and 13 other journalists, television executives, producers, directors and scriptwriters. Mr Dumanlı and 15 others were released by the prosecution pending trial after providing statements.<sup>168</sup> Mr Karaca and the three police officers remain in detention without indictment.
92. Mr Karaca, Mr Dumanlı, the three police chiefs and 14 others are under investigation for being “members or leading members of an armed organisation” contrary to Article 314(1) of the Turkish Criminal Code (TCK), “depriving individuals of their liberty through force, threats or deception” and “slander”. The suspects were detained two days after the threshold for the burden of proof required for obtaining a search warrant was reduced from “strong doubt based on concrete evidence” (which had been introduced in February 2014) to reasonable doubt.<sup>169</sup>
93. On the same day as Mr Karaca’s arrest, the Istanbul 1<sup>st</sup> Criminal Judge of the Peace issued a warrant for the arrest of Fethullah Gülen on the grounds of “establishing and managing a terrorist organisation” contrary to Article 314(1) of the TCK; “using physical power or threat or deception to perform an act or during commission of an offence” contrary to Article 109(2) of the TCK; “casting aspersions on an individual

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<sup>166</sup> ‘Five Released Within December Operation Raids’, BIA News Agency, 15 December 2014, available at: <http://bianet.org/english/politics/160829-five-released-within-december-14-operation-raids>; ‘Black Sunday: The Day Turkey Detained Its Prominent Journalists’, Today’s Zaman, 14 December 2014, available at: [http://www.todayszaman.com/anasayfa\\_black-sunday-the-day-turkey-detained-its-prominent-journalists\\_366944.html](http://www.todayszaman.com/anasayfa_black-sunday-the-day-turkey-detained-its-prominent-journalists_366944.html)

<sup>167</sup> Mr Karaca is also a member of the High Commission of Press Council and the chairman of the Television Broadcasters’ Foundation

<sup>168</sup> Mr Dumanlı was released pending trial after six days in custody. The court imposed travel restrictions despite the fact that his family is resident in Turkey and the impediment to his work as a journalist. Since December 2014 there has been no further hearing and no indictment has been served.

<sup>169</sup> See para 75 above.

and causing imposition of punitive or administrative sanctions on the aggrieved party” contrary to Article 267 (7) of the TCK.<sup>170</sup>

94. Many journalists currently in prison are charged with being a member of a criminal organisation under Article 314 of the TCK.<sup>171</sup> In 2011 the Commissioner for Human Rights on the Council of Europe expressed his concern that Article 314 was often used in conjunction with the Anti-Terrorism Act to detain journalists.<sup>172</sup> The United Nations Country Team (UNCT) has also expressed concern about the continued use of anti-terrorist laws for the politically motivated prosecution of large numbers of persons, including politicians, human rights defenders and journalists, in particular for alleged “membership of a terrorist organisation”.<sup>173</sup>
95. Mr Karaca and Mr Dumanlı, along with other newspaper journalists, and the director, producer and scriptwriters of a television drama, are accused of conspiring against an Islamist group called Tahşiye (or Tahşiyeciler) whose leader, Mehmet Doğan, was detained for 17 months in 2010 and later released pending trial. The defendants are said to have fabricated evidence against the Tahşiye and its leader on Fethullah Gülen’s direction, and in the case of the journalists and media executives through media coverage of the police investigations of the Tahşiye in 2009. The evidence against Mr Karaca, in so far as it has been disclosed, appears to be that he is alleged to have sent encrypted messages to police officers responsible for the investigation into the Tahşiye targeting the group’s leader through the medium of an episode of a fictional television drama called ‘Tek Türkiye’ broadcast by Samanyolu in 2009.<sup>174</sup> The police chiefs who launched the operation against the Tahşiye, the respective former heads of the Istanbul anti-terrorism and organised crime police departments, were also detained.
96. Many Turkish and international observers have commented that it appears that the true motivation for the prosecution of Mr Karaca and Mr Dumanlı is retribution for the December 2013 corruption scandal. A senior researcher at Human Rights Watch commented at the time of the arrests, “The timing [on the anniversary of the

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<sup>170</sup> As a result of a non-disclosure order under Art 153 of the CMK, it is not possible to obtain an official statement regarding the grounds for this arrest warrant. A second arrest warrant was subsequently issued by the 3<sup>rd</sup> Criminal Court of the Peace of Istanbul on 24 February 2015. Similarly, the grounds for this second warrant are subject to a non-disclosure order. Emre Uslu, a prominent supporter of the Gülen movement, was also a subject of this arrest warrant. Mr Gülen and Mr Uslu are reported to be accused of illegal wiretapping, espionage, breaching private life, illegally recording personal data forgery of official documents, establishing an illegal organisation, and attempting to overthrow the Turkish government. Legal representatives for Mr Gülen have stated that the warrant is unlawful on the grounds that it is in breach of international agreements and that the evidence that Mr Gülen is involved in a crime is far-fetched and illogical, and that the issue of the warrant shows that the judiciary is being used as a tool to suppress people and groups who do not share the same views as the ruling government.

<sup>171</sup> These provisions are discussed at paras 138-142 below.

<sup>172</sup> ‘Freedom of expression and media freedom in Turkey’, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 12 July 2011, CommDH(2011)25, (see n 23 above), paras 24-30.

<sup>173</sup> Submission by the UNCT to the Universal Periodic Review of Turkey 2015, para 37, available at: <http://www.refworld.org/pdfid/54c109084.pdf>.

<sup>174</sup> A non-disclosure order was issued under Art 153 of the CMK. Art 153, as amended on 12 December 2014, provides: “(1) The defence counsel may review the full contents of the file related to the investigation phase and may take a copy of his choice of documents, and is not obliged to pay any fees for such; (2) The power of the defence counsel may be restricted upon motion of the public prosecutor, by decision of the justice if such power hinder the aim of the ongoing investigation. Such restriction is limited to the investigations for [certain] offences”; Statement of Av. Fikret Duran.

December 2013 corruption investigations] and the limited evidence made public suggests these arrests are politically motivated, not based on reasonable suspicion of a criminal offence”.<sup>175</sup> The executive director of the Committee to Protect Journalists stated “The heavy-handed actions this morning smack of political vengeance”.<sup>176</sup> The arrests had in fact been preceded two days earlier by President Erdoğan signaling a fresh campaign against the Hizmet movement.<sup>177</sup>

97. In a statement issued on 14 December 2014 the European Commission also condemned the arrests: “The police raids and arrest of a number of journalists and media representatives in Turkey are incompatible with the freedom of the media, which is a core principle of democracy. This operation goes against European values and standards Turkey aspires to be part of”.<sup>178</sup> In February and March 2015, 88 members of the US Congress and 74 members of the US Senate wrote to US Secretary of State, John Kerry, expressing deep concern about the recent arrest of journalists and urged the government “to stop suppressing the free press and put an end to gross intimidation efforts among members of the media who express opinions or report events in a way that the regime feels is opposed to their interests.”<sup>179</sup> Opposition leader Kemal Kiliçdaroğlu referred to the arrests as “a coup against democracy. Detentions of journalists and dawn raids on television stations are not something we can accept under any circumstances”.<sup>180</sup> Turkish journalists, who have criticised the Hizmet movement in the past, also criticised the raids.<sup>181</sup> Asli Aydintaşbaş, a columnist for the newspaper *Milliyet*, commented if you call out the government and defend the *Zaman* newspaper, “you will be accused of being part of a parallel state”.<sup>182</sup>
98. The legal representatives of Mr Karaca have made a number of complaints in relation to the conditions of their client’s arrest and detention which deserve to be investigated, in particular that:
  - in contravention of the law that stipulates that after a detention period of four days,<sup>183</sup> no one can be held in custody unless they are brought before a judge,

<sup>175</sup> ‘Turkey crackdown on opposition media’, Human Rights Watch, 19 December 2014, available at: <http://www.hrw.org/news/2014/12/19/turkey-crackdown-opposition-media>

<sup>176</sup> What the Zaman Raid Means for Turkey’s Media’, The New Yorker, 17 December 2014, available at: <http://www.newyorker.com/news/news-desk/after-zaman-raid-turkeys-journalists-rally-Erdoğan>.

<sup>177</sup> “We have gone into their lairs and we will go into them again. Whoever is beside them and behind them, we will bring down this network and bring it to account”: ‘Turkey’s Erdoğan signals fresh moves against Gülen supporters’, Reuters, 12 December 2014, available at: <http://www.reuters.com/article/2014/12/12/us-turkey-erdogan-cleric-idUSKBN0JQ1LJ20141212>.

<sup>178</sup> Joint statement of the Vice-President of the Commission and the Commissioner for Enlargement Negotiations, 14 December 2014 [http://europa.eu/rapid/press-release\\_STATEMENT-14-2640\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-2640_en.htm)

<sup>179</sup> See para 142 below. The congressional members said the charges faced by Dumanlı and Karaca are “questionable”.

<sup>180</sup> ‘Turkish police arrest 23 in raids on opposition media’, The Guardian, 14 December 2014, available at: <http://www.theguardian.com/world/2014/dec/14/turkish-police-raid-opposition-media>.

<sup>181</sup> What the Zaman Raid Means for Turkey’s Media’, The New Yorker, 17 December 2014 (see n 176 above).

<sup>182</sup> Ibid.

<sup>183</sup> The maximum authorised period of police custody is 24 hours, but in the case of terrorism-related offences, the custody period can be extended by the court to a maximum of four days: see n 164 above.

Mr Karaca was unlawfully held in custody for another 14 hours without any court order<sup>184</sup>;

- there are no facts or matters that give rise to reasonable grounds of suspicion, objectively judged, that Mr Karaca is a member of a terrorist organisation”; and
- the judge’s reasons for arrest in the arrest warrant wrongfully relied on a transcript of a telephone conversation which allegedly took place between Mr Karaca and Fethullah Gülen in 2013, which has been vigorously denied by both Mr Karaca and Mr Gülen’s lawyers and which would, in any event, have been illegally intercepted. Under Article 38(6) of the Turkish Constitution “unlawfully obtained findings cannot be accepted as evidence”.<sup>185</sup> The detention order cited the alleged telephone conversation as grounds for the detention notwithstanding that the public prosecutor had withdrawn his questions about the alleged telephone recording.

### ***Order for the release of Hidayet Karaca and 63 police officers***

99. Mr Karaca and 63 high-ranking police officers remain in custody in Silivri prison. Despite lengthy periods in detention no indictments have yet been served.
100. On 25 April 2015 an order was made by the Istanbul 32<sup>nd</sup> Criminal Court of First Instance for the release on bail of Mr Karaca and 63 police officers who had been previously arrested and detained in the July 2014 operations. An earlier petition by the defendants that the Criminal Judges of the Peace were not an impartial and independent tribunal and should be recused had been accepted by the Istanbul 29<sup>th</sup> Criminal Court of First Instance on 20 April 2015, who had referred the case to the Istanbul 32<sup>nd</sup> Criminal Court of First Instance, the duty court on that day, for examination of the defendants’ application for release on bail.
101. In his reasoned ruling, Judge Mustafa Başer of the Istanbul 32<sup>nd</sup> Court of First Instance held that the suspects should be released as the detaining judge had failed to identify facts or evidence in accordance with Article 170 of the Code on Criminal Procedure (CMK) which gave rise to the requisite level of suspicion. The court held that it is very unlikely for the suspects to abscond taking into consideration that some of them are police officers and Hidayet Karaca is a journalist, that many of them had come forward when informed they were being sought and that they have a fixed address and no new evidence which would call for an extension of their detention had been identified. Further, the court noted that the extension orders which the Criminal

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<sup>184</sup> The Istanbul 32<sup>nd</sup> Court of First Instance in its judgment of 25 April 2015 upheld this complaint: “It is clear that the suspects were detained well after the maximum 4 day custody time limit had lapsed. As a matter of fact, the ECHR has ruled the holding of a person in custody for 21 days (when the custodial time limit was 15 days maximum) to be in violation of Art 5(1) of the ECHR”. See para 99 below.

<sup>185</sup> Statement of Av. Fikret Duran; Statement of Av. Coşkun Yorulmaz; ‘Karaca’s lawyers ask Constitutional Court to overturn detention order’, Today’s Zaman, 6 January 2015, available at: [http://www.todayszaman.com/national\\_Karacas-lawyers-ask-constitutional-court-to-overturn-detention-order\\_369066.html](http://www.todayszaman.com/national_Karacas-lawyers-ask-constitutional-court-to-overturn-detention-order_369066.html)



Judges of the Peace have separately issued lack the kind of reasoning which the Constitutional Court and the ECHR require.<sup>186</sup>

102. In respect of the decision that the Criminal Judges of the Peace should be recused, Judge Metin Özçelik of the Istanbul 29<sup>th</sup> Court of First Instance rejected the argument that the Courts of First Instance are not authorised to rule on the recusal of the Criminal Judges of the Peace. The court held that the Criminal Judges of the Peace were not an independent and impartial tribunal according to the objective criteria laid down by the ECtHR.<sup>187</sup>
103. However, and extraordinarily, public prosecutors refused to carry out the order of the Istanbul 32<sup>nd</sup> Court of First Instance for the release of the defendants.<sup>188</sup> The Istanbul chief public prosecutor's office claimed the order of the Istanbul 32<sup>nd</sup> Court of First Instance to release the defendants was void as the court was not authorised to rule on the issue as the Istanbul 29<sup>th</sup> Court of First Instance had referred the case without proper examination of the case files and with no authority to do so. The Istanbul 10<sup>th</sup> Criminal Judge of the Peace also issued a ruling that the Istanbul 29<sup>th</sup> Court of First Instance was not authorised to determine whether the Criminal Judges of the Peace should be recused.
104. In fact, following an earlier application to the Istanbul 32<sup>nd</sup> Court of First Instance to replace the Criminal Judges of the Peace, the Istanbul 32<sup>nd</sup> Court of First Instance applied to the Istanbul 9<sup>th</sup> High Criminal Court to determine which court had the competent jurisdiction to review requests for replacement of the Criminal Judges of the Peace. In February 2015 the Istanbul 9<sup>th</sup> High Criminal Court ruled unanimously that the Courts of First Instance have jurisdiction over such matters rather than the Criminal Judges of the Peace under Articles 26, 27, 28 of the Code on Criminal Procedure (CMK).<sup>189</sup> The judge at the 3<sup>rd</sup> Criminal Court of the Peace, Judge İslam Çiçek, had also reportedly indicated that Criminal Courts of the Peace are not trial courts but rather function as investigating courts and therefore the proper request for a recusal of Criminal Judges of the Peace should be made to the Courts of First Instance.<sup>190</sup>
105. On 27 April 2015 the Istanbul 32<sup>nd</sup> and 29<sup>th</sup> Criminal Courts of First Instance reaffirmed their earlier judgments, stating that the 10<sup>th</sup> Criminal Judge of the Peace is subordinate to them and has no jurisdiction on the matter and that the Istanbul chief public prosecutor has no authority to challenge the courts' decision. The Istanbul 32<sup>nd</sup>

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<sup>186</sup> Judgment of Judge Mustafaer Başer, 32<sup>nd</sup> Istanbul Criminal Court of First Instance, 25 April 2015 (unofficial translation).

<sup>187</sup> Judgment of Judge Metin Özçelik of the Istanbul 29<sup>th</sup> Court of First Instance, 24 April 2015.

<sup>188</sup> Fikret Duran, one of the lawyers representing Mr Karaca, reportedly maintained that one of the prosecutors on duty in the Istanbul Courthouse over the weekend of 25/26 April 2015 told him he could not sign the petition for release out of fear for his life: 'Removal of judges by HSYK reveals judiciary under government control', Today's Zaman, 28 April 2015, available at: [http://www.todayszaman.com/anasayfa\\_removal-of-judges-by-hsyk-reveals-judiciary-under-government-control\\_379237.html](http://www.todayszaman.com/anasayfa_removal-of-judges-by-hsyk-reveals-judiciary-under-government-control_379237.html).

<sup>189</sup> 'Political interference in judiciary: Chosen court puts judges under arrest', Today's Zaman, 3 May 2015, available at: [http://www.todayszaman.com/national\\_political-interference-in-judiciary-chosen-court-puts-judges-under-arrest\\_379717.html](http://www.todayszaman.com/national_political-interference-in-judiciary-chosen-court-puts-judges-under-arrest_379717.html); 'Things have gone completely mad', BGN News, 6 May 2015, available at: <http://www.bgnnews.com/things-have-gone-completely-mad-yazisi-5729>

<sup>190</sup> 'How did the courts work their way up to release judgment?', Cihan, 27 April 2015, available at: [http://en.cihan.com.tr/news/TIMELINE-How-did-the-courts-work-their-way-up-to-release-judgment-\\_6390-CHMTc2NjM5MA==](http://en.cihan.com.tr/news/TIMELINE-How-did-the-courts-work-their-way-up-to-release-judgment-_6390-CHMTc2NjM5MA==).

Criminal Court of First Instance instructed the prosecutor's office and prison warden to execute the release orders or face criminal charges for dereliction of duty.

106. Later the same day, the 2nd Chamber of the HSYK<sup>191</sup> announced that the judges of the Istanbul 32nd and 29th Criminal Courts of First Instance, Metin Özçelik and Mustafa Başer, were suspended on grounds of "damaging the reputation and influence of the judiciary".<sup>192</sup> They were later arrested and detained in custody on 1 May 2015 by the Bakırköy 2nd High Criminal Court on charges of "attempting to overthrow the Turkish government or hindering the government's operation in part or full" and "being a member of an armed organisation".<sup>193</sup> Investigators from the HSYK reportedly recommended the arrest of the judges without even giving them the opportunity of defending themselves before the HSYK.<sup>194</sup> The chief public prosecutor of Istanbul said in a statement to the press that the judges had "abused their power on the orders of an illegal organisation," in an apparent reference to the Hizmet movement.<sup>195</sup>
107. Shortly before the Second Chamber of the HSYK convened to deliver a decision about the two judges, President Erdoğan said in a television interview that the HSYK was in fact late in convening to intervene in the issue and reportedly stated "I would hope that the HSYK will reach the ideal conclusion with its ruling". When the HSYK discharged the judges, the chairman of the 2nd Chamber of the HSYK stated "I apologise to the public. Our ruling was delayed due to the weekend".<sup>196</sup> AKP Vice Chairman, Mustafa Şentop, and the former Minister of Justice, Bekir Bozdağ, criticised the decision of the 32<sup>nd</sup> Court of First Instance on Twitter.<sup>197</sup> President Erdoğan and Prime Minister Davutoğlu have both since condemned the judges' order, saying the decisions "came from Pennsylvania"<sup>198</sup> in a reference to Fethullah Gülen.<sup>199</sup>
108. On 28 April 2015 Judge Erdoğan Şimşek, who was temporarily appointed to the Istanbul 32nd Court of First Instance by the HSYK, in an unprecedented move, ruled

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<sup>191</sup> now strongly dominated by pro-government judges, see paras 62-68 above.

<sup>192</sup> 'Three judges suspended for decisions to release 79 suspects', *Hürriyet*, 27 April 2015, available at: <http://www.hurriyetdailynews.com/three-judges-suspended-for-decisions-to-release-79-suspects.aspx?pageID=238&nID=81622&NewsCatID=338>

<sup>193</sup> 'Turkey: Second judge in 'parallel state' case arrested', Anadolu News Agency, 1 May 2015, available at: <http://www.aa.com.tr/en/news/503135--turkey-second-judge-in-parallel-state-case-arrested>.

<sup>194</sup> 'Turkey up in arms over arrest of two judges', *Today's Zaman*, 1 May 2015, available at: [http://www.todayszaman.com/national\\_turkey-up-in-arms-over-arrest-of-two-judges\\_379565.html](http://www.todayszaman.com/national_turkey-up-in-arms-over-arrest-of-two-judges_379565.html)

<sup>195</sup> 'Turkey's war within the judiciary deepens', *Al-Monitor*, 30 April 2015, available at: <http://www.al-monitor.com/pulse/originals/2015/04/turkeys-war-within-the-judiciary-deepens.html#ixzz3a0pfY85T>

<sup>196</sup> 'Turkish judicial body complies with Erdoğan, discharges judges', *BGN News*, 27 April 2015, available at: <http://national.bgnnews.com/turkish-judicial-body-complies-with-Erdogan-discharges-judges-haberi/5496>

<sup>197</sup> Former Minister of Justice, Bekir Bozdağ referred to it as "a decision which defied the law".

<sup>198</sup> Mr Davutoğlu also reportedly claimed to have recordings to prove that the judges were directed by Mr Gülen but no recordings have been produced: 'Gülen's lawyers file civil suit and criminal complaints against Prime Minister Davutoğlu', *Today's Zaman*, 27 April 2015, available at: [http://www.todayszaman.com/national\\_gulens-lawyers-file-civil-suit-and-criminal-complaints-against-prime-minister-davutoglu\\_379085.html](http://www.todayszaman.com/national_gulens-lawyers-file-civil-suit-and-criminal-complaints-against-prime-minister-davutoglu_379085.html)

<sup>199</sup> Just a day after Judge Başer issued his decision, Prime Minister Davutoğlu made a speech in which he condemned the two judges, saying they had conspired against the government as part of the Gülenist 'parallel structure': 'For judges who defy Turkey's leaders, short road to jail', *Open Democracy*, 28 May 2015, available at: <https://www.opendemocracy.net/emma-sinclairwebb/for-judges-who-defy-turkey-s-leaders-short-road-to-jail>.

to revoke the release order.<sup>200</sup> On 30 April lawyers for the defendants announced that an application to the Constitutional Court had been made.<sup>201</sup> This was followed on 6 May 2015 by an announcement that, in the absence of an expedited hearing in the Constitutional Court, they had applied to the ECtHR. Prominent Lawyer Celal Ülgen, who had previously defended the suspects of the Ergenekon and Balyoz trials, said the release had to be implemented: “The law of criminal procedure indicates that when a recusation is filed against a Criminal Judge of the Peace, the Court of First Instance decides”. On 11 May 2015 the defendants were transferred to new cells without the knowledge of their relatives, the conditions of which, according to the defendants’ lawyers, are degrading and inhumane.<sup>202</sup>

### ***Conclusions on the right to liberty and security***

109. The right to liberty is enshrined in Article 5 of the ECHR.<sup>203</sup> The ECtHR has consistently emphasised that it is one of the fundamental principles of a democratic society that the state must strictly adhere to the rule of law when interfering with the right to personal liberty.<sup>204</sup>

#### *(i) ‘In accordance with a procedure prescribed by law’ (Article 5(1))*

110. In the case of the complaints by the defendants that they were held unlawfully and not “in accordance with a procedure prescribed by law” as required by Article 5(1) of the Convention, if it can be substantiated that custody officers failed to comply with the time limits laid down in the Code on Criminal Procedure (CMK) and arrest warrants, the defendants’ detention would not be “in accordance with a procedure prescribed by law” and therefore in violation of Article 5(1). A deprivation of liberty may be said to be “lawful” only if it is carried out in strict compliance with national procedural and substantive rules.<sup>205</sup>

<sup>200</sup> ‘New judge in Karaca case prevents release’, Today’s Zaman, 29 April 2015, available at:

[http://www.todayszaman.com/national\\_new-judge-in-Karaca-case-prevents-release\\_379345.html](http://www.todayszaman.com/national_new-judge-in-Karaca-case-prevents-release_379345.html)

<sup>201</sup> ‘Lawyers of Hidayet Karaca apply to Constitutional Court’, BGN News, 30 April 2015, available at:

<http://national.bgnnews.com/lawyers-of-hidayet-Karaca-apply-to-constitutional-court-haberi/5583>

<sup>202</sup> ‘Karaca, Baransu and officers moved to ‘torturous,’ inhumane cells’, Today’s Zaman, 11 May 2015, available at: [http://www.todayszaman.com/national\\_Karaca-baransu-and-officers-moved-to-torturous-inhumane-cells\\_380418.html](http://www.todayszaman.com/national_Karaca-baransu-and-officers-moved-to-torturous-inhumane-cells_380418.html)

<sup>203</sup> The right is protected by Art 9 of the Universal Declaration of Human Rights. It also appears in Art 9(1) of the ICCPR and all other general rights instruments.

<sup>204</sup> “Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Art 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, “one of the fundamental principles of a democratic society ... which is expressly referred to in the Preamble of the Convention” and “from which the whole Convention draws its inspiration”: *Brogan v UK* 11209/84, Judgment of 29 November 1988, A/145-B (1988), 11 EHRR 117, §58; *Klass v Germany*, Judgment of 6 September 1978, Series A no. 28, (1979) 2 EHRR 214, §33; *Engel v Netherlands*, Judgment of 8 June 1976, Series A no. 22, (1979) 1 EHRR 647, §69.

<sup>205</sup> The expressions “lawful” and “in accordance with a procedure prescribed by law” in Art 5(1) require scrupulous adherence to national substantive and procedural rules: *Winterwerp v Netherlands* 6301/73, Judgment of 24 October 1979, A/33 (1979), 2 EHRR 387, §39; *Ladent v. Poland*, 11036/03, Judgment of 18 March 2008, §47.

*(ii) Right to be brought promptly before a judge (Article 5(3))*

111. Article 5(3) requires that a person who has been arrested or detained must be “brought promptly before a judge or other officer authorised by law to exercise judicial power”.<sup>206</sup> The purpose of Article 5(3) is to provide, as a safeguard against arbitrary detention, an independent scrutiny of the reasons for an accused person’s detention, and to ensure release if continued detention is not justified.<sup>207</sup> The judicial control on the first appearance of an arrested individual must above all be prompt, to provide effective safeguards against the risk of ill-treatment, which is at its greatest at the early stage of detention, to guard against the abuse of powers by law enforcement officers and to keep to a minimum any unjustified interference with individual liberty.<sup>208</sup>
112. Under the Code of Criminal Procedure (CMK) a person arrested on reasonable suspicion of involvement in terrorism-related offences may be detained by police for an initial period of 24 hours, and, on the authorisation of a judge, for a further period of up to four days. With regard to Mr Karaca’s complaint that he was held for more than 4 days, although the ECtHR and E Comm HR have refrained from setting abstract time limits, the Commission has suggested that the period should be no longer than four days.<sup>209</sup> It seems likely therefore that the detention of Mr Karaca for four days and 14 hours without bringing him before a judge or other officer authorised by law to exercise judicial power would be found to violate Article 5(3). These conclusions are consistent with the finding of the Istanbul 32<sup>nd</sup> Court of First Instance in its judgment of 25 April 2015, which held that “it is clear that the suspects were detained well after the maximum 4 day custody time limit had lapsed”.<sup>210</sup>

*(iii) Right to release pending trial (Articles 5(1)(c) and 5(3))*

113. The requirement of reasonable suspicion is an essential safeguard against arbitrary arrest and detention.<sup>211</sup> A “reasonable suspicion” that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.<sup>212</sup> Even

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<sup>206</sup> Art 5(3) reads as follows: “Everyone arrested or detained in accordance with the provisions of paragraph Art 5(1)(c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”.

<sup>207</sup> Identified in *Schiesser v Switzerland* 7710/76, Judgment of 4 December 1979, A/34 (1979), 2 EHRR 417, §31.

<sup>208</sup> *Medvedyev v France*, (GC), 3394/03, Judgment of 29 March 2010, ECHR 2010-; §117.

<sup>209</sup> See *Brogan v UK* (see n 199 above); *Pantea v. Romania*, 3343/96, Judgment of 3 June 2003, §242 where periods of more than four days in detention without appearance before a judge were held to be in violation of Art 5(3), even in the special context of terrorist investigations. In the case of *Brogan v UK*, detention for four days and six hours was found to breach Art 5(3).

<sup>210</sup> Judgment of Judge Mustafaer Başer, 32<sup>nd</sup> Istanbul Criminal Court of First Instance, 25 April 2015 (unofficial translation).

<sup>211</sup> Art 5(1)(c) permits deprivation of liberty which is in accordance with a procedure prescribed by law for the lawful arrest or detention for bringing a person before a competent legal authority on reasonable suspicion of having committed a criminal offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing having done so.

<sup>212</sup> *Fox, Campbell and Hartley v UK*, 12244/86, Judgment of 30 August 1990, §32, Series A/182, (1991) 13 EHRR 157, § 32. The length of the deprivation of liberty may also be material to the level of suspicion required: *Murray v UK*, (GC), 14310/88, Judgment of 28 October 1994, §55, A/300-A.

in cases of suspected terrorism, the Court has stated that “the exigencies of dealing with terrorist crimes cannot justify stretching the notion of reasonableness to the point where the essence of the safeguard secured by Article 5(1)(c) is impaired.”<sup>213</sup>

114. Although “the persistence of a reasonable suspicion that the person arrested has committed an offence is a sine qua non of the validity of the continued detention”, after a certain period Article 5(3) requires that the defendant be released unless further reasons can be found to justify continued detention.<sup>214</sup> In such circumstances the Court will examine the reasons advanced for denying bail in the national courts, and the applicant’s arguments in favour of bail being granted, to decide whether the continuation of the detention beyond that time was justified.<sup>215</sup>
115. The Convention case-law has developed four legitimate reasons for refusing bail, namely (a) the risk that the accused will fail to appear for trial; (b) the risk that the accused, if released, would take action to prejudice the administration of justice; (c) commit further offences; or (d) cause public disorder.<sup>216</sup> If the fear is of the defendant absconding, detention will be considered necessary only if there is a real risk, supported by adequate reasons which are clearly addressed to the facts of the case, that the feared absconson will take place if the defendant is granted bail.<sup>217</sup> The danger of absconding cannot be gauged solely on the basis of the severity of the sentence faced.<sup>218</sup>
116. The reasons, in so far as they have been disclosed for Mr Karaca’s arrest, appear highly questionable.<sup>219</sup> The claim that there exists “reasonable suspicion” that such a serious offence as conducting a terrorist organisation was committed on the basis of a fictional TV drama series broadcast in 2009, particularly in light of the fact that Mr Karaca is the chief executive of the entire broadcasting group, appears highly dubious. Furthermore, in view of the fact that Mr Karaca surrendered himself to custody in December 2014 and that the defendants are well-established in Turkey with strong family connections, the conclusion of the 32<sup>nd</sup> Court of First Instance that there is no real risk that any of the defendants would abscond appears sound and their continued detention is a violation of Articles 5(1)(c) and (3).

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<sup>213</sup> *Loukanov v Bulgaria*, 21915/93, Judgment of 20 March 1997, (1997) 24 EHRR 121.

<sup>214</sup> *Labita v. Italy* (GC), 26772/95, Judgment of 6 April 2000, §152-153, ECHR 2000-IV; *Goral v Poland*, Judgment of 30 October 2003, §66.

<sup>215</sup> *Stögmüller v Austria* 1602/62, Judgment of 10 November 1969, A 9 (1969), 1 EHRR 155, §4; *B v Austria* 11968/86, Judgment of 28 March 1990, A/175 (1990), 13 EHRR 20, §42. Similar passages occur in, eg, *Letellier v France*, 12369/86, Judgment of 26 June 1991, A/207 (1991), 14 EHRR 83, §35; *Yağci and Sargin v Turkey* 16419/90, Judgment of 8 January 1990, A/319-A (1995), 20 EHRR 505, §50.

<sup>216</sup> *Piruzyan v. Armenia*, 33376/07, Judgment of 26 June 2012, §94.

<sup>217</sup> *Stögmüller v Austria* A 9 (see n 210 above); *Matznetter v Austria* 11968/86, Judgment of 28 March 1990, A/10 (1969), 1 EHRR 198, §8; *Letellier v France* (see n 215 above).

<sup>218</sup> *Letellier v France* (see n 215 above), § 43; *Yağci and Sargin v Turkey* (see n 215 above), §52; *Neumeister v. Austria*, 1963/63, Judgment of 27 June 1968, Series A/8, §10.

<sup>219</sup> See para 95 above.

(v) *The importance of reasons (Articles 5(1)(c) and 5(3))*

117. Insufficient and unconvincing reasoning in detention orders has been held to violate Article 5(1)(c) and 5(3).<sup>220</sup> The ECtHR approaches the question whether the proper consideration of the circumstances militating for and against the accused's detention, as required under Article 5(3), was carried out, and whether the detention was justifiable, by close analysis of the reasoning. The ECtHR has stated repeatedly that the reasons put forward by domestic courts will be regarded as inadequate if they are "abstract" or "stereotyped" or "bald assertions".<sup>221</sup> This will arise where the court fails to properly scrutinise the facts relating to the particular defendant and to relate its conclusions closely to those facts.<sup>222</sup> The reasons of the national courts must deal with any counter-arguments put forward by the defendant. To the extent that they fail to do so, the Court will treat them as inadequate.<sup>223</sup>
118. The judgment of the Istanbul 32<sup>nd</sup> Criminal Court of First Instance held that "the detaining judge had failed to identify the facts which gave rise to the requisite level of suspicion to justify the detention of the suspects; that the reasons given in the extension orders issued by the Criminal Judges of the Peace are inadequate; and that extension had been ordered impermissibly on the grounds of "there being no change in the circumstances in which the original detention order was given"; and that "the evidence the public prosecutor had specifically been trying to gather or he had actually gathered or the reasons why the public prosecutor failed to submit his indictment despite the fact that the suspects had been detained a long time ago was never discussed". This judgment suggests the reasoning disclosed in the judgments of the detaining judge and those granting extensions to the defendants' detention would be considered wholly inadequate by the ECtHR.

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<sup>220</sup> The following paragraph commonly occurs by way of introduction to the Court's judgments in Art 5(3) cases: 'It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of Art 5(3)': *Toth v Austria* 11894/85, Judgment of 12 December 1991, A 224 (1991), 14 EHRR 551, §67. See also *Letellier v France* (see n 215 above), §35; *Clooth v Belgium* 12718/87, Judgment of 12 December 1991, A 225 (1991), 14 EHRR 717, §36; *Kemmache v France* (Nos 1 & 2) 12325/86, Judgment of 27 November 1991, A/218 (1991), 14 EHRR 520, §45; *Tomasi v France* 12850/87, Judgment of 27 August 1992, A/241-A (1992), 15 EHRR 1, §84; *W v Switzerland* 14379/88 Judgment of 26 January 1993, A/254-A (1993), 17 EHRR 60, §30.

<sup>221</sup> *Smirnova v Russia*, 46133/99, Judgment of 24 July 2003, §63, 70; *Boicenco v Moldova*, 41088/05, Judgment of 11 July 2006 §142-143; *Khudoyorov v Russia* 6847/02, Judgment of 8 November 2005, §173; *Panchenko v Russia* 45100/98, Judgment of 8 February 2005, §106).

<sup>222</sup> Examples include *Clooth v Belgium* (see n 220 above), where the national court in part justified detention by merely referring "by means of a stereotyped formula" (§44) to an earlier decision; *Yağci and Sargin v Turkey* (see n 215 above), where the national court "nearly always used an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding" (§52); and *IA v France* 28213/95, Judgment of 23 September 1988, where the decisions of the national court "refer in an abstract manner" (§104) to various features of the case.

<sup>223</sup> In *Letellier v France* A 207 (see n 215 above), the national court did not properly address the applicant's arguments that she would not abscond because she had young children and derived her income from a small business she ran on her own. See also *Neumeister v Austria* (see n 218 above), § 11; *Stögmüller v Austria* (see n 215 above), § 15; *Matznetter v Austria* (see n 217 above), §11; *Tomasi v France* (see n 220 above), §98.

*(vi) Failure to execute the order of release (Articles 5(1)(c) and 5(4))*

119. According to the hierarchy of the judiciary under the Constitution, the courts with higher authority than the Criminal Judges of the Peace are the Criminal Courts of First Instance, and that the Courts of First Instance are the competent courts to make a decision in respect of an application for the recusal of Criminal Judges of the Peace. Article 27 of the Code on Criminal Procedure (CMK) reads: "If the petition asking for a new judge was filed against the judge of a Criminal Court of the Peace [replaced by Criminal Judges of the Peace], the Criminal Court of First Instance of the same jurisdiction shall decide on the issue, and if the petition was filed against the judge sitting alone, the High Criminal Court in the jurisdiction shall decide". Further, the Criminal Courts of First Instance are competent to review the lawfulness of detention and, if the detention is unlawful, to order release.
120. Provided the Courts of First Instance are of competent jurisdiction, as would appear to be the case here, the Istanbul chief public prosecutor's office cannot refrain from executing a court order to release the defendants. Whether the decision is right or wrong, the decision of the court should have been carried out by the prosecutor. If the decision of the court is to be challenged there are avenues for review, such as the appeals court. Non-judicial authorities should not question a judicial ruling or prevent its execution.<sup>224</sup> To detain a person without such detention being based on a judicial decision, is arbitrary, incompatible with the principle of legal certainty and the rule of law. A period of detention is, in principle, "lawful" beyond the initial custody period only if it is based on a court order.
121. Further, Article 5(4) confers on a person deprived of his liberty the right to take proceedings by which the lawfulness of his detention shall be decided speedily and his release ordered if the detention is not lawful. It is an inherent requirement of this provision that the national authorities should promptly comply with any such order for release. The fact that the public prosecutor has refused to respect or give effect to the order of the Court is the clearest evidence of the ineffectiveness of the remedy and a violation of the State's obligations under Article 5(4) of the Convention.

***Conclusions on the right to a fair trial***

122. In the instant case, the decision to arrest and the dismissal of appeals for release were made by Criminal Judges of the Peace, established by Law No. 6545 on 18 June 2014.<sup>225</sup> According to Article 142 of the Constitution, the establishment of the courts, their jurisdiction, function and procedures must be defined by law. Article 37 of the Constitution states that "no one can be brought before an agency other than the court to which he or she is legally submitted". These two provisions bar the establishment of exceptional courts after the time of the commission of the crime. Further, Article 37 further states that no exceptional court shall be established which will result in depriving a defendant of his right to be brought before his natural judge.<sup>226</sup> If a court

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<sup>224</sup> *Asianize v Georgia* 71503/01, Judgment of 8 April 2004, §129-130.

<sup>225</sup> Serious doubts have been raised about the constitutionality of these courts, especially with regard to the principles of the rule of law and of the natural judge see para 72 above.

<sup>226</sup> Introduction to Turkish Law (2011), T. Ansay, D. Wallace (eds.), p. 205.

does not have jurisdiction in accordance with domestic law, it is not “established by law” for the purposes of Article 6(1). Moreover, the ECtHR has consistently held that in order to establish whether a tribunal is “independent”, “regard must be had, inter alia, to the manner of the appointment of its members and to their terms of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence”.<sup>227</sup> The political context in which these courts were established, including statements made by the executive<sup>228</sup>, give rise to considerable doubts as to whether criminal judges of the peace can be considered “an independent and impartial tribunal”. In order for a challenge under this heading to succeed, it would need to be shown that the practice of appointment of Criminal Judges of the Peace as a whole was unsatisfactory and/or that the establishment of Criminal Judges of the Peace with no right of appeal other than to another Criminal judges of the Peace, was an attempt by Mr Erdoğan’s government to influence the outcome.<sup>229</sup> With regard to President Erdoğan and other government ministers’ statements, the Court has consistently stressed that the scope of the State’s obligation to ensure a trial by an “independent and impartial tribunal” under Article 6(1) of the Convention is not limited to the judiciary, but also implies obligations on the executive and any other state authority to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Respect for the authority of the courts by the executive is an indispensable precondition for public confidence in the courts and the rule of law.<sup>230</sup>

123. Equality of arms and the principle that everyone charged with a criminal offence has the right to be informed promptly of the nature and cause of the accusation against him<sup>231</sup> may also have been breached by the limited access given to the defendants during their interrogations about the evidence against them and to the defendants’ lawyers in respect of their clients’ case files.<sup>232</sup> In cases where evidence has been withheld from the defence on public interest grounds the ECtHR will examine the decision-making procedure to ensure that it complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.<sup>233</sup> The allegation that the defendants were forced to sign documents by interrogating police officers stating that they wanted to exercise their right to silence against their will, if it can be substantiated, is a clear breach of Article 6.

<sup>227</sup> *Bryan v UK* 19178/91, Judgment of 22 November 1995, (1996) 21 EHRR 342, § 37.

<sup>228</sup> See para 72 above.

<sup>229</sup> *Zand v Austria*, 7360/76, (1978) 15 DR 70, § 77.

<sup>230</sup> ‘Guide on Article 6 The Right to a Fair Trial’, Council of Europe, para 129, available at: [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

<sup>231</sup> This provision is aimed at the information that is required to be given to the accused at the time of the charge or the commencement of the proceedings. In the case of *Deweere v Belgium* 6903/75, Judgment of 27 February 1980, §§ 42, 44 and 46 it was held applicable before the point of indictment “where official notification (is) given to an individual by the competent authority of an allegation that he is suspected of having committed a criminal offence, or where the situation of the [suspect] has been substantially affected because of that same suspicion”. For example, when a person is first questioned as a suspect (*Hozee v Netherlands* 21961/93, 22 May 1998) or when a person’s arrest for a criminal offence is ordered (*Wemhoff v Germany* 2122/64, 27 June 1968). See ‘The Right to a Fair Trial’, Council of Europe Human Rights Handbook, pp. 19-20, available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-03\(2006\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-03(2006).pdf)

<sup>232</sup> *Mooren v Germany* (GC), 11364/03, Judgment of 9 July 2009, §124.

<sup>233</sup> *Jasper v UK* 27052/95, Judgment of 16 February 2000, 2000 30 EHRR 441, §53.



## ***Conclusions on the prohibition on torture and inhuman or degrading treatment***

124. The conditions to which persons are subjected while in detention may be such as to amount to inhuman or degrading treatment.<sup>234</sup> The guiding rule is that “the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured”.<sup>235</sup> The Court will consider matters such as hygiene, natural light, available personal space, access to sanitary facilities, food, medical care, bedding, exercise and extent of contact with outside world, both separately and cumulatively.<sup>236</sup>
125. The conditions described by the defendants’ lawyers are debasing and violate notions of respect for human dignity.<sup>237</sup> One of the positive obligations that arise under Article 3 is that of ensuring that there is a prompt, impartial and effective investigation into allegations of breaches of Article 3 when an individual raises an arguable claim that they have been seriously mistreated in custody by the police or other agents of the state unlawfully and in breach of Article 3.<sup>238</sup> The investigation must be carried out in public by an independent body and must be thorough and rigorous,<sup>239</sup> and the failure to undertake such an investigation will be a breach of Article 3.<sup>240</sup> In *Turan Cakir v Belgium*, the ECtHR found that the failure of the State properly to investigate

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<sup>234</sup> The prohibition contained in Art 3 is closely modeled on Art 5 of the Universal Declaration of Human Rights. A number of international instruments contain similar prohibitions, including the ICCPR. More detailed measures adopted by the international community are contained in the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Turkey in 1988, the Optional Protocol (ratified by Turkey in 2011) and the 1987 European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment (ratified by Turkey in 1988). See ‘Human Rights and the Rule of Law, A Scoping Report’, the British Institute of International and Comparative Law (BIICL), (see n 1 above), p. 113-114, 120-122, 124-5.

<sup>235</sup> *Karalevičius v Lithuania* 53254/99, Judgment of 7 April 2005, §34.

<sup>236</sup> *Dougoz v Greece* 40907/98, Judgment of 6 March 2001, (2002) 34 EHRR 61, §46; *Tekin v Turkey* 22496/93, (2001) 31 EHRR 4; *Peers v Greece* 28524/95, (2001) 33 EHRR 51; *Novoselov v Russia* 66460/01, Judgment of 2 June 2005, (2007) 44 EHRR 11.

<sup>237</sup> The ECtHR has held that there was a violation of Art 3 where the applicant’s cell had been unsanitary, continuously lit and overcrowded to the extent that each inmate had only an area of between 0.9-1.2m<sup>2</sup> to himself (*Kalashnikov v Russia* 47095/99, Judgment of 15 July 2002, (2003) EHRR 587). While handcuffing does not normally give rise to an issue under Art 3 of the Convention where the measure entails public exposure, it can exceed what is reasonably considered necessary in the circumstances (*Raninen v Finland* 20972/92, Judgment of 16 December 1997, (1997) 26 EHRR 563 § 56) Further, the Court has held that failure to make efforts to improve conditions, where there had been complaints about the standards, denoted lack of respect for the detainee (*Peers v Greece* (see n 236 above)).

<sup>238</sup> *Kmetty v Hungary* 57967/00, Judgment of 16 December 2003, (2005) 40 EHRR 6, § 38; *Ozkan v Turkey* 21689/93, Judgment of 6 April 2004, §358; *Secic v Croatia* 40116/02, Judgment of 31 May 2007, (2007) 15 BHRC 24, §59.

<sup>239</sup> See also the UN’s Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by Assembly resolution 55/89 of 4 December 2000, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx>.

<sup>240</sup> *Aksoy v Turkey* 21987/93, Judgment of 18 December 1996, (1997) 23 EHRR 533, §98-99; *Aydin v Turkey* (GC) 23178/94, Judgment of 25 September 1997, (1998) 25 EHRR 251, §88-98; *Assenov v Bulgaria* 24760/94, Judgment of 28 October 1998, (1998) 28 EHRR 652, §102; *Selmouni v France* 25803/94, Judgment of 28 July 1999, (2000) 29 EHRR 403, §79; *Caloc v France* 33951/96, Judgment of 20 July 2000, (2002) 35 EHRR 14.

complaints of ill-treatment by the applicant violated the State's procedural obligations under Article 3. In addition, they found that the failure to investigate also amounted to a violation of Article 3, in conjunction with the right to freedom from discrimination, since the State was under a duty not only to investigate allegations of ill-treatment, but also allegations that this ill-treatment was itself discriminatory, being motivated in that case by racism.<sup>241</sup>

126. Turkey has made a declaration under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognising the competence of the Committee Against Torture to receive and consider individual complaint communications. Therefore, at the UN Treaty Bodies level, individual complaints about alleged human rights violations by Turkey are possible before the Human Rights Committee<sup>242</sup> and the Committee against Torture. The exhaustion of available domestic remedies is a requirement to access the UN Treaty Bodies complaint mechanisms.

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<sup>241</sup> *Turan Cakir v Belgium*, 44256/06, Judgment of 10 March 2009.

<sup>242</sup> Turkey has ratified the First Optional Protocol to the International Covenant on Civil and Political Rights on the individual complaints procedure.

## B. THE RIGHT TO FREEDOM OF EXPRESSION

127. In the wake of the Gezi Park demonstrations in June 2013 and the government corruption scandal of December 2013, the government has increasingly used repressive measures, including restrictions on freedom of the press and interference with social media, to stifle free reporting and public debate. This section examines the following measures used by the government against journalists associated with the Hizmet movement and other journalists critical of the government:
- criminal prosecution of journalists for defamation, insulting the government of the Turkish Republic and under the Anti-Terror Law (TMK) and organised crime provisions in the Turkish Criminal Code (TCK);
  - pressure on media companies through arbitrary tax inspections and regulatory fines;
  - direct interference with freedom of the press, including censorship of social media, accreditation bans and attacks on journalists.
128. The mechanisms used to oppress Hizmet-affiliated journalists and media companies existed before the AKP came to power, but the AKP government has used them with increasing frequency and force. The concerted actions since December 2013 against journalists associated with the Hizmet movement are unfortunately just one example of the AKP's determination to intimidate and suppress a free press and full public debate of political issues in Turkey.<sup>243</sup> In recent years, the deteriorating situation regarded freedom of expression has raised serious concerns in Turkey and internationally, the most chilling example of government abuse being the detention and imprisonment of large numbers of journalists, mainly but not all Kurdish.<sup>244</sup>

### *Freedom of Expression*

129. The freedom to speak on political matters is a cornerstone of democracy, and is closely related to the enjoyment of a number of other key human rights, particularly

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<sup>243</sup> There are also concerns over pressure and interference by government to diminish the influence of other critics of the regime, for example, during the Gezi Park protests in June 2013 in which eight civilians died, large numbers of journalists were dismissed from their posts, amidst accusations that media owners were being coerced into dismissing dissenters and suppressing coverage.

<sup>244</sup> There has been growing concern, both in Turkey and internationally, regarding the large number of proceedings and arrests involving journalists in Turkey. In both 2012 and 2013 there were more journalists in prison than any other country in the world.. As other reports have documented, the majority of the journalists in prison or in pre-trial detention are Kurds working for outlets associated with the Kurdish movement. The 2014 European Peer Review mission noted that while the 2011 Peer Review reported an increasing number of around 40 and this number indeed increased to about 95 according to OSCE sources, by May 2014 it has dropped to less than 30 (or according to the Committee for the Protection of Journalists to 16), all apparently on charges under the anti-terror law. Several had been released immediately before the Peer Review mission: European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, p 23, available at: [http://avrupa.info.tr/fileadmin/Content/Downloads/PDF/2014\\_Peer\\_Review\\_report\\_by\\_Wolfgang\\_Benedek\\_and\\_Nyman\\_Metcalf.pdf](http://avrupa.info.tr/fileadmin/Content/Downloads/PDF/2014_Peer_Review_report_by_Wolfgang_Benedek_and_Nyman_Metcalf.pdf)

According to Bianet, as of 1 January 2015, 22 journalists and 10 newspaper distributors were in prison in Turkey, 14 of those journalists and all the newspaper distributors were from the Kurdish media.

freedom of thought<sup>245</sup> and the freedoms of assembly and association.<sup>246</sup> It plays an indispensable role in the development of a healthy intellectual and political discourse within a democratic society. Freedom of expression has been described as “the primary right in a democracy”, one without which “effective rule of law is not possible”.<sup>247</sup> In *R v Secretary of State for the Home Department, ex p Simms* Lord Steyn explained why freedom of expression enjoys such a privileged status in the hierarchy of rights within democratic societies:

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market”. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country”.<sup>248</sup>

130. The right to freedom of expression is enshrined in Article 26 of the Turkish Constitution<sup>249</sup> and Article 19 of the Universal Declaration of Human rights, as well as in a number of international treaties to which Turkey is a signatory, including Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ECHR.

### ***Criminal prosecution of journalists associated with the Hizmet movement***

131. Since the December 2013 corruption scandal President Erdoğan and his government have brought criminal prosecutions against large numbers of journalists working for Hizmet-affiliated media, and according to The Guardian, nearly 70 journalists are

<sup>245</sup> The right to freedom of thought and opinion is enshrined in Article 9 of the ECHR and Article 25 of the Constitution of Turkey, which states that: “Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions”.

<sup>246</sup> Article 11 of the ECHR and Article 33 of the Constitution of Turkey. The ECtHR has observed that the “freedom to hold opinions and impart information and ideas is one of the objectives of freedom of assembly and association as enshrined in Article 11”: *Ahmed v United Kingdom* 22954/93, Judgment of 2 September 1998, (1998) 29 EHRR 1, §70.

<sup>247</sup> *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at §297 per Lord Steyn.

<sup>248</sup> [2000] 2 AC 115 AT 126.

<sup>249</sup> Under Article 26 of the Constitution “Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing”. Article 26 allows freedom of expression to be restricted as follows: “for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary”.

being prosecuted in Turkey for their reporting of the December 2013 corruption allegations.<sup>250</sup>

132. In the case of Hizmet-affiliated media, notable examples of prosecutions include:

- on 6 February 2014 Mahir Zeynalov, a reporter for *Today's Zaman* and an Azerbaijani national, was deported due to his journalism on Twitter and put on a list of foreign individuals who are barred from entering Turkey because of “posting tweets critical of high-level state officials”.<sup>251</sup> Mr Erdoğan had previously filed a complaint against Mr Zeynalov for posting tweets that include “heavy insults and swear words in a bid to provoke the nation to hatred and animosity”.
- on 14 March 2014 a photographer for *Zaman*, Derviş Genç, was arrested after taking photographs at a government rally. In response to a question from Mr Genç during a press conference as to whether the National Intelligence Organisation (MIT) had warned him about the December 2013 corruption scandal, Mr Erdoğan reportedly accused Mr Genç of “working together [with the parallel state] to the degree that you are able to have access to an MIT report”.<sup>252</sup>
- on 16 June 2015 an Ankara court handed down a 21 month suspended sentence to the editor of *Today's Zaman*, Dr Bülent Keneş, after convicting him of insulting President Erdoğan in a tweet which allegedly implied that his late mother would have been ashamed of him. This is one of a number of criminal complaints filed against Dr Keneş by Mr Erdoğan and AKP politicians on grounds that they had insulted him in their tweets.<sup>253</sup>
- on 11 November 2014 public prosecutors filed a criminal prosecution against Harun Çümen, the managing editor of *Zaman*, asking the court to imprison him for 17 years for reporting a speech in Parliament about government corruption by the leader of the Republican People's Party, Kemal Kılıçdaroğlu, which referred to an alleged phone call between Mr Erdoğan and his son, Bilal, in December 2013 in which he allegedly instructed his son to hide large amounts of money from investigators. Mr Çümen was reportedly charged with violating the confidentiality of an investigation and being a member of an unidentified illegal organisation contrary to Article 314 of the Turkish Criminal Code (TCK). Mr Çümen defended himself by saying: “This is an arbitrary legal action to intimidate the free press. All other prominent Turkish media outlets, as well as other renowned news agencies, reported the speech in Parliament. Reporting statements

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<sup>250</sup> ‘Presence at Paris rally of leaders with poor free press records is condemned’, *The Guardian*, 11 January 2015, available at: <http://www.theguardian.com/world/2015/jan/11/paris-rally-charlie-hebdo-free-press-reports-without-borders>

<sup>251</sup> ‘Int'l press organizations rally behind deported Today's Zaman journalist’, *Today's Zaman*, 7 February 2014, available at: [http://www.todayszaman.com/national\\_intl-press-organizations-rally-behind-deported-todays-zaman-journalist\\_338840.html](http://www.todayszaman.com/national_intl-press-organizations-rally-behind-deported-todays-zaman-journalist_338840.html)

<sup>252</sup> ‘Today's Zaman photojournalist detained during Erdoğan rally’, *Today's Zaman*, 14 March 2014, available at: <http://www.todayszaman.com/news-343361-todays-zaman-photo-journalist-detained-during-erdogan-rally.html>

<sup>253</sup> ‘European Commission voices concern over Keneş' case in name of media freedom in Turkey’, *Today's Zaman*, 18 June 2015, available at: [http://www.todayszaman.com/diplomacy\\_european-commission-voices-concern-over-keness-case-in-name-of-media-freedom-in-turkey\\_388784.html](http://www.todayszaman.com/diplomacy_european-commission-voices-concern-over-keness-case-in-name-of-media-freedom-in-turkey_388784.html); ‘Today's Zaman chief editor gets 21-month prison sentence over tweet’, *Today's Zaman*, 16 June 2015, available at: [http://www.todayszaman.com/anasayfa\\_todays-zaman-chief-editor-gets-21-month-prison-sentence-over-tweet\\_387605.html](http://www.todayszaman.com/anasayfa_todays-zaman-chief-editor-gets-21-month-prison-sentence-over-tweet_387605.html); ‘Press freedom in pincers of gov't with arbitrary detentions, complaints’, *Today's Zaman*, 30 March 2014, [http://www.todayszaman.com/national\\_press-freedom-in-pincers-of-govt-with-arbitrary-detentions-complaints\\_343436.html](http://www.todayszaman.com/national_press-freedom-in-pincers-of-govt-with-arbitrary-detentions-complaints_343436.html); ‘Erdoğan files another lawsuit against Today's Zaman editor-in-chief’, *Today's Zaman*, 10 July 2014, available at: [http://www.todayszaman.com/anasayfa\\_erdogan-files-another-lawsuit-against-todays-zaman-editor-in-chief\\_352658.html](http://www.todayszaman.com/anasayfa_erdogan-files-another-lawsuit-against-todays-zaman-editor-in-chief_352658.html)

made by the main opposition party leader in Parliament about events that have implications for the public is just a routine job of the press media”.<sup>254</sup>

- on 14 December 2014 police officers raided the offices of *Zaman* and Samanyolu Media Group and detained 27 individuals, including Ekrem Dumanlı, the editor-in-chief of *Zaman*, Hidayet Karaca, the chief executive of Samanyolu Media Group, and 13 other journalists (including 79-year-old Ahmet Şahin), television executives, producers, directors and scriptwriters employed by Samanyolu. The OSCE Representative for the Freedom of the Media and European Commission called for the immediate release of the journalists.<sup>255</sup> They are accused of being “members or leading members of an armed organisation” contrary to Article 314(1) of the Turkish Criminal Code (TCK), “depriving individuals of their liberty through force, threats or deception” and “slander”. Mr Dumanlı was released pending trial after six days in custody. The court imposed travel restrictions despite the fact that his family is resident in Turkey and the impediment to his work as a journalist. Since December 2014 there has been no further hearing and no indictment has been served. Hidayet Karaca is still in held in prison on remand.<sup>256</sup>
- on 29 December 2014 Prime Minister Davutoğlu filed a criminal complaint against the editor of *Today's Zaman*, Dr Keneş, the managing editor, and a columnist on charges of “insulting a public official” contrary to Article 125 of the Turkish Criminal Code (TCK) in respect of a number of comments posted on Twitter. The offending tweets include a tweet by Dr Keneş in which he asked Mr Davutoğlu whether he could be considered a slanderer for continuing to use the term ‘parallel structure’ without presenting concrete evidence. Another read: “Mr Davutoğlu, please do not tie yourself up in lies in order to be applauded more. Shame!”<sup>257</sup> Access to the tweets was blocked in February 2014 following a court ruling that the tweets tarnished the reputation of government officials.<sup>258</sup>
- on 11 April 2015 Prime Minister Davutoğlu requested the Ankara chief public prosecutor's office initiate another prosecution against Dr Keneş on charges of “insulting a public official”. The article published in January 2015 criticised Mr Davutoğlu for his ‘willful political impotence’ and “sacrific[ing] even the last remnants of his personality, dignity and willpower to Erdoğan's unrestrained tyranny”.<sup>259</sup>
- on 29 March 2014 journalist Önder Aytaç was briefly detained in Ankara as part of an investigation into the leak of a recording of top security officials discussing possible military action in Syria.<sup>260</sup>

<sup>254</sup> ‘Journalist face jail for publishing widely reported wiretapping’, BGN News, 12 November 2014, available at: <http://national.bgnnews.com/journalist-face-jail-for-publishing-widely-reported-wiretapping-haberi/1475>;

‘Prosecutor asks Zaman editor to be sentenced to 17 years’, 11 November 2014, *Today's Zaman*, available at: [http://www.todayszaman.com/national\\_prosecutor-asks-zaman-editor-to-be-sentenced-to-17-years\\_364140.html](http://www.todayszaman.com/national_prosecutor-asks-zaman-editor-to-be-sentenced-to-17-years_364140.html)

<sup>255</sup> See OSCE, Media freedom representative calls on authorities in Turkey to release detained journalists, 15 December 2014, OSCE Vienna; Joint statement on the police raids and arrests of media representatives in Turkey, 14 December 2014, (see n 180 above).

<sup>256</sup> This case is discussed above at paras 91-123 above.

<sup>257</sup> ‘PM Davutoğlu sues Today's Zaman editors over tweets’, *Today's Zaman*, 24 March 2015, available at: [http://www.todayszaman.com/national\\_pm-davutoglu-sues-todays-zaman-editors-over-tweets\\_376198.html](http://www.todayszaman.com/national_pm-davutoglu-sues-todays-zaman-editors-over-tweets_376198.html)

<sup>258</sup> ‘Twitter blocks access to tweets by Today's Zaman editors for ‘insulting’ PM’, *Today's Zaman*, 25 March 2015, available at: [http://www.todayszaman.com/anasayfa\\_twitter-blocks-access-to-tweets-by-todays-zaman-editors-for-insulting-pm\\_376303.html](http://www.todayszaman.com/anasayfa_twitter-blocks-access-to-tweets-by-todays-zaman-editors-for-insulting-pm_376303.html)

<sup>259</sup> ‘Davutoğlu sues Today's Zaman editor-in-chief over blog post’, *Today's Zaman*, 11 April 2015, available at: [http://www.todayszaman.com/anasayfa\\_davutoglu-sues-todays-zaman-editor-in-chief-over-blog-post\\_377723.html](http://www.todayszaman.com/anasayfa_davutoglu-sues-todays-zaman-editor-in-chief-over-blog-post_377723.html)

<sup>260</sup> ‘Erdoğan sues Gülen-linked journalists, as one pundit briefly detained’, *Hurriyet*, 29 March 2014, available at: <http://www.hurriyetdailynews.com/erdogan-sues-gulen-linked-journalists-as-one-pundit-briefly-detained.aspx?PageID=238&NID=64275&NewsCatID=338>

*Insulting the Turkish government and criminal defamation*

133. These cases against journalists associated with the Hizmet movement are part of a concerning wider trend. Despite strong international criticism, defamation is still criminalised under Turkish law.<sup>261</sup> There is no official tally of defamation lawsuits by the Turkish government, but the number may be in the hundreds.<sup>262</sup> Article 301 of the Criminal Code criminalises an “insult” to “the Turkish nation, the State of the Turkish Republic, the Turkish Grand National Assembly, the Government of the Republic of Turkey or the judicial organs of the state.” Article 299 of the Turkish Criminal Code states that anybody who insults the President can face a prison term of up to four years. This sentence can be increased by a sixth if committed publicly; and a third if committed by press or media.<sup>263</sup> The vague wording of these Articles, have been widely criticised as they allows the prosecution of peaceful protestors or journalists for criticising the regime in their work and have been used widely against journalists and broadcasters.<sup>264</sup> According to Turkish media reports, the number of complaints filed by President Erdoğan's lawyers on charges of insulting him has reached 236 since he was elected President in August 2014.<sup>265</sup> The ECtHR has found that Article 301 is excessively broad and vague, but no amendments have been made.<sup>266</sup> Three recommendations during Turkey's previous UPR cycle called on the State to revise or abolish Article 301, but were rejected by Turkey.<sup>267</sup>
134. Notable recent examples of prosecutions against other critics of the government include:
- in October 2014 journalist and publisher Erol Özkoray was given a suspended sentence of 11 months and 20 days for defamation of President Erdoğan in respect of the reproduction in a book of anti-Erdoğan graffiti and banners by the Gezi Park protesters. The 2nd

<sup>261</sup> Criminal penalties for libel (a feature of many European jurisdictions) does not necessarily violate Article 10, however, on particular facts, a criminal prosecution can infringe the Convention where, for example, the penalty imposed is disproportionate. In the UK the offence of criminal libel was abolished in 2009.

<sup>262</sup> According to statistics provided by the Bureau for Investigation of Press Crimes in the offices of the chief public prosecutor of Istanbul, there were 604 criminal investigations into journalists from Jan-May 2014 of which 96 were concluded with an indictment. 73 concerned offences such as insult, slander, attempts to influence a fair trial or violation of confidentiality regulated in the Turkish Criminal Code. As the European Peer Review mission to Turkey on Freedom of Expression commented, although this shows that the majority of cases did not lead to indictments, the number of cases brought in four months for Istanbul alone shows that there is still a high number of investigations, which by themselves can already have a chilling effect on freedom of expression: European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, (see n 244 above), p. 9.

<sup>263</sup> See ‘Human Rights and the Rule of Law, A Scoping Report’, the British Institute of International and Comparative Law (BIICL), 2015, p. 78, available at: <http://www.biicl.org/index>, which reports that between August 2014 and March 2015, 236 individuals were investigated for insulting the head of state, with 105 indicted and eight formally arrested. More generally, during Mr Erdoğan's time in office (Prime Minister 2003-14, President from 2014), 63 journalists have been sentenced to a total of 32 years in prison, with collective fines of \$128,000.

<sup>264</sup> Ibid at p. 6.

<sup>265</sup> Out of the 236 individuals, eight are currently under arrest and trials are under way involving 105 of them.

‘Actress faces 2 years in jail for ‘insulting’ Erdoğan’, Today's Zaman, 27 March 2015, available at: [http://www.todayszaman.com/anasayfa\\_actress-faces-2-years-in-jail-for-insulting-erdogan\\_376426.html](http://www.todayszaman.com/anasayfa_actress-faces-2-years-in-jail-for-insulting-erdogan_376426.html)

<sup>266</sup> See *Altug Taner Akcam v Turkey* 27520/07, Judgment of 25 October 2011, § 93, where the Court refers to Art 301 as “a continuing threat to the exercise of freedom of expression” because of its vagueness, cited in European Union Peer Review Mission on Freedom of Expression, (see n 244 above), p. 20.

<sup>267</sup> ‘Human Rights and the Rule of Law, A Scoping Report’, the British Institute of International and Comparative Law (BIICL), (see n 1 above), p. 77.

Istanbul Criminal Court of First Instance held Mr Özkoray had engaged in criminal defamation by reproducing these images in print.<sup>268</sup>

- on 30 December 2014 Sedef Kabaş, a television presenter, was arrested after criticising on Twitter the decision of the Istanbul chief prosecutor to drop the 2013 corruption investigation. Her offending tweet read: "Don't ever forget this man. He is the prosecutor Hadi Salihoglu, who decided not to pursue the proceedings in the December 17th case". Police searched the journalist's home and confiscated her computers and mobile phone. According to Turkish authorities, Ms Kabaş was arrested on charges of "targeting individuals involved in anti-terror operations", and in a second indictment of "making insults" and "preventing officers from doing their duty" by keeping officers waiting outside her house and accusing them of being partial. In the indictments, prosecutors are seeking up to five years in prison for each indictment.<sup>269</sup>
- in March 2015 two cartoonists from the Turkish satirical magazine *Penguen* were found guilty of insulting President Erdoğan in a cartoon published on the cover of the magazine's August 2014 issue. The cartoon depicted newly elected Erdoğan arriving at his presidential palace and saying: "What a bland celebration. We could have at least sacrificed a journalist". The court subsequently commuted a prison sentence of 11 months and 20 days in prison to a fine of 7,000 Turkish liras.<sup>270</sup>
- On 2 March 2015 investigative journalist Mehmet Baransu was detained and charged with obtaining classified documents and faces up to eight years in prison on grounds that he illegally obtained and published the documents in a series of articles in *Taraf* in early 2010, in which he revealed an alleged plot to overthrow the government of Turkey by members of the Turkish military.<sup>271</sup>
- on 2 June 2015 President Erdoğan submitted a criminal complaint demanding the imprisonment of the editor of *Cumhuriyet*, Can Dündar, for publishing video of Turkish intelligence agents apparently delivering weapons to Islamist fighters in northern Syria. Mr Erdoğan's complaint seeks a life sentence for Mr Dündar for "forming an illegal organisation, crimes against the state, obtaining confidential information pertaining to national security, political and military espionage, unlawfully making confidential information public and attempting to influence a trial". This is reportedly at least the fourth case that Mr Erdoğan has attempted to bring against Can Dündar in the last 13

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<sup>268</sup> 'Turkey: Writer, journalist and publisher Erol Özkoray convicted of criminal defamation', PEN, 1 October 2014, available at: <http://www.pen-international.org/newsitems/turkey-writer-journalist-and-publisher-erol-ozkoray-convicted-of-criminal-defamation/>

<sup>269</sup> 'Social media becomes battleground in Turkish press freedom fight', Financial Times, 29 January 2015, available at: <http://www.ft.com/cms/s/0/845c0bba-a537-11e4-ad35-00144feab7de.html#axzz3bk2gNDMM>; 'Charges filed against journalist detained over critical tweet for keeping police waiting', Today's Zaman, 29 January 2015, available at: [http://www.todayszaman.com/anasayfa\\_charges-filed-against-journalist-detained-over-critical-tweet-for-keeping-police-waiting\\_371119.html](http://www.todayszaman.com/anasayfa_charges-filed-against-journalist-detained-over-critical-tweet-for-keeping-police-waiting_371119.html)

<sup>270</sup> 'Turkey's President Traces a New Internal Threat: The Way He's Drawn', New York Times, 3 January 2015, available at: [http://www.nytimes.com/2015/01/04/world/europe/turkish-leader-traces-a-new-internal-threat-the-way-hes-drawn.html?\\_r=0](http://www.nytimes.com/2015/01/04/world/europe/turkish-leader-traces-a-new-internal-threat-the-way-hes-drawn.html?_r=0)

<sup>271</sup> PEN has called for Mr Baransu's release and criticised the prosecution on the grounds that it: "flies in the face of established European case law concerning the publication of classified documents that fall within the public interest. This latest case is symptomatic of the political climate that is increasingly holding sway in today's Turkey and raises serious questions about the deteriorating state of freedom of expression in the country: <http://www.pen-international.org/newsitems/turkey-journalist-mehmet-baransu-must-be-released/#sthash.9i3GeTRJ.dpuf>. Mr Baransu remains in pre-trial detention.



months. The threats against *Cumhuriyet* and other media have provoked international protests.<sup>272</sup>

- in addition to journalists, prosecutions have been brought or threatened against students,<sup>273</sup> musicians,<sup>274</sup> actors,<sup>275</sup> lawyers<sup>276</sup> and opposition politicians.<sup>277</sup>

135. While some of the journalists above may have published harsh and personally offensive criticism of President Erdoğan, their comments were clearly made within the context of political expression. Freedom of expression on political matters is a cornerstone of democracy and the right to impart information and ideas and express opinions on political matters enjoys the highest degree of protection under the Convention. This approach was underlined by the ECtHR in *Tuşalp v Turkey*,<sup>278</sup> a civil defamation action brought by Mr Erdoğan in respect of the publication of two articles in *Bugün* concerning allegations of corruption. The ECtHR highlighted the relevance of the fact that the author's strong criticism of the Prime Minister (as he then was) involved "important matters in a democratic society of which the public had a legitimate interest in being informed and which fell within the scope of political debate". Regarding the offensiveness of the words used, the court held that "the protection of Article 10 was applicable not only to information and ideas that were favourably received but also to those which offend, shock and disturb" and "the limits of acceptable criticism were wider for politician[s] [who were] obliged to display a greater degree of tolerance" than private individual[s]". The *Tuşalp* judgment

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<sup>272</sup> 'Turkey: Criminal complaint against Can Dunder must be dropped', PEN, 3 June 2015, available at: <http://www.pen-international.org/newsitems/turkey-criminal-complaint-against-journalist-can-dundar-must-be-dropped/>; 'Turkish president's feud with press is rooted in a deeper, personal unease', The Guardian, 4 June 2015, available at: <http://www.theguardian.com/world/2015/jun/04/turkish-presidents-feud-with-press-is-rooted-in-a-deeper-personal-unease>

<sup>273</sup> On 24 December 2014 a 16-year-old student was detained in solitary confinement for 48 hours for making a speech during a student protest in which he reportedly said Mr Erdoğan was regarded as the "thieving owner of the illegal palace" (referring to a controversial 1,150-room palace inaugurated by the President in October 2014): 'Turkey teenager accused of insulting president released', BBC, 26 December 2014, available at:

<http://www.bbc.co.uk/news/world-europe-30603709>. On 12 November 2013 university student Osman Garip was sentenced to over a year in prison for continually 'insulting' Mr Erdoğan on Facebook: Joint Submission by Article 19 & Others to UPR of Turkey, 14 June 2014, para 18, available at: <http://www.pen-international.org/wp-content/uploads/2014/07/PEN-International-joint-submission-to-the-UPR-Turkey.pdf>

<sup>274</sup> In June 2012 pianist Fazıl Say was given a 10 month suspended prison sentence for "denigrating the values of a section of the population" by retweeting a tweet about 'Allahists', referring to followers of Allah.

<sup>275</sup> On 27 March 2015 public prosecutors in Ankara sought a prison sentence of two years against an actress on charges of insulting Mr Erdoğan on Twitter. She claims she merely shared a caricature depicting Mr Erdoğan. On 27 July 2014 it was reported that an actor and theatre director was called in for questioning under Art 313 (inciting the population to armed rebellion) of the TCK, a crime carrying a maximum sentence of 25 years. It is not known whether these criminal investigations have resulted in charges.

<sup>276</sup> On 22 April 2015 Umut Kılıç, a lawyer, was detained in custody for referring to 'Fascist Erdoğan' at an interview for a judicial position at the Ministry of Justice: 'Turkish lawyer arrested for insulting Erdoğan', *Hürriyet*, 11 March 2015, available at: <http://www.hurriyetdailynews.com/turkish-lawyer-arrested-for-insulting-erdogan.aspx?pageID=238&nID=81395&NewsCatID=339>

<sup>277</sup> In March 2015, the Anadolu 55th Criminal Court of First Instance ordered People's Communist Party of Turkey (HKTP) board member Memet Adıgüzel to pay a fine of TL 6,080 for a banner hung at a HKTP branch office in August 2014 that allegedly insulted Mr Erdoğan.

<sup>278</sup> 32131/08, Judgment of 21 February 2012.

continues a strong tradition in Strasbourg jurisprudence that freedom of expression should prevail in cases of insult or defamation of those in high public office.<sup>279</sup>

136. The same principle is echoed in General Comment No.34 of the UN Human Rights Committee concerning the content of political discourse: “the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.”<sup>280</sup>
137. The last point is of particular relevance as Article 125 of the Turkish Criminal Code (TCK) provides that defaming a public official in the commission of their duty carries a higher minimum sentence or fine than for defamation of ordinary citizens. It is difficult to see how this provision can be justified as it places the reputational rights of those in positions of authority above those of the general public.<sup>281</sup>

*The misuse of the Anti-Terrorism Law and organised crime provisions in the Turkish Criminal Code*

138. Writers and journalists commonly face charges under the following provisions of the anti-terror legislation (ATL): Article 5(1) (membership of a terrorist organisation); Article 6(2), which provides that printing or publishing declarations or statements of terrorist organisations is punishable by a term of imprisonment of one to three years; Article 6(4), which provides for the imprisonment of media owners and editors, even if they have not personally participated in the commission of crimes under Article 6; Article 7(2), which provides for a term of imprisonment for one to five years for propaganda for a terrorist organisation;<sup>282</sup> Often used in conjunction with the ATL is Article 314 of the Turkish Criminal Code (TCK), which provides that membership of a terrorist organisation is punishable by a term of imprisonment of seven and a half years.<sup>283</sup>

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<sup>279</sup> For example, *Lingens v Austria* 9815/82, Judgment of 8 July 1986, (1986) 8 EHRR 407, *Oberschlick (no. 2) v Austria* 20834/92, Judgment of 1 April 1997, A/204 (1997) 10 EHRR 389, *Feldek v Slovakia* 29032/95, Judgment of 12 July 2001, *Karakó v Hungary* 39311/05, Judgment of 28 April 2009.

<sup>280</sup> ‘General comment No. 34 Article 19: Freedoms of opinion and expression’ para 38, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>281</sup> For the case for reform of this provision, see European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, (see n 244 above), p. 6.

<sup>282</sup> According to the Turkish National Police, authorities confiscated 185 publications between Jan-Oct 2013, 96 of them under the anti-terror law on grounds of spreading propaganda for illegal organisations.

<sup>283</sup> According to Human Rights Watch, many of the thousands in detention for non-violent speech and association – the majority Kurdish political activists but also journalists, trade unionists, and human rights activists – are charged with this offence.

139. Notable recent prosecutions under the anti-terrorism legislation include:

- in November 2013 Füsün Erdoğan, journalist and founder of the radio station *Özgür Radyo*, and five other journalists were sentenced to life imprisonment under the ATL for their alleged leading roles in the banned Marxist-Leninist Communist Party (*Marksist-Leninist Komünist Partisi* or MLKP). They were among 29 people who had been on trial since 2006.<sup>284</sup>
- on 24 April 2015, Gultekin Avcı, *Bugün* columnist and a former public prosecutor, was summoned to testify to a prosecutor on charges of establishing a terrorist organisation and attempting to overthrow the government for retweeting in February 2014 a link to an audio recording of Mr Erdoğan allegedly instructing his son to remove large amounts of cash from their house on 17 December 2013. Other notable journalists who face similar charges, include Emre Uslu, Önder Aytac, Mehmet Baransu and Ismail Saymaz,<sup>285</sup> and
- the continued detention of Hidayet Karaca and arrest of 27 other journalists and media executives following the December 2014 raid on *Zaman*.<sup>286</sup>

140. In 2011 the Commissioner for Human Rights of the Council of Europe expressed his concern about the continued application of the ATL with a view to prosecuting and convicting persons who have expressed non-violent opinions, in particular in cases where the opinions expressed relate to the situation of the Kurdish minority in Turkey or the ongoing conflict in south-east Turkey.<sup>287</sup> The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Judicial Reform Packages adopted in 2012-2014 amended some of the offences in the ATL, however, these reforms did not go far enough according to the Human Rights Council, which deemed that Turkey's 'Anti-Terror Law' is not compatible with the ICCPR.<sup>288</sup>

141. In *Gözel et Özer v Turkey*, the Grand Chamber noted that it has repeatedly found violations of Article 10 where media professionals had been convicted for publishing statements made by terrorist organisations, without the courts conducting an in-depth analysis. This particular case related to complaints brought by the editors of two magazines published in Turkey, who had been convicted of offences under the Prevention of Terrorism Act which are directed against anyone who “printed or published statements or leaflets of terrorist organisations”. The applicants had published statements from banned organisations, including the Turkish Communist Party. In that case, the Grand Chamber noted that to condemn a text simply on the basis of the identity of the author would entail the automatic exclusion of groups of individuals from the protection afforded by Article 10.<sup>289</sup>

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<sup>284</sup> ‘Füsün Erdoğan and five other Turkish journalists get life sentences’, PEN, 6 November 2013, available at: <http://www.pen-international.org/newsitems/press-release-fusun-erdogan-and-five-other-turkish-journalists-get-life-sentences/>

<sup>285</sup> ‘Ex-Turkey prosecutor says facing life term over retweet’, Hurriyet, 26 April 2015, available at: <http://www.hurriyetdailynews.com/ex-turkey-prosecutor-says-facing-life-term-over-retweet.aspx?PageID=238&NID=81558&NewsCatID>

<sup>286</sup> See paras 89-121 above.

<sup>287</sup> ‘Freedom of expression and media freedom in Turkey’, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 12 July 2011, CommDH(2011)25, (see n 22 above), paras 24-30.

<sup>288</sup> During its 2015 UPR, Turkey did not support a recommendation made by Cyprus which called to amend further or revoke the ATL: See ‘Human Rights and the Rule of Law, A Scoping Report’, the British Institute of International and Comparative Law, (see n 1 above), p. 99.

<sup>289</sup> *Gözel et Özer v Turkey*, (GC), 43453/04, Judgment of 6 July 2010, § 54.

142. Following the raid on *Zaman* of 14 December 2014, 89 members of the US Congress wrote to Secretary of State John Kerry on 2 February 2015, urging him to support freedom of the media in Turkey. Noting the prosecution of Mr Karaca and Mr Dumanlı on charges that were “questionable”, the letter stated: “We are deeply concerned by the recent arrests in Turkey of members of the Turkish media. A strong democracy requires both tolerance and transparency in order to thrive, but this decision by the Turkish government to intimidate, arrest, and smother voices opposed to the government is a threat to the very democratic principles that Turkey claims to hold dear”.<sup>290</sup> This was followed by a second letter to John Kerry in similar terms in March 2015 signed by 74 US Senators.<sup>291</sup>

### ***Pressure on media companies***

#### ***(i) Media ownership***

143. The government’s greatest leverage on the media, however, is economic. There are no restrictions in Turkey on cross-ownership and practically all the major commercial television channels and newspapers<sup>292</sup> belong to large conglomerates, with significant non-media interests, such as construction, mining, finance, or energy. Editorial independence from the affairs of the conglomerates they belong to is often called into question by Turkish and international observers.
144. In Turkey’s state-centered economy, the government controls the allocation of billions of dollars in privatised assets, housing contracts, and a public procurement process that allows rewarding favoured companies, including those with media interests, who are thus susceptible to government pressure to suppress criticism and dismiss critical journalists. For example, Doğu Holding, which broadcast NTV and Star TV won a \$702 million (US) bid in May 2013 to operate Istanbul’s Galataport in Karaköy.<sup>293</sup> In November 2014 İhlas Holding, who own *Türkiye*, İhlas News Agency and TGRT TV, signed a \$1.86 billion (US) deal to redevelop Istanbul’s Gaziosmanpaşa neighbourhood.<sup>294</sup> Deputy Prime Minister Bülent Arınç announced in June 2014 that state advertisements worth TL 13,288,000 had been granted exclusively to pro-government newspapers for four months.<sup>295</sup>

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<sup>290</sup> ‘US Congressmen send Kerry letter about Turkey’s crackdown on Gülen-linked media, *Hürriyet*, 5 February 2015, available at: <http://www.hurriyetdailynews.com/us-congressmen-send-kerry-letter-about-turkeys-crackdown-on-gulen-linked-media.aspx?pageID=238&nID=77971&NewsCatID=358>

<sup>291</sup> ‘74 US senators urge Kerry to address press freedom in Turkey, *Hürriyet*, 19 March 2015, available at: <http://www.hurriyetdailynews.com/74-us-senators-urge-kerry-to-address-press-freedom-in-turkey.aspx?pageID=238&nid=79884>

<sup>292</sup> The most popular daily newspapers are *Hürriyet*, *Posta*, *Sabah*, *Sözcü*, and *Zaman*. Of those titles, *Zaman*, has the largest circulation. *Zaman* and the English-language *Today’s Zaman* are owned by the Gülen-affiliated Feza Media Group.

<sup>293</sup> ‘Democracy in Crisis: Corruption, Media and Power in Turkey’, Freedom House Special Report 2014, p. 12, available at: <https://freedomhouse.org/report/special-reports/democracy-crisis-corruption-media-and-power-turkey#.VVyIUUsWEYV>

<sup>294</sup> Ibid at p. 12.

<sup>295</sup> ‘Freedom of the Press: Events and Photographs 2014’ by Salih Sarıkaya, Suat Özçelik and Kamil Arlı.

145. In addition, many media outlets came under indirect government control after the 2001 banking crisis. The Savings Deposit and Insurance Fund (TMSF), the body that recovers debt owed to banks and failed financial institutions, has been severely criticised for the way it manages media assets that it seizes and for the lack of transparency behind the sale of assets seized, which have resulted in the transfer of media companies to supporters of the AKP. For example, this was the mechanism by which Sabah-ATV group and the newspaper *Akşam* were sold to pro-government business groups in 2007<sup>296</sup> and the sale of the newspaper *Milliyet* to a pro-government business group to pay off the Doğan Media Group's tax penalties in 2009. Following its sale to pro-government owners, *Milliyet* dismissed important critical columnists such as Hasan Cemal and Can Dündar.<sup>297</sup> In 2013 Çukurova's media properties, including *Akşam*, was seized by TMSF in May 2013 as a result of considerable tax arrears incurred by its parent company and sold to Ethem Sancak, a close associate of Mr Erdoğan. Even before Mr Sancak's purchase of *Akşam*, TMSF had appointed a former AKP deputy to replace the newspaper's long-serving editor, prompting a spate of dismissals of writers who were critical of the government.<sup>298</sup> According to Ash Tunç, an expert on media ownership and head of the Media School at Bilgi University in Istanbul, two-thirds of the media is now either institutionally embedded with or submissive to the AKP.<sup>299</sup> Opposition critics have also questioned the audit process that leads to seizures by the TMSF, suggesting that companies that take an anti-government stance are more vulnerable to aggressive audits than those that are supportive of the administration. The \$2.5 billion (US) tax fine levied against the Doğan Media Group in 2009 after its reporting on AKP corruption forcing it to sell off one of the country's leading newspapers, *Hurriyet*, to owners supportive of the AKP and ending its dominance of the media sector, is often cited as the clearest example of this.<sup>300</sup>

(ii) *Political interference with media companies*

146. On 3 January 2014, in a wave of dismissals triggered by the December 2013 corruption scandal the chief editor of the state-run Turkish Radio and Television Corporation (TRT)<sup>301</sup>, the chief editor of the TRT news station, and his deputy were

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<sup>296</sup> The CEO at the time was Mr Erdogan's son-in-law and the sale achieved with the assistance of loans from two state-run banks: 'Diminishing press freedom in Turkey', Rethink Institute, November 2014, (see n 34 above) p. 6; 'Democracy in crisis: Corruption, Media and Power in Turkey, Freedom House Special Report 2014 (see n 293 above).

<sup>297</sup> Sixteen journalists lost their jobs at *Milliyet* during the Gezi Park protests in July 2013: 'The Gezi Park Protests: The impact on freedom of expression in Turkey', PEN, 2014, available at: <http://www.pen-international.org/newsitems/turkey-end-human-rights-violations-against-writers-and-journalists/>

<sup>298</sup> Ibid.

<sup>299</sup> 'Finding new ways to censor journalists in Turkey, Committee to Protect Journalists, 27 April 2015, available at: <https://www.cpj.org/2015/04/attacks-on-the-press-finding-new-ways-to-censor-journalists-in-turkey.php>

<sup>300</sup> 'Diminishing press freedom in Turkey, Rethink Institute, November 2014, (see n 34), p. 9; 'Democracy at Risk', International Press Institute, March 2015, available at: [http://www.freemedia.at/uploads/media/IPI\\_Special\\_Report\\_-\\_Turkey\\_2015\\_Final.pdf](http://www.freemedia.at/uploads/media/IPI_Special_Report_-_Turkey_2015_Final.pdf)

<sup>301</sup> The largest television broadcast outlet is the state-owned Turkish Radio and Television Corporation (TRT), which until the 1990s had a monopoly on television broadcasting. TRT broadcasts five national and two international channels.

fired<sup>302</sup>. A total of 800 TRT reporters were reportedly fired on 22 January 2014.<sup>303</sup> By this process and the replacement of staff in senior positions with AKP supporters, critics accuse the government of using its effective control of TRT to favour the AKP, and that AKP's control was made plain by the biased coverage of the local and Presidential elections in 2014.<sup>304</sup> The pro-government NTV station subsequently fired 20 employees, and 30 staff members were dismissed from the pro-government *Vatan*.<sup>305</sup> According to a study by Bianet, in 2014 339 journalists, columnist and media workers were dismissed or forced to quit their jobs in Turkey.<sup>306</sup>

147. Koza İpek Holding's chairman, Akin İpek, who is known for his support for the Hizmet movement, stated in an interview that he was sent lists with names of journalists working for his media group who were to be fired and that people from government circles had called him several times concerning columns published by his media outlets.<sup>307</sup> The former Rome bureau chief of the pro-government *Sabah*, Yasemin Taşkın, was fired from her position following publication of an interview her husband conducted with Fethullah Gülen for an Italian newspaper.<sup>308</sup> Murat Aksoy, a columnist for *Yeni Şafak*, a pro-government newspaper, who appeared on a television programme on 25 December 2013 calling for accountability and respect for the rule of law was subsequently dismissed he claims because of his comments.<sup>309</sup> In December 2013, a well-known columnist for *Sabah*, Nazlı Ilıcak, was dismissed the day after she criticised the government over the December 2013 corruption probe. In January 2014, Murat Aksoy, a writer for *Yeni Şafak*, was also dismissed after making similarly critical remarks on air.
148. In late April 2015 in the run up to the 2015 general election the head of the Bureau for Crimes against the Constitutional Order, sent a letter to the Turkish Satellite Communications Company (TÜRKSAT) directorate general asking it to “prevent a state-owned satellite connection from being used” by media outlets that, according to him, have links to the Hizmet movement on the grounds that the media outlets “foster polarization in society, incite hatred and public enmity, and disseminate a terrorist organisation’s propaganda.”<sup>310</sup> According to the Committee to Protect Journalists, some 20 or more audio leaks between Mr Erdoğan and the proprietors or senior

<sup>302</sup> ‘Ministry of education removes staff from post after profiling them’, Today’s Zaman, 3 January 2014, available at: [http://www.todayszaman.com/national\\_ministry-of-education-removes-staff-from-post-after-profiling-them\\_335722.html](http://www.todayszaman.com/national_ministry-of-education-removes-staff-from-post-after-profiling-them_335722.html)

<sup>303</sup> ‘Freedom of the Press: Events and Photographs 2014.’ by Salih Sarıkaya, Suat Özçelik and Kamil Arlı. On 6 January 2015 the Association of Journalists in Turkey reported to a Council of Europe delegation that there had been 700 dismissals in 2014.

<sup>304</sup> See para 27 above.

<sup>305</sup> Ibid.

<sup>306</sup> cited by Freedom House 2015, available at: <https://freedomhouse.org/report/freedom-press/2015/turkey#.VWtoMEsWEYU>

<sup>307</sup> Interview with Tarık Toros, editor-in-chief of Bugün TV. Koza İpek Holding, which owns Bugün and Kanaltürk TV station, is affiliated with the Gulen movement.

<sup>308</sup> ‘Taşkın was fired the day her husband's interview was published’, Today’s Zaman, 28 March 2014, available at: [http://www.todayszaman.com/latest-news\\_fired-journalist-says-turkey-shifting-away-from-democracy\\_343744.html](http://www.todayszaman.com/latest-news_fired-journalist-says-turkey-shifting-away-from-democracy_343744.html)

<sup>309</sup> ‘Turkish PM acknowledges phone call to media executive’, Hurriyet, 12 February 2014, available at: <http://www.hurriyetdailynews.com/turkish-pm-acknowledges-phone-call-to-media-executive.aspx?pageID=238&nID=62368&NewsCatID=338>

<sup>310</sup> ‘Ban Sought. Turkish Authorities Try To Gag Independent Media In Run-Up To Elections’, Reporters without borders, 22 May 2015, available at: <http://en.rsf.org/turkey-ban-sought-turkish-authorities-try-22-05-2015,47922.html>

managers in 2014 revealed that the political executive of Turkey was directly interfering with the editorial decisions, such as when Mr Erdoğan ordered the removal of news tickers from TV channel screens or rebuked a media proprietor about an article in *Milliyet* on the Kurdish issue, demanding that the offending columnist be punished. As a result, some of the most highly respected journalists in Turkey were dismissed. On 10 July 2014 at the start of his Presidential campaign Mr Erdoğan urged people to boycott the *Zaman*. Mr Erdoğan made similar calls during the run-up to the March 2014 local elections.

149. Moreover, Turkish courts and regulators issued several reporting bans on issues of public interest. In February 2014, a ban on allegations of MIT involvement in weapons shipments to Syria was imposed. In March 2014, a ban was issued concerning the leaked audio recordings of a national security meeting at the Foreign Ministry. In June, an Ankara court imposed a ban on reporting about the kidnapping of 49 Turkish citizens from the Turkish consulate in Mosul, Iraq. Moreover, in November 2014 an unprecedented reporting ban was issued in respect of reporting on the parliamentary inquiry into the December 2013 corruption allegations concerning four former ministers.<sup>311</sup>

*(iii) Financial pressure on Hizmet-affiliated media companies*

150. Critical media outlets have not only been exposed to political pressure, but also financial repercussions. Gold mining company Koza Altın A.Ş., the owner of *Bugün* and Kanal Türk TV station, had its activities halted on 31 December 2013 in Çukuralan goldfield, one of the company's five major gold mines, in a move that has been seen as an example of the government's exploitation of inspections to put pressure on those with critical views.<sup>312</sup> Turkey's flagship carrier Turkish Airlines stopped distributing several dailies, including *Zaman*, *Today's Zaman*, *Bugün*, *Ortadoğu*, *Aydınlık*, *Birgün*, *Cumhuriyet*, *Evrensel*, *Yeni Çağ* and *Yurt* in December 2013. The ban was imposed on the newspapers on 23 December 2013 without any explanation, six days after the government corruption investigation was made public.<sup>313</sup> All of the public bodies which used to buy news reports from Cihan news agency have also cancelled their contracts.<sup>314</sup>
151. Other newspapers critical of the government have been subjected to tax inspections on a regular basis, with papers such as *Taraf* receiving huge tax fines in 2014, which it argued were selectively applied while pro-government newspapers such as *Sabah*

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<sup>311</sup> 'Turkish court bans coverage of Parliament corruption inquiry', International Press Institute, 26 November 2014, available at: <http://www.freemedia.at/newssview/article/turkish-court-bans-coverage-of-parliament-corruption-inquiry.html>

<sup>312</sup> Websites reportedly publishing one-sided, pro-government articles and commentary mentioned the closure of the goldfield a day before the decision of the closure had even reached the company, stirring suspicions that the move was politically motivated: 'Koza Altın latest victim of government silencing political dissent', *Today's Zaman*, 31 December 2013, available at: [http://www.todayszaman.com/\\_koza-altin-latest-victim-of-government-silencing-political-dissent\\_335399.html](http://www.todayszaman.com/_koza-altin-latest-victim-of-government-silencing-political-dissent_335399.html)

<sup>313</sup> 'Turkey criticized for press freedom violations at European Parliament event', *Today's Zaman*, 22 April 2015, available at: [http://www.todayszaman.com/diplomacy\\_turkey-criticized-for-press-freedom-violations-at-european-parliament-event\\_378631.html](http://www.todayszaman.com/diplomacy_turkey-criticized-for-press-freedom-violations-at-european-parliament-event_378631.html)

<sup>314</sup> Statement of Hamit Bilici, director general of Cihan news agency.

were not subjected to fines for similar practices.<sup>315</sup> Tax inspections were initiated against *Zaman* and the Cihan news agency in July and October 2014 respectively. Tax inspections were seen by a number of interviewees for a PEN report in 2014 as a means of penalising and intimidating companies critical of the government. Blogger Gürkan Özturan told PEN he saw fear of tax officials as one of the obstacles he faced in obtaining work: “I am not unemployed because of lack of education, but I am unemployable. That is what I hear from bosses who say they cannot hire me because they fear tax officers. Tax officers are the new police”.<sup>316</sup>

*(iv) Disproportionate and arbitrary regulatory fines*

152. Turkey’s broadcast regulator is the Radio and Television Supreme Council (RTÜK) which has broad powers for the regulation of all radio and television broadcasters in Turkey, including frequency allocations, licensing and content monitoring. Although it is intended to operate independently as an administrative body for policy-making and supervision of the broadcast sector, it is composed of nine members who are elected by the TGNA under party quotas, and therefore until the general election of June 2015 the AKP enjoyed a significant majority.<sup>317</sup> The RTÜK has been heavily criticised for turning into a censoring authority rather than a regulatory one.<sup>318</sup>
153. Hizmet-affiliated media organs have been subjected to a disproportionate number of steep fines for content critical of the government. For example:
  - In July 2014 RTÜK issued a TL 73,000 fine for STV and a TL 12,300 fine for Samanyolu News TV over the jingles used between their news reports in its coverage of the Soma Mining Disaster, citing the regulation that unnatural sounds cannot be used while broadcasting news.<sup>319</sup>
  - In September 2014 the RTÜK fined STV and Samanyolu television stations one percent of their advertising revenues for one month over their reports of a police officer whose pregnant wife died while he was in custody after being arrested as part of the July 2014 operations.<sup>320</sup> RTÜK fined the two stations for violating principles concerning reporting on individuals’ private lives.<sup>321</sup>
  - In February 2015 RTÜK fined Samanyolu Media Group TL 1 million for its coverage of the 14 December 2014 raid on *Zaman*. The RTÜK justified the penalty on the grounds that numerous statements made on air in the coverage of the raid “prevented the public

<sup>315</sup> ‘Diminishing press freedom in Turkey’, Rethink Institute, November 2014, (see n 34), p.10; ‘Democracy at Risk’, International Press Institute, March 2015 (see n 300 above).

<sup>316</sup> ‘Free expression under a shadow’, Pen Norway, December 2014, available at:

‘<http://www.norskpen.no/Portals/0/Turkey%20Report%20final%20version.pdf>

<sup>317</sup> ‘Diminishing press freedom in Turkey’, Rethink Institute, November 2014, (see n 34 above) p. 11.

<sup>318</sup> Ibid; ‘The Gezi Park Protests: The Impact on Freedom of Expression in Turkey’, 14 March 2014, (see n 297 above) p. 15. See also Diminishing Press Freedom in Turkey, Rethink Institute Paper 18, November 2014, (see n 34 above) p. 11.

<sup>319</sup> ‘AK Party municipality forces STV from mosque’, Today’s Zaman, 11 July 2014, available at: [http://www.todayszaman.com/national\\_ak-party-municipality-forces-stv-from-mosque\\_352823.html](http://www.todayszaman.com/national_ak-party-municipality-forces-stv-from-mosque_352823.html)

<sup>320</sup> For the background to the government-backed July operations, see para 73 above.

<sup>321</sup> ‘RTÜK fines STV and Samanyolu over coverage of officer’s tragedy’, Today’s Zaman, 26 September 2014, available at: [http://www.todayszaman.com/blog/turkish-media-watch/rtuk-fines-stv-and-samanyolu-over-coverage-of-officers-tragedy\\_359953.html](http://www.todayszaman.com/blog/turkish-media-watch/rtuk-fines-stv-and-samanyolu-over-coverage-of-officers-tragedy_359953.html)



from forming its independent opinion”.<sup>322</sup> Since December 2013, RTÜK has levied a total 145 administrative fines totaling TL 4 million against the group, which hosts a number of TV stations including Samanyolu TV and Samanyolu Haber.<sup>323</sup>

- This tactic has also been deployed against other critics of the government. In June 2013 during the Gezi Park protests, the RTÜK convened an emergency session and imposed a fine of TL 11,000 and a warning to Ulusal TV, Halk TV, EM TV and Cem TV for “inciting violence” in broadcasts on Gezi Park events. Persons known to oppose the AKP owned all four stations. In November 2013 prosecutors asked for a prison sentence of one to 13 years for a Ulusal TV director on charges of “publicly inciting the commission of offenses” through broadcasts of Gezi Park protests.<sup>324</sup> RTÜK fined Samanyolu TV approximately TL 75,000 because their live television coverage of demonstrators ‘contained uncensored images of citizens smoking cigarettes’.

154. Esat Çıplak, a member of RTÜK elected from the quota of the Nationalist Movement Party (MHP), said in an interview in October 2014 that up until the December 2013 government corruption scandal, Samanyolu was praised by the government due to its impeccable compliance with RTÜK principles, but since then the group has incurred huge fines and numerous suspensions. According to Çıplak, the RTÜK, which had been used as a stick during the Gezi protests against critical TV station Halk TV, is now a tool being used against the Samanyolu group.<sup>325</sup> According to an analysis of fines issued by RTÜK by the Rethink Institute, the five channels that have received the most penalties in 2014 are all known to be critical of the government, and all five had received no fines in 2013.<sup>326</sup>
155. For a sanction by the RTUK to be lawful under Article 10, the interference must be prescribed by law and proportionate to a legitimate aim. The media service principles in Article 8 of the Broadcasting Law mainly consist of prohibitions, including that media services “shall not be contrary to human dignity and the principle of privacy”, “violate the existence and independence of the State of the Republic of Turkey” or include “humiliating, derogatory and defamatory statements against persons or entities or organisations, beyond criticism”<sup>327</sup> and make no reference to the importance of freedom of expression. Moreover, there is no public interest defence.<sup>328</sup> In view of the obvious high public interest of events such as the Soma mining disaster, the police raid on *Zaman* and the Gezi Park protests, these fines appear difficult to justify.

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<sup>322</sup> ‘Politicized Turkish watchdog targets Samanyolu TV with new fine’, BGN News, 15 February 2015, available at: <http://national.bgnnews.com/politicized-turkish-watchdog-targets-samanyolu-tv-with-new-fine-haberi/3524>

<sup>323</sup> The fines were generally imposed on the group for news broadcasts on the December 2013 corruption allegations, which RTÜK judged as violations of privacy: “Turkey’s Human Rights Rollback”, Human Rights Watch, 29 September 2014, available at: <http://www.hrw.org/es/node/129354/section/7>.

[http://www.todayszaman.com/\\_rtuk-issues-fines-to-intimidate-samanyolu-tv\\_349587.html](http://www.todayszaman.com/_rtuk-issues-fines-to-intimidate-samanyolu-tv_349587.html)

<sup>324</sup> ‘The Gezi Park protests: the impact on freedom of expression in Turkey’, PEN, March 2014, (see n 297 above), p.15.

<sup>325</sup> ‘RTÜK has never been this politicized, member says’, Today’s Zaman, 7 October 2014, available at: [http://www.todayszaman.com/national\\_rtuk-has-never-been-this-politicized-member-says\\_360945.html](http://www.todayszaman.com/national_rtuk-has-never-been-this-politicized-member-says_360945.html)

<sup>326</sup> namely, Samanyolu Haber, CEM TV, Bugün TV, Samanyolu TV and Halk TV: ‘Diminishing press freedom in Turkey’, Rethink Institute, November 2014, (see n 23 above), p.11, Appendix C.

<sup>327</sup> Law No. 6112 on the Establishment of Radio and Television Enterprises and their Media Services. The English text of the Broadcasting Law is available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=241854](http://www.wipo.int/wipolex/en/text.jsp?file_id=241854). See European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, (see n 244 above), p 13.

## *Direct interference with freedom of the press*

### *(i) Internet and social media censorship*

156. The emergence of social media and its enormous impact as a conduit for news and commentary has done much to challenge government attempts to stifle critical news reporting and public debate. The traditional media's failure to report the early days of the Gezi Park protests in June 2013 and the December 2013 corruption scandal led to many in Turkey turning to social media to learn about the demonstrations<sup>329</sup> and the allegations of corruption, which implicated major government figures.

### *Events following December 2013*

157. In the wake of the government corruption scandal in December 2013 and the dissemination through social media of politically damaging leaked audio recordings supporting the corruption allegation,<sup>330</sup> the government passed a series of amendments to the Internet Law in January and February 2014.<sup>331</sup> The draft amendments regulating internet access were submitted to Parliament without consultation in an omnibus bill amending 42 different laws.<sup>332</sup> The new amendments endowed the Telecommunication and Communications Directorate (TIB), whose head is appointed by government,<sup>333</sup> with the authority to block online content, even if no complaints were received and in some cases without having first obtained a court order.<sup>334</sup> Internet Service Providers (ISPs) were required to execute the blocking of content within four hours after being instructed to do so by the TIB.<sup>335</sup>

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<sup>329</sup> During the Gezi Park protests, the government regularly monitored social media and in some cases issued arrest warrants for those who organised or supported the protests via their Twitter and Facebook accounts. In Izmir on 4 June 2013, 38 Twitter users were detained for up to 36 hours for "inciting riots and conducting propaganda" and "encouraging breaking of the law" for tweets that indicated areas where police were intervening against protesters and safe areas where medical help could be sought.

<sup>330</sup> On one such recording a voice resembling Mr Erdoğan is heard to instruct his son to dispose of large amounts of cash from a residence in December 2013: 'Turkish social media ban raises censorship fears', BBC News, 7 April 2015, available at: <http://www.bbc.co.uk/news/world-europe-32204177>; 'The internet bill: Is freedom of expression under threat in Turkey?', Al Jazeera, 8 February 2014, available at:

<http://www.aljazeera.com/indepth/opinion/2014/02/internet-bill-freedom-expressio-201427122110808964.html>

<sup>331</sup> Prior to January 2014 access to approximately 37,000 websites, including news websites such as Özgür Gündem and Keditör, as well as content-sharing websites such as YouTube, Wordpress and Vimeo, had been denied by court orders and administrative blocking orders issued by the TIB. Furthermore, several users received fines, prison time or suspended sentences for comments made on social media platforms.

<sup>332</sup> The bill amended the Internet Law of Turkey (Law No. 5651) and entered into force on 23 May 2007. Law 5651 frequently facilitated censorship of online speech. The 2007 law allowed websites to be blocked based on "sufficient suspicion" of certain crimes, pursuant to court orders that were freely granted.

<sup>333</sup> In July 2014 Mr Erdoğan, then Prime Minister, stated that the directorate should be run by the National Intelligence Agency (MIT). The current head is a former MIT operative. After Cemattin Çelik was appointed in December 2013 to lead the TIB, an extensive purge followed in which scores of workers lost their jobs at the agency. A revised law on the MIT, adopted in April 2014, increased government surveillance powers and unfettered access to data and increased penalties for whistleblowers and journalists who publish leaked intelligence. See para 164 below.

<sup>334</sup> Individuals and legal entities are then required to apply to a judge within 24 hours who is then required to issue a decision within 48 hours.

<sup>335</sup> OSCE Briefing on Proposed Amendments to Law No. 5651 The Internet Law of Turkey, January 2014, available at: <http://www.osce.org/fom/110823?download=true>; 'Turkish internet bill would deepen press

158. Following the introduction of the new controls, access to Twitter and You Tube were blocked on 20 March 2014.<sup>336</sup> In a press release the TIB said that, as a result of complaints from citizens about violations of personality and privacy rights the courts had decided to block access.<sup>337</sup> The Turkish government said that Twitter was engaged in “systematic character assassinations” for hosting accounts posting leaked audio recordings.<sup>338</sup> The blocking of access to Twitter came after Mr Erdoğan told supporters on 20 March 2014: “We now have a court order. We will wipe out Twitter. I don’t care what the international community says at all. Everyone will see the power of the Turkish Republic”.
159. Described as a “civil coup,” the ban provoked a huge public backlash. It was later revealed that a court order to block Twitter had never been made. The courts had ordered the blocking of certain URL addresses, and TIB had used this order as a basis to block access to Twitter nationwide. The blocking of Twitter and YouTube prompted condemnation around the world,<sup>339</sup> including a joint statement in March from two United Nations special rapporteurs.<sup>340</sup> Both sites were re-opened in April and May 2014 respectively after the Constitutional Court lifted the blocking orders.
160. In its decision regarding the access ban of an entire Twitter website, the Constitutional Court stated: “The social media ground the internet provides is indispensable for people to express, mutually share and disseminate their information and thoughts. Therefore, it is clear that administrative authorities must be extremely sensitive in the regulation and practice for internet and social media instruments, which has become one of the most effective and widespread methods to express thoughts”. The Court concluded that the “blockage of access to this social sharing website without a legal basis and by means of a decision of prohibition whose borders are not definite constitutes a severe intervention on the freedom of expression which is one of the most basic values of democratic societies”.<sup>341</sup> Following the Constitutional Court

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freedom crisis, Committee to Protect Journalists, 3 February 2014, available at:

<https://cpj.org/blog/2014/02/turkish-internet-bill-would-deepen-press-freedom-c.php>

<sup>336</sup> On 22 March 2014, the TIB blocked Google DNS and other DNS servers, which were being used by thousands to circumvent the ban on Twitter.

<sup>337</sup> ‘Dispatches: Turkey shuts down Twitter’, 21 March 2014, Human Rights Watch, available at:

<http://www.hrw.org/news/2014/03/21/dispatches-turkey-shuts-down-twitter>

<sup>338</sup> Turkey was still debating the Twitter ban when access to YouTube was blocked on 27 March 2014 due to recordings alleging official corruption were posted on the site and leaked footage of a meeting at the Foreign Ministry, showed state officials allegedly discussing a possible incursion into Syria by Turkey: ‘Turkish court orders YouTube access to be restored’, BBC, 29 May 2014, available at:

<http://www.bbc.co.uk/news/technology-27623640>; <http://www.hrw.org/news/2014/03/27/turkey-youtube-block-violates-free-expression>.

<sup>339</sup> The European Commission Vice-President stated: “The Twitter ban in Turkey is groundless, pointless, cowardly. Turkish people and the international community will see this as censorship.” In the United States, the White House issued a statement condemning Turkey’s blockage of “access to basic communication tools”: “We oppose this restriction on the Turkish people’s access to information, which undermines their ability to exercise freedoms of expression and association and runs contrary to the principles of open governance that are critical to democratic governance”.

<sup>340</sup> ‘UN rights experts concerned at attempts to restrict access before elections’, 28 March 2014, available at:

<http://freemasssembly.net/rapporteurpressnews/turkey-twitter-youtube/>

<sup>341</sup> Turkish Constitutional Court, Judgment of Second Section, dated 2 April 2014, the Application no. 2014/3986 (Judgment on Blockage, of a Social Media Website (Twitter)), paras 39-40, 46-48, available at: <http://www.anayasa.gov.tr/en/News/Detail/judgment/2014-3986.pdf>

judgment, the ban on Twitter was lifted on 3 April 2014.<sup>342</sup> In May 2014, the Constitutional Court overturned the ban on access to YouTube.<sup>343</sup>

161. These decisions of the Constitutional Court were followed by a judgment in October 2014 which annulled some of the more controversial aspects of the Internet Law.<sup>344</sup> The Constitutional Court ruled that the authority of the TIB to close websites within four hours, without a court decision, on the grounds of protecting national security, public order, or preventing crime, was unconstitutional. The Court held that there was a risk in giving power to a non-judicial body to block online access on the grounds of protecting national security or public order where the grounds for doing so were vague and may be interpreted in a particularly wide manner. The Court also ruled against TIB's right to store internet data for up to two years.<sup>345</sup>

#### *Events following the decisions of the Constitutional Court*

162. However, on 20 January 2015, the AKP government introduced a nearly identical amendment to the Internet Law containing the same offending provisions which the Constitutional Court had ruled unconstitutional. As with the overturned law, this law would oblige the ISPs to execute the blocking of contents within four hours of receiving the order from the TIB, to block websites without seeking a court ruling first and without giving the website an opportunity first to remove the offending content<sup>346</sup> enabling the government to block websites quickly and without due process of law.<sup>347</sup> It remains unclear whether the law will also be overturned by the Constitutional Court.
163. In April 2015 Twitter and YouTube were again blocked following an Istanbul court ruling forbidding the publication of images of Mehmet Selim Kiraz, a Turkish prosecutor, held at gunpoint after being taken hostage at an Istanbul courthouse on 31 March 2015 by members of the Revolutionary People's Liberation Front (DHKP-C), a militant Marxist group.<sup>348</sup> The court held that the ban was necessary because the images were "propaganda for an armed terrorist organisation and distressing for the prosecutor's family". A further 166 websites which shared the images were blocked

<sup>342</sup> Mr Erdoğan said he had no respect for the court's decision and accused the Court of defending "the commercial rights of international companies instead of the rights of their own country and own nation": 'Cübbeni Çıkar Siyasete Gel' ('Take off your robe and engage in politics'), *Hürriyet*, 13 April 2014.

<sup>343</sup> See the summary of Turkish Constitutional Court, Judgment of General Assembly, dated 28/5/2014, Application no. 2014/4705 (Judgment on Blockage of a Social Media Website YouTube), available at: [www.anayasa.gov.tr/en/News/Detail/judgment/2014-4705.pdf](http://www.anayasa.gov.tr/en/News/Detail/judgment/2014-4705.pdf)

<sup>344</sup> On 11 September 2014, a new amendment to the Internet law was passed by Parliament, which had provided additional powers for the TIB President to block access to the internet without a court order in cases of national security, prevention of crime and preservation of the public order (Article 127 of Law No. 6552). No translation of this judgment is available, although a summary of the judgment in Turkish is available from the Constitutional Court's website at: <http://www.anayasa.gov.tr/Gundem/Detay/632/632.pdf>

<sup>345</sup> These powers were granted to TIB by amendments to the Internet Law, passed by Parliament on 10 September. There was no prior consultation on the amendments, which were slipped into the bill at the last minute on 8 September 2014.

<sup>346</sup> 'Turkish social media ban raises censorship fears', BBC, 7 April 2015, available at: <http://www.bbc.co.uk/news/world-europe-32204177>

<sup>347</sup> EDRI, "Yet another internet blocking law in Turkey", 11 February 2015, available at: <https://edri.org/yet-another-internet-blocking-law-turkey/>

<sup>348</sup> 'Turkish social media ban raises censorship fears', BBC News, 7 April 2015, available at: <http://www.bbc.co.uk/news/world-europe-32204177>. Mehmet Selim Kiraz was subsequently killed during an attempted rescue operation.

and a criminal investigation was launched against four newspapers for publishing the images.<sup>349</sup> Access to Twitter and Facebook was restored 20 hours later after the sites complied with the request to remove the photographs.<sup>350</sup>

164. Introduced in April 2014, the new Intelligence Agency (MIT) Law provides wide powers to the MIT to obtain a variety of information from public institutions and private organisations and to wiretap communications, creating major interferences with the right to data protection and privacy. For example, it provides for a term of imprisonment of up to 12 years for publication without authorisation of documentation concerning the activities of the MIT.<sup>351</sup> The 2014 European Peer Review mission on Freedom of Expression concluded: “No doubt this law will have a strong chilling effect on the publication of news on activities of the MIT, which would be in the public interest. However, no public interest exceptions exist to the high fines foreseen”.<sup>352</sup>

*(ii) Refusal of accreditation for journalists working for Hizmet-affiliated media*

165. Journalists working for Hizmet-affiliated media companies and other journalists critical of the government have been barred from covering events organised by the President’s office and ministries through the means of accreditation. Denying members of critical media outlets access to government events has been a common practice since December 2013. The most significant examples include:
- The AKP refused to issue press accreditations for the announcement of Mr Erdoğan's nomination for the presidency in August 2014 to a number of broadcasters and newspapers, including *Taraf*, *Sözcü*, *Yurt*, *Birgün*, *Evrensel*, *Yeni Asya* and *Aydınlık*, as well as broadcasters Halk TV, Ulusal Kanal and Hayat TV.
  - Correspondents from *Zaman*, *Bugün*, Samanyolu TV and Cihan news agency have been banned from the presidential palace since President Erdoğan’s inauguration in August 2014. The ban was extended to key ministries including the Prime Minister’s office and the Ministry of Foreign Affairs in November 2014.<sup>353</sup>
  - Reporters from *Zaman* and the Cihan news agency were excluded from press conferences during the European Union Affairs Minister and chief EU negotiator Volkan Bozkır's first visit to the European Union as a minister in Brussels and Strasbourg on 18 September

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<sup>349</sup> Ibid.

<sup>350</sup> ‘Turkey Twitter block lifted after image removed’, BBC, 6 April 2015, available at: <http://www.bbc.co.uk/news/technology-32194915>; ‘Turkey’s Online Censorship’, New York Times, 8 April 2015, available at: <http://takingnote.blogs.nytimes.com/2015/04/08/turkeys-online-censorship/>; ‘Turkey bans twitter in bid to block 'propaganda' pictures of kidnapping’, The Guardian, 6 April 2015, available at: <http://www.theguardian.com/world/2015/apr/06/briton-suspects-turkish-militant-raid-hostage>. See also ‘Turkey lifts ban on access to Twitter and YouTube’, Financial Times, 7 April 2015, available at: <http://www.ft.com/cms/s/0/12ef52aa-dc52-11e4-a6f7-00144feab7de.html#axzz3WcTXvErm>. The ban was eventually lifted with regard to the websites that removed the controversial images.

<sup>351</sup> See Law amending the law on the state intelligence services and national intelligence organisations (Law No. 2937), adopted on 17 April 2014. See European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, (see n 244 above), p. 11.

<sup>352</sup> Ibid.

<sup>353</sup> ‘Turkish media linked to exiled cleric Gülen say they shut out by government’, Reuters, 18 November 2014, available at: <http://blogs.reuters.com/faithworld/2014/11/18/turkish-media-linked-to-exiled-cleric-gulen-say-they-shut-out-by-government/>

2014.<sup>354</sup> Selçuk Gültaşlı, who has been the Brussels correspondent for *Zaman* for more than 10 years and Mehmet Dinç, *Zaman's* correspondent in Strasbourg, were also excluded from press conferences held by Mr Bozkır in Brussels and Strasbourg on 18 October 2014.<sup>355</sup>

- political reporters from *Zaman* and Kanaltürk TV were denied entry to Parliament in February 2015 after their access cards were cancelled by the Press Relations Board, following complaints filed by AKP deputies on grounds that the reporters had insulted them and without giving them the opportunity to defend themselves.<sup>356</sup>
- reporters from *Zaman*, Cihan news agency, Samanyolu TV, Kanaltürk and Bugün TV channels were barred from entering a Turkish Union of Chambers and Commodity Exchanges meeting in Ankara in April 2015. A *Zaman* reporter who tried to enter the meeting was reportedly told by a security guard that “*Zaman* reporters will not be allowed in on orders from the Prime Minister”.<sup>357</sup>
- Reporters from *Zaman* and the Cihan news agency were ejected from a rehabilitation facility for the disabled in Antalya in June 2015 where they were covering a visit by the daughter of President Erdoğan and were called “traitors” by a municipal official.<sup>358</sup>
- A Cihan news agency reporter Hüseyin Aydın and his cameraman were ejected from an event in April 2015 by security guards for President Erdoğan's wife.<sup>359</sup>

166. The ban on media outlets critical of the government was criticised as censorship by Reporters Without Borders (RSF): “Blocking access to critical media is one more example of blatant censorship. We urge [the AKP] to stop resorting to such practices, which violate the constitutional principle of freedom of expression and the international conventions ratified by Turkey”.<sup>360</sup>

### *(iii) Personal attacks and smear campaigns against journalists*

<sup>354</sup> ‘AK Party’s accreditation block reaches Europe’, Today’s Zaman, 18 September 2014, available at: [http://www.todayszaman.com/\\_ak-partys-accreditation-block-reaches-europe\\_359085.html](http://www.todayszaman.com/_ak-partys-accreditation-block-reaches-europe_359085.html)

<sup>355</sup> ‘Ministry imposing bans against Zaman’, Today’s Zaman, 29 January 2015, available at: [http://www.todayszaman.com/anasayfa\\_ministry-imposing-bans-against-zaman-cihan-defends-press-freedom-in-crimea\\_371162.html](http://www.todayszaman.com/anasayfa_ministry-imposing-bans-against-zaman-cihan-defends-press-freedom-in-crimea_371162.html)

<sup>356</sup> ‘Speaker Çiçek: I don’t want to be remembered for bans on media’, Today’s Zaman, 17 April 2015, available at: [http://www.todayszaman.com/national\\_speaker-cicek-i-dont-want-to-be-remembered-for-bans-on-media\\_378276.html](http://www.todayszaman.com/national_speaker-cicek-i-dont-want-to-be-remembered-for-bans-on-media_378276.html)

<sup>357</sup> ‘Government bars critical media outlets from TOBB meeting’, Today’s Zaman, 8 April 2015, available at: [http://www.todayszaman.com/national\\_government-bars-critical-media-outlets-from-tobb-meeting\\_377457.html](http://www.todayszaman.com/national_government-bars-critical-media-outlets-from-tobb-meeting_377457.html)

<sup>358</sup> ‘Cihan, Zaman reporters booted from facility before visit by Erdoğan’s daughter’, Today’s Zaman, 5 June 2015, available at: [http://www.todayszaman.com/national\\_cihan-zaman-reporters-booted-from-facility-before-visit-by-erdogans-daughter\\_383385.html](http://www.todayszaman.com/national_cihan-zaman-reporters-booted-from-facility-before-visit-by-erdogans-daughter_383385.html)

<sup>359</sup> ‘Cihan reporter thrown out of event by Emine Erdoğan’s guards’, Today’s Zaman, 20 April 2015, available at: [http://www.todayszaman.com/anasayfa\\_cihan-reporter-thrown-out-of-event-by-emine-erdogans-guards\\_378506.html](http://www.todayszaman.com/anasayfa_cihan-reporter-thrown-out-of-event-by-emine-erdogans-guards_378506.html)

<sup>360</sup> ‘AK Party’s accreditation block reaches Europe’, 18 September 2014, available at: [http://www.todayszaman.com/blog/turkish-media-watch/ak-partys-accreditation-block-reaches-europe\\_359144.html](http://www.todayszaman.com/blog/turkish-media-watch/ak-partys-accreditation-block-reaches-europe_359144.html) The EU has previously criticised the accreditation process carried out by military authorities against certain media outlets. In its report for the year 2011, the EU Commission said, “The selective accreditation by the military of certain media has continued”, available at: [http://www.todayszaman.com/\\_ak-partys-accreditation-block-reaches-europe\\_359085.html](http://www.todayszaman.com/_ak-partys-accreditation-block-reaches-europe_359085.html)

167. Since December 2013, a number of journalists associated with the Hizmet movement and other journalists critical of the government have become targets for personal attacks and smear campaigns by government figures:

- The Washington representatives of *Bugün* and *Zaman* who were attempting to report on a meeting between President Erdoğan and US Vice President Joe Biden were reportedly sworn at by President Erdoğan's advisers on 25 September 2014.<sup>361</sup>
- During a presidential election rally in August 2014, Mr Erdoğan referred to a columnist on *Taraf* and the Turkey correspondent for *The Economist*, Amberin Zaman, as: "A militant in the guise of a journalist, a shameless woman... Know your place! ... You insult a society of 99 percent Muslims" and encouraged the crowd to boo her because she had earlier criticised the government in a television interview. Following the incident Ms Zaman was subject to hate mail and death threats but stated to Human Rights Watch that she felt that a complaint to the prosecutor would be useless as Mr Erdoğan's words had "constituted a licence" to attack her.<sup>362</sup>
- Cüneyt Özdemir, a columnist for *Radikal* was threatened in February 2014 by two members of pro-government media companies for writing critical commentary. Mr Erdoğan personally lambasted him in public for one of his articles in *Radikal* and called on the owner of the paper to dismiss him.<sup>363</sup>
- CNN International correspondent Ivan Watson was briefly detained on 3 June 2014 during a live broadcast on the anniversary of the Gezi Park protests.
- A reporter from *Zaman* was beaten and briefly detained by police while he was taking photos at Gezi Park on the second anniversary of the Gezi Park protests on 31 May 2015. When the reporter complained, the officer reportedly stated: 'Will you tell on me to the United States? Will you have Fethullah Gülen tell on me?'<sup>364</sup>

168. Even before December 2013, it had become commonplace for members of the government, especially President Erdoğan, to publicly attack journalists and call for their dismissal. In March 2013, *Milliyet* columnist Hasan Cemal, one of Turkey's most respected journalists, defended his paper's decision to publish leaked information on PKK leader Abdullah Öcalan's attitudes toward peace talks. In a speech two days later, Mr Erdoğan attacked Cemal, saying, "If this is journalism, then down with your journalism!" Cemal was dismissed from *Milliyet* a month later.

169. These verbal attacks are also allied to a concerning trend of physical attacks on journalists. During the Gezi Park protests in June 2013, numerous human rights and

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<sup>361</sup> 'Criticism mounts after Erdoğan's men attack journalists in New York', Today's Zaman, 28 September 2014, available at: [http://www.todayszaman.com/blog/turkish-media-watch/criticism-mounts-after-erdogans-men-attack-journalists-in-new-york\\_360170.html](http://www.todayszaman.com/blog/turkish-media-watch/criticism-mounts-after-erdogans-men-attack-journalists-in-new-york_360170.html)

<sup>362</sup> Human Rights Watch interview with Amberin Zaman, 9 September 2014; 'Amberin Zaman, Our Correspondent in Turkey', The Economist (blog), 7 August 2014, available at: <http://www.economist.com/blogs/newsbook/2014/08/amberin-zaman>

<sup>363</sup> 'Journalist: I was threatened over not supporting government', Today's Zaman, 19 January 2014, available at: [http://www.todayszaman.com/national\\_journalist-i-was-threatened-over-not-supporting-government\\_339908.html](http://www.todayszaman.com/national_journalist-i-was-threatened-over-not-supporting-government_339908.html)

<sup>364</sup> 'Zaman reporter beaten, briefly detained by police at Gezi Park', Today's Zaman, 31 May 2015, available at: [http://www.todayszaman.com/national\\_zaman-reporter-beaten-briefly-detained-by-police-at-gezi-park\\_382165.html](http://www.todayszaman.com/national_zaman-reporter-beaten-briefly-detained-by-police-at-gezi-park_382165.html)

journalists' organisations alleged police directly aimed water cannons and tear gas at press members and smashed their cameras despite the fact that they prominently displayed their press credentials.<sup>365</sup> According to Bianet, police assaulted at least 105 journalists while they were covering the protests. During the protests police also detained at least 28 journalists, including five foreign correspondents.<sup>366</sup>

### *Conclusions on freedom of expression*

170. The increasingly repressive measures adopted by Erdoğan's government since December 2013 are a serious setback for Turkish democracy and a sharp reversal of the reform process that had been taking place since Turkey began accession talks with the European Union in 2005. Events since December 2013 have highlighted urgent concerns about freedom of expression in Turkey: cross-ownership of media companies; the lack of independence of media and internet regulators from the state; legislation that fails to comply with international human rights standards such as the Broadcasting Law and new Internet Law; and the threat of criminal prosecution to stifle coverage of matters of high public interest. As the 2014 European Peer Review Commission on Freedom of Expression concluded:

"Since 2011, there have been important positive developments in the legislative framework related to freedom of expression.... More attention to the case law of the European Court of Human Rights regarding freedom of expression can also be observed with the judiciary. New institutions have been established for the protection of human rights and new remedies created like the individual application to the Constitutional Court. Most importantly, the number of journalists in detention has dropped significantly and in defamation cases hardly any prison sentence are given anymore. Trials were suspended and restrictions on publications lifted. The Kurdish language can be more freely used. Special Anti-Terrorism Courts were abolished. Opportunities for education and training activities on freedom of expression for judges and prosecutors were created and used. ...However, it appears that since the May 2013 demonstrations and the Gezi Park events as well as the corruption allegations against members of government the dynamics of reform in some areas has slowed down if not partly been reversed. ...In conclusion, the progress made by the judicial reform and democratisation packages and other efforts appear to be at risk in view of recent tendencies to invigorate the control over the media and to extend it also to the new media on the internet".<sup>367</sup>

171. As a result of these successive negative developments, the Washington-based watchdog Freedom House lowered Turkey's status from "partly free" to "not free" in their "Freedom of the Press 2014" report, which highlighted the increased political

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<sup>365</sup> In March 2015 the TGNA passed a new domestic security bill which has attracted wide criticism for threatening the right to freedom of assembly by expanding police powers to detain demonstrators, conduct warrantless searches and use deadly force during violent protests. See 'Human Rights and the Rule of Law, A Scoping Report', the British Institute of International and Comparative Law (BIICL), 2015, pp. 87-88, available at: <http://www.biicl.org/index>

<sup>366</sup> Ultimately no members of the press were charged for being present at the protests.

<sup>367</sup> See European Union Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014, (see n 244 above), pp. 19-21.



pressure on the Turkish media. With this decision, Turkey became the only country in Europe with a “no press freedom” status.<sup>368</sup>

172. In April 2014 the Committee to Protect Journalists addressed an open letter to Mr Erdoğan asking him to ease restrictions on traditional and online media. While recognising the reduction of the number of journalists in custody, it deplored the violations against the Turkish press stating that the media environment in Turkey is becoming increasingly repressive.<sup>369</sup> During the 2015 UPR, a number of states expressed concern at the increase in restrictions on media and dissenting voices.<sup>370</sup> In its September 2014 report ‘Turkey’s Human Rights Rollback’, Human Rights Watch concluded:

“Turkey is undergoing a worrying rollback of human rights. In office for twelve years under the leadership of [Mr] Erdoğan, the AKP has shown increasing intolerance of political opposition, public protest, and critical media. Over the past nine months, in an effort to stifle corruption investigations, the AKP government has sought to curb the independence of the judiciary and weaken the rule of law. The erosion of human rights through limitations on media freedom, clampdown on protest, and further loss of trust in Turkey’s politicised criminal justice system have deepened political polarization in the country”.<sup>371</sup>

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<sup>368</sup> ‘Freedom of the Press 2014’, Freedom House, available at: <https://freedomhouse.org/report/freedom-press/freedom-press-2014#.VW7d6ksWEYU>

<sup>369</sup> ‘Turkey should reverse all anti-press measures and laws’, CPJ, 9 April 2014, available at: <https://cpj.org/2014/04/turkey-should-reverse-all-anti-press-measures-and.php>

<sup>370</sup> Draft Report of the Working Group on the Universal Periodic Review, Turkey, 29 January 2015, A/HRC/WG.6/21/L.12. Among the recommendations accepted by Turkey during the 2015 UPR were calls for “efforts to ensure that the national laws protect freedom of expression online and offline”; “[a] commitment to a comprehensive reform of legislation aimed at guaranteeing the rule of law, the freedom of thought, religion, expression and of the media, in compliance with international standards” and to “ensure the penal code and anti-terror laws are consistent with international obligations.” With regard to the press and the work of journalists, it also agreed to “[t]ake measures to ensure full enjoyment of freedom of expression, particularly freedom of the press” and “to fully ensure that journalists can pursue their profession without harassment and fear of reprisals”: paras 148.14 148.36, 148.116 -148-118, available at: [http://www.upr-info.org/sites/default/files/document/turkey/session\\_21\\_-\\_january\\_2015/a\\_hrc\\_wg.6\\_21\\_l.12.pdf](http://www.upr-info.org/sites/default/files/document/turkey/session_21_-_january_2015/a_hrc_wg.6_21_l.12.pdf)

<sup>371</sup> “Turkey’s Human Rights Rollback”, Human Rights Watch, 29 September 2014, available at: <http://www.hrw.org/es/node/129354/section/7>

## C. DISCRIMINATION, HATE SPEECH AND PROPERTY VIOLATIONS

### *Discrimination*

173. The prohibition on discrimination is guaranteed by Article 10 of the Turkish Constitution<sup>372</sup> and Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention.<sup>373</sup> Turkey is also party to the following UN human rights treaties, all of which contain a prohibition on discrimination: the International Covenant on Civil and Political Rights (ICCPR),<sup>374</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>375</sup> and the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>376</sup>
174. The ECtHR has emphasised that the rights guaranteed under the ECHR must be read as though “Article 14 formed an integral part of each of the articles laying down rights and freedoms”.<sup>377</sup> Article 14 will be violated where (i) the alleged discrimination falls within the ambit of another Convention article<sup>378</sup>; (ii) there is a difference in treatment between the applicant and other persons in relevantly similar situations; (iii) the difference of treatment is on a ground protected by Article 14;<sup>379</sup> and (iv) the difference in treatment is not justifiable. Discrimination is caught by Article 14 only when it is within the ambit of another Convention provision, but it does not require a breach of such a provision. Where discrimination is at the heart of the application the court will consider the Article 14 allegation even when there is a substantive breach. For example, in *Petropoulou-Tsakiris v Greece*<sup>380</sup> the court found a breach of the

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<sup>372</sup> Art 10 states that “[A]ll individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.” Turkey has no specific equality or anti-discrimination legislation. In the 2015 UPR, Turkey has stated its commitment to enacting a comprehensive anti-discrimination legislation: Draft Report of the Working Group on the Universal Periodic Review, Turkey, 29 January 2015, A/HRC/WG.6/21/L.12, para 148.16-18.

<sup>373</sup> Protocol 12 (2000) to the ECHR, signed but not ratified by Turkey expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law).

<sup>374</sup> Art 26 not only entitles all persons to equality before the law, as well as equal protection of the law, but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Turkey made a reservation with regard to the First Optional Protocol to the ICCPR, which provides for the individual complaint mechanism. According to this reservation, Turkey does not recognise the jurisdiction of the Human Rights Committee to hear complaints resulting from Art 26 ICCPR, covering discrimination and equality before the law, except insofar as they relate to rights expressly affirmed in the ICCPR.

<sup>375</sup> With regard to the CERD, Turkey has not made the necessary declaration under Art 14 of the Convention to allow individual complaints

<sup>376</sup> Turkey made a reservation with respect to Article 29(1), which provides for the referral of a dispute to arbitration or to the ICJ. Turkey is party to the inquiry procedure under the Optional Protocol, which enables the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights.

<sup>377</sup> See *the Belgian Linguistic Case (No 2)* (A/6) (1979-80) 1 EHRR 252.

<sup>378</sup> *Inze v Austria*, 8695/79, Judgment of 28 October 1987, Series A no. 126, p.17, § 36.

<sup>379</sup> Art 14 provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

<sup>380</sup> 44803/04, Judgment of 6 December 2007, §61-66.

procedural aspects of Article 3 but went on to consider Article 14 and found that the failure of the authorities to investigate possible racial motives for the applicant's ill-treatment, combined with their attitude during the investigation, constituted discrimination contrary to Article 14 taken in conjunction with Article 3. Article 14's prohibition of discrimination on the ground of religious or political opinion is also buttressed by the right to freedom of thought, conscience and religion in Article 9.<sup>381</sup>

### ***Profiling and purging***

175. It is estimated that approximately 40,000 police officers, civil servants, judges and public prosecutors have been removed from their posts since the December 2013 corruption investigation. Since December 2013, the government has reassigned, suspended, dismissed, and in some cases detained in custody large numbers of officers in the police force, including dozens of high-level officers and a number of police chiefs in various provinces, some of whom were directly involved in the carrying out the December 2013 investigation.<sup>382</sup> By way of example:

Nazmi Ardiç, the former head of the organised crime unit of the Istanbul police whose unit was responsible for carrying out the December 2013 investigation, was removed from his post by the Interior Minister a day after his unit arrested the sons of cabinet members, businessmen close to AKP and top bureaucrats implicated in the scandal. He was first reassigned to a police school, then he was sent to Yozgat in central Turkey and then to another city in southern Turkey. Before December 2013, Mr Ardiç had never been subject to an internal investigation into his conduct in his 21 year career with the police. In fact, he had been commended on 50 different occasions and received over 600 rewards for his work. Since December 2013 however, 30 different internal investigations have been launched into his conduct. He was dismissed from the police in February 2015 for not informing the Ministry of Interior of the criminal investigation despite, Mr Ardiç says, a law which forbade police officers from disclosing details of criminal investigations to anybody, let alone to a minister who is a suspect, together with his son. On 19 April 2015 he was detained in custody with 28 other police chiefs. According to the Doğan news agency, those detained are accused of "forming an illegal organisation and being a member of an illegal organisation, political espionage, forgery of official documents, illegal wiretapping, documenting personal information and deleting computer data".<sup>383</sup>

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<sup>381</sup> The European Court of Human Rights has on several occasions been faced with applications alleging that an individual has been subjected to discriminatory treatment on the basis of religion or belief.

<sup>382</sup> See paras 54, 73, 78-81, 87-106 above. Since April 2015 former Istanbul Police Department Financial Crimes Unit Chief, Yakup Saygılı; former Istanbul Counterterrorism Unit head and Hakkari Police Chief, Tufan Ergüder; former Istanbul Police Department Public Security Unit head, Ertan Erçikti; former Istanbul Counterterrorism Unit Chief, Yurt Atayün; former Istanbul Police Department Intelligence Unit Chief, Ali Fuat Yılmaz; former Istanbul Police Department Financial Crimes Unit head, Mehmet Akif Üner; and Nazmi Ardiç, former Istanbul Police Department organised crime unit head, all of whom were prominent in the Istanbul police department and took part in the December 2013 corruption investigations, are being held in Istanbul's Silivri Prison.

<sup>383</sup> Statement from Nazmi Ardiç.

176. Some 1,776 senior police officials have also been retired.<sup>384</sup> According to Ercan Taştekin, a former Bingöl province police chief, the AKP is aiming to create a police force that is loyal to the AKP and the closure of the Police College and the Police Academy, as well as the barring of their students from becoming police officers through recent legislation, represents a further step by the AKP to create its own police force.<sup>385</sup> At the same time, the government has engaged in a widespread purge of suspected pro-Hizmet judges and public prosecutors.<sup>386</sup>
177. The government's massive purges of the police force and judiciary were followed by hundreds of civil servants being removed from their positions from April 2015. The reassignments reportedly came after the civil servants were profiled by a five member team assigned by the government and the National Intelligence Organisation (MIT) to investigate whether civil servants were part of the Hizmet movement or others groups critical of the AKP.<sup>387</sup> According to columnist, Abdullah Bozkurt, President Erdoğan “used his own concocted conspiracy to conduct a wide scale witch-hunt in the police and judiciary to eliminate nationalists, social democrats, Alevis and those affiliated with opposition political parties and Gülen” and is “smear[ing] the exam system in order to undermine public confidence in the existing system” in order that the central exam (KPSS) requirement, a standard exam for employment in the civil service, be replaced with oral interviews that would allow the AKP to screen candidates according to their ideological enthusiasm. “In the end”, Bozkurt states “employment in public services will be completely dependent on political affiliation with the prevailing ideology of the ruling party determining selection and promotion”.<sup>388</sup> Notable examples of government interference include:
- In March 2015 the AKP reportedly asked the Asia-Pacific Space Cooperation Organisation (APSCO) to fire Secretary-General Celal Ünver after claiming that he was a member of the “parallel structure”. The APSCO administration rejected the demand from the Scientific and Technological Research Council of Turkey (TÜBİTAK) saying that it does not understand the term “parallel structure” or what it refers to and that it is only possible to remove a secretary-general with votes from three-quarters of the members of its administrative council.
  - Former TÜBİTAK Vice President Hasan Palaz and over 250 engineers and scientists were dismissed from the institution between December 2013 and April 2014.<sup>389</sup> On 20 February 2014 Hasan Palaz issued a statement, and subsequently in March 2015

<sup>384</sup> following a meeting of the High Assessment Board of the National Police Department in April 2015 under newly enacted, controversial domestic security legislation that amended the Police Duties and Authorities (PVSK) law.

<sup>385</sup> ‘AK Party removes chiefs considered to be ‘brain’ of police force following graft probe’, Today’s Zaman, 18 April 2015, available at: [http://www.todayszaman.com/anasayfa\\_ak-party-removes-chiefs-considered-to-be-brain-of-police-force-following-graft-probe\\_378265.html](http://www.todayszaman.com/anasayfa_ak-party-removes-chiefs-considered-to-be-brain-of-police-force-following-graft-probe_378265.html)

<sup>386</sup> The detail of these extensive purges is set out at paras 54, 57-58, 65-68, 78-83 and 106-108 above.

<sup>387</sup> ‘Ministerial bureaucrats purged after being profiled by MIT’, Today’s Zaman, 16 April 2014, available at: [http://www.todayszaman.com/national\\_ministerial-bureaucrats-purged-after-being-profiled-by-mit\\_344868.html](http://www.todayszaman.com/national_ministerial-bureaucrats-purged-after-being-profiled-by-mit_344868.html)

<sup>388</sup> ‘Building partisan civil service in Turkey’, Today’s Zaman, 12 January 2015, available at: [http://www.todayszaman.com/columnist/abdullah-bozkurt/building-partisan-civil-service-in-turkey\\_369558.html](http://www.todayszaman.com/columnist/abdullah-bozkurt/building-partisan-civil-service-in-turkey_369558.html); ‘Gov’t-led KPSS probe to pave way for partisan recruitments in civil service’, Today’s Zaman, 23 March 2015, available at: [http://www.todayszaman.com/anasayfa\\_govt-led-kpss-probe-to-pave-way-for-partisan-recruitments-in-civil-service\\_376086.html](http://www.todayszaman.com/anasayfa_govt-led-kpss-probe-to-pave-way-for-partisan-recruitments-in-civil-service_376086.html)

<sup>389</sup> ‘Gov’t-led KPSS probe to pave way for partisan recruitments in civil service’, Today’s Zaman, 23 March 2015, [http://www.todayszaman.com/national\\_ak-party-tries-to-push-its-parallel-paranoia-on-space-organization\\_375748.html](http://www.todayszaman.com/national_ak-party-tries-to-push-its-parallel-paranoia-on-space-organization_375748.html)

published a book, in which he described how he was threatened with losing his job if he did not alter key evidence in a scientific report that was prepared as part of a criminal investigation into the installing of bugging devices at Mr Erdoğan's offices in 2012. Mr Palaz and two other employees of TÜBİTAK were charged with membership of a terrorist organisation, forging official documents under Article 204 of the Turkish Criminal Code (TCK), and charges of destroying, concealing or changing evidence of a crime under Article 281.<sup>390</sup> On 26 June 2015 the Ankara 7<sup>th</sup> Criminal Court ruled that no evidence had been found of wiretapping with the aim of political espionage or violating the privacy of inter-personal communications but Mr Palaz remains on bail on charges of falsifying the report.<sup>391</sup>

178. In a public address in May 2014, Mr Erdoğan accused the reassigned officers of “betraying Turkey” because of their suspected allegiance to the Hizmet movement, “If reassigning individuals who betray this country is called a witch-hunt, then, yes, we will carry out a witch-hunt”.<sup>392</sup> It was reported that on 25 June 2014 the national police department sent a written communication to police departments in 30 provinces in which it asked the police to profile members of the Hizmet movement in their provinces and inquire into whether those members have the strength to overthrow the government.<sup>393</sup> It followed an earlier order by the Ankara chief public prosecutor, Serdar Coşkun, who sent an order to the Ankara police department and its anti-smuggling and organised crime bureau on 11 June 2014 to carry out an investigation into whether the Hizmet movement may be considered a terrorist organisation and asked the police department to gather intelligence about its members and Hizmet-affiliated media, schools, companies and associations.<sup>394</sup> In February 2015 it was reported that bodies called “Parallel Monitoring Units” (PIB) had been established at police counter-terrorism branches across 81 provinces to keep records of members of the Hizmet movement.<sup>395</sup>
179. According to independent Kütahya Deputy, Idris Bal, who had earlier resigned from the AKP, the illegal profiling of civil servants is reminiscent of Adolf Hitler's profiling of Jews. Main opposition Republican People's Party (CHP) Secretary-General, Gürsel Tekin, described the government operation against the Hizmet movement as “banditry.” “Whoever devised this plot and sent it to police departments has committed a crime. Turkey has never witnessed such widespread profiling of its

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<sup>390</sup> ‘High-level post offered to ex-TÜBİTAK official in return for falsification of report’, Today’s Zaman, 5 May 2015, available at: [http://www.todayszaman.com/anasayfa\\_high-level-post-offered-to-ex-tubitak-official-in-return-for-falsification-of-report\\_379867.html](http://www.todayszaman.com/anasayfa_high-level-post-offered-to-ex-tubitak-official-in-return-for-falsification-of-report_379867.html)

<sup>391</sup> ‘Ex-TÜBİTAK deputy chief released in report forgery case’, Today’s Zaman, 7 July 2015, available at: [http://www.todayszaman.com/national\\_ex-tubitak-deputy-chief-released-in-report-forgery-case\\_393104.html](http://www.todayszaman.com/national_ex-tubitak-deputy-chief-released-in-report-forgery-case_393104.html)

<sup>392</sup> ‘New operations target police investigating tender-rigging, spying’, Today’s Zaman, 19 August 2014, [http://www.todayszaman.com/anasayfa\\_new-operations-target-police-investigating-tender-rigging-spying\\_356085.html](http://www.todayszaman.com/anasayfa_new-operations-target-police-investigating-tender-rigging-spying_356085.html)

<sup>393</sup> ‘Anti-Hizmet plot no more innocent than practices of coup periods’, Today’s Zaman, 12 July 2014, <http://www.todayszaman.com/news-352766-anti-hizmet-plot-no-more-innocent-than-practices-of-coup-periods.html>

<sup>394</sup> ‘Prosecutor orders mass profiling of Hizmet members’, Today’s Zaman, 24 June 2014, <http://www.todayszaman.com/news-351238-prosecutor-orders-mass-profiling-of-hizmet-members.html>

<sup>395</sup> ‘Special units established at TEM to monitor Hizmet members’, Today’s Zaman, 12 February 2015, [http://www.todayszaman.com/diplomacy\\_special-units-established-at-tem-to-monitor-hizmet-members\\_372459.html](http://www.todayszaman.com/diplomacy_special-units-established-at-tem-to-monitor-hizmet-members_372459.html)

citizens. Turkey has never witnessed a period during which the law was violated so harshly and boldly.”<sup>396</sup>

*Hizmet schools, tuition centres (dershanes) and teachers suspected of being supporters of the Hizmet movement*

180. President Erdoğan has also advised parents not to send their children to educational institutions which are seen as being linked with the Hizmet movement and called on local governments in Turkey and other national governments to close down Hizmet-affiliated schools and tuition centres (*or dershanes*). For example, addressing a rally at Burdur on 27 February 2014 Mr Erdoğan called on people at the rally not to attend schools and dershanes associated with the movement.<sup>397</sup> On 22 January 2015 President Erdoğan was reported as having said while on a state visit to Ethiopia: “In countries we visit, we have been talking about the status of these schools and saying they should be closed down” and that the Turkish Education Ministry was ready to offer the same service as provided by these schools.<sup>398</sup> As a consequence, many parents have withdrawn their children from Hizmet schools giving reasons such as distrust of the teachers and education offered as a result of statements by the government or fear that their children would be profiled or their prospects otherwise damaged.<sup>399</sup> Ozel Zumrut Fetih Egitim Metotlari, a special course provider for KPSS (the entry exam for employment in the civil service) had to be closed down as it had no registrations for the current year.<sup>400</sup>
181. Further, in June 2014 Mr Erdoğan (then Prime Minister) called on mayors to take back land and buildings given to Hizmet-affiliated institutions. He was reported as saying: “I want to you take back each and every piece of land and building given to them [Hizmet], within the boundaries of law and democracy”. Following Mr Erdogan’s call, it was reported that the Bolu Municipality shut two schools belonging to businessmen affiliated with the Hizmet movement on the grounds that the buildings were not licensed and in breach of municipality regulations; the Istanbul Metropolitan Municipality attempted to stop the construction of an education complex on privately owned land on the grounds that the land had been re-zoned green space and a meeting point in the event of an earthquake; the same municipality decided to construct a road through the courtyard of Hizmet-affiliated Fatih Koleji and despite the fact that the school is surrounded by empty plots of land and that there are no residential areas around the school; two dormitories for male students in the Black Sea province of

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<sup>396</sup> ‘Anti-Hizmet plot no more innocent than practices of coup periods’, Today’s Zaman, 12 July 2014, available at: <http://www.todayszaman.com/news-352766-anti-hizmet-plot-no-more-innocent-than-practices-of-coup-periods.html>

<sup>397</sup> ‘PM Erdoğan increases intensity of hate speech against Hizmet movement’, Today’s Zaman, 27 February 2015, available at: [http://www.todayszaman.com/national\\_pm-erdogan-increases-intensity-of-hate-speech-against-hizmet-movement\\_340677.html](http://www.todayszaman.com/national_pm-erdogan-increases-intensity-of-hate-speech-against-hizmet-movement_340677.html)

<sup>398</sup> ‘Report: Erdoğan’s anti-Turkish school rhetoric damages Turkish-African ties’, Cihan news agency, 20 March 2015, available at: [http://www.cihan.com.tr/tr/haber/Report-Erdogans-anti-Turkish-school-rhetoric\\_4274-CHMTxNDI3NC80](http://www.cihan.com.tr/tr/haber/Report-Erdogans-anti-Turkish-school-rhetoric_4274-CHMTxNDI3NC80); ‘Erdoğan pushes to close down Turkish schools in Africa’, Today’s Zaman, 22 January 2015, available at: [http://www.todayszaman.com/diplomacy\\_erdogan-pushes-to-close-down-turkish-schools-in-africa\\_370535.html](http://www.todayszaman.com/diplomacy_erdogan-pushes-to-close-down-turkish-schools-in-africa_370535.html)

<sup>399</sup> Statement of Niyazi Dinç, chairman of Nusret Özel Eğitim Tesisleri; Statement of Mehmet Batmaz, Principal of Erkul Primary and Erkul Secondary; Statement of Ahmet Demir, Principal of Private Otlukbeli Primary.

<sup>400</sup> Statement of Principal of Ozel Zumrut Fetih Egitim Metotlari.

Rize were closed down without warning; and the Antalya Metropolitan Municipality changed the status of land belonging to the Hizmet-affiliated group Toros Educational Institutions to prevent the building of a private educational facility.<sup>401</sup>

182. The Istanbul Metropolitan Municipality also removed the signboards of the FEM and Anafen prep schools and Fatih College high school on 29 and 30 June 2014 on the grounds that the school had violated the municipality's advertising regulations. The schools have legally challenged the removal of the signs on the grounds that they owe no outstanding taxes on the signs, which were put up with the approval of the municipality.<sup>402</sup> The government has also excluded private schools affiliated with the Hizmet movement from a list of approved schools where less privileged pupils may obtain financial assistance from the government, despite the schools' proven competitiveness and success.<sup>403</sup> According to the said schools, the scheme, as originally introduced by the government, uniformly applied to students of private schools, however, Hizmet schools were selectively removed from the list and the schools were offered no explanation as to the reasons for their removal. As a result, many schools have seen student numbers fall.
183. There have also been reports of profiling at Hizmet schools. The local representatives of the Ministry of Education asked Sarıyer Işık Eğitim Hizmetleri Tic. A.Ş to furnish them with a list of their students for the last 5 years, which, according to the principal, is a breach of current regulations which permit the ministry to only lawfully ask for a list of students being taught in the current school year, and caused legitimate concerns that the students were being profiled. Similar demands were made of the students of Özel Aksu FEM Dershanesi in Kahramanmaraş in southern Turkey. When the staff declined the demand, the Ministry of Education launched an investigation.<sup>404</sup> The Ministry of Education sent inspectors to tuition centres and dormitories run by a company named Elmas Özel Eğitim Hizmetleri Tic. Anonim Şirketi in Zonguldak in northern Turkey. The inspectors set up interrogation rooms and asked students, some of whom were as young as eight, whether their teachers subjected them to political propaganda.<sup>405</sup>
184. Pro-AKP government newspapers *Akit* and *Sabah* published articles stating that primary school students at Erkul Koleji were made to take a multiple question test about the life of Fethullah Gülen. The allegations were categorically refuted by Mr Suleyman Yildirim, the school's lawyer. Immediately following publication, the principal of Erkul Primary and Erkul Secondary stated "that inspectors were sent in to interview our staff, administration, students and even parents. The interviewing went

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<sup>401</sup> 'Offensive launched against Hizmet-affiliated schools in Antalya', Today's Zaman, 11 September 2014, available at: [http://www.todayszaman.com/national\\_offensive-launched-against-hizmet-affiliated-schools-in-antalya\\_358408.html](http://www.todayszaman.com/national_offensive-launched-against-hizmet-affiliated-schools-in-antalya_358408.html); 'Decision to build road on school grounds nonsensical, say parents', Today's Zaman, 29 August 2014, available at:

[http://www.todayszaman.com/national\\_decision-to-build-road-on-school-grounds-nonsensical-say-parents\\_357151.html](http://www.todayszaman.com/national_decision-to-build-road-on-school-grounds-nonsensical-say-parents_357151.html); 'Private high school declared green space', Today's Zaman, 15 June 2014, available at: [http://www.todayszaman.com/business\\_private-high-school-declared-green-space\\_350453.html](http://www.todayszaman.com/business_private-high-school-declared-green-space_350453.html)

<sup>402</sup> 'Istanbul Municipality continues signboard discrimination', Today's Zaman, 30 June 2014, available at: [http://www.todayszaman.com/national\\_istanbul-municipality-continues-signboard-discrimination\\_351739.html](http://www.todayszaman.com/national_istanbul-municipality-continues-signboard-discrimination_351739.html)

<sup>403</sup> 'Gov't violates right to equal opportunity in education', Today's Zaman, 14 September 2014, available at: [http://www.todayszaman.com/national\\_govt-violates-right-to-equal-opportunity-in-education\\_358648.html](http://www.todayszaman.com/national_govt-violates-right-to-equal-opportunity-in-education_358648.html)

<sup>404</sup> Statement of Av. Muhuttin Yilmaz.

<sup>405</sup> Ibid.

on for three weeks. It was just before the TEOG exams for high schools admissions. Interviews affected both the students and their parents. It also caused concern amongst the school staff. The stories published were total fabrication. We have complained about them but still waiting to hear from the court. The first team of inspectors did not find any wrongdoing as far as the false allegations made by *Sabah* and *Akit*. Just a few days later, however, another team of inspectors were sent in to investigate the same matter. The persecution resulted in the fall in student numbers, our turnover and loss of experienced personnel. The number of our students has fallen from 750 to 470 and is likely to fall further”.<sup>406</sup>

185. Teachers at state schools have also been targeted. For example:

- Sebahattin Köklü, who qualified as a teacher in 1998 and has worked as a principal in three different schools described how he had been unfairly investigated and disciplined as a result of his suspected links with the Hizmet movement: “In 2014 the district directorate of the Ministry of Education launched an investigation about me. I was questioned about 17 different financial, educational and technical matters. The investigation failed to conclude any wrongdoing in my part. Subsequently, when I was away, the district director of the Ministry of Education reported that I did not turn up for work and punished me with an official warning despite the fact that I have furnished them with an official letter of assignment which explained my absence from work”.<sup>407</sup>
- Yakup Pelit who qualified as a teacher in 1998 and qualified as a principal in 2010 described how he had been unfairly demoted without a proper assessment: “I have been removed by the Ministry of Education from my position as the Principal of Şişli Meslek Eğitim Merkezi in Istanbul in June 2014. The district directors of the ministry who carried out my assessment as a principal have not met me or even been to my school. Despite receiving full marks from the representatives of parents, teachers and students they demoted me by giving me suspiciously low marks. Their assessment was biased and subjective. I believe it was based on other matters such as my membership to a particular teachers’ union rather than my merits as a principal”.<sup>408</sup>

### ***Conclusions on the lawfulness of profiling and purges***

186. The ECtHR has given a broad construction to the concept of “private life” within Article 8 of the Convention. Starting with its ruling in *Niemietz*, it has consistently held that the right “secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality” and is not restricted to an “inner circle” but also extends to encompass the right to form and develop relationships with other human beings, including with colleagues at work.<sup>409</sup> Article 8

<sup>406</sup> Statement of Mehmet Batmaz, Principal of Erkul Primary and Erkul Secondary

<sup>407</sup> Statement of Sebahattin Köklü.

<sup>408</sup> Statement of Yakup Pelit.

<sup>409</sup> In *Niemietz v. Germany*, 13710/88, Judgment of 16 December 1992, Series A no. 251-B, §29), the Court stated in regard to the notion of “private life”: “it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”. See also *C. v. Belgium*, 217941/93,



also protects honour and reputation as part of the right to respect for private life.<sup>410</sup> Articulated in this way, dismissals from office<sup>411</sup> and restrictions imposed on access to a profession<sup>412</sup> have been found to interfere with the right to respect for private life. In *Volkov v Ukraine* the ECtHR held that the dismissal of a judge from office engaged Article 8 as dismissal from office affected a wide range of his relationships with other persons, including professional relationships, as well as affecting his professional reputation and “inner circle” because of its consequences for his material well-being and that of his family.<sup>413</sup>

187. The demotion or dismissal of these individuals from their posts will have affected their relationships with others, including relationships of a professional nature, and if they involved dismissal or demotion will have had an impact on their material well-being. Moreover, the reasons for the dismissal or demotion, for example, disloyalty to the State or failure to comply with a professional duty, suggests that their professional reputations will also have been affected. The expression “in accordance with the law” requires that the dismissal or demotion should have some basis in domestic law and that it should be accessible to the person concerned and be compatible with the rule of law.<sup>414</sup> There is no indication that at the time of the reassignments and dismissals there were any guidelines establishing a consistent and restrictive practice or that the requisite procedural safeguards had been put in place to prevent arbitrary application of the relevant substantive law. Further, there appears to be no justification for these widespread and extensive purges. No evidence has been produced for the existence of a ‘parallel state’ seeking to overthrow the government or of individuals’ lack of loyalty to the Republic. If Mr Ardic’s claims can be substantiated, this would be sufficient to establish a breach of Article 8, in conjunction with Articles 5 and 14, as his dismissal and detention in custody would not be lawful under domestic law.<sup>415</sup>

### *Hate speech*

188. In the wake of the corruption scandal, supporters of the Hizmet movement have become the target of a campaign of vilification by President Erdoğan. There has been widespread use of speech and propaganda promoting hatred against the Hizmet movement and dehumanising and demonising its members. Mr Erdoğan has declared supporters of the Gülen movement to be “perverts”,<sup>416</sup> “traitors”,<sup>417</sup> “vampires”,<sup>418</sup>

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Judgment of 7 August 1996, §25: “[private life] encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature”.

<sup>410</sup> See *Thlimmenos v Greece* (GC), 34369/97, Judgment of 6 April 2000, (2000) 31 EHRR 411 (prohibition on the admission of those with criminal convictions into the accountancy profession breached Articles 9 and 14); *Pfeifer v Austria*, 12556/03, 15 November 2007, §35, and *A. v Norway*, 28070/06, Judgment of 9 April 2009, §63-64.

<sup>411</sup> See *Özpınar v. Turkey*, 20999/04, Judgment of 19 October 2010, §43-48.

<sup>412</sup> see *Sidabras and Džiautas v. Lithuania*, 55480/00, 59330/00, Judgment of 27 July 2004, §47 and *Bigaeva v Greece*, 26713/05, Judgment of 28 May 2009, §22-25.

<sup>413</sup> Judgment of 9 January 2013 (because his dismissal was not in accordance with domestic law, it was unlawful under Article 8). See also *IB v Greece* 552/10, Judgment of 3 October 2013 (unjustified dismissal on grounds of health).

<sup>414</sup> See, among other authorities, *Kopp v. Switzerland*, 23224/94, Judgment of 25 March 1998, §55.

<sup>415</sup> For a consideration of the position under Art 5, see paras 109-121 above.

<sup>416</sup> ‘Başbakan: Bunlar Sapık, Bunlar Kasetçi, Montajcı, Tweetçi!’, *Radikal*, 10 March 2014, available at: [http://www.radikal.com.tr/politika/basbakan\\_bunlar\\_sapik\\_bunlar\\_kasetci\\_montajci\\_tweetci-1180572](http://www.radikal.com.tr/politika/basbakan_bunlar_sapik_bunlar_kasetci_montajci_tweetci-1180572). The following examples are all cited in ‘The Persecution of the Hizmet (Gülen) Movement in Turkey: A Chronicle’

“[worse than] leeches”,<sup>419</sup> “assassins”,<sup>420</sup> “spies”,<sup>421</sup> “members of spy rings”,<sup>422</sup> “worse than Shia” in “lies, slander and taqiyyah”,<sup>423</sup> “dishonest and despicable”,<sup>424</sup> “a gang (or örgüt),<sup>425</sup> “insidious viruses and parasites”,<sup>426</sup> “members of a terrorist organisation”,<sup>427</sup> and that “only Hell will purify them”.<sup>428</sup> Mr Erdoğan stated in a rally that he is “suspicious of their faith [in Islam]”,<sup>429</sup> “For them hypocrisy is legitimate, lying is legitimate, slandering is legitimate, sedition is legitimate. In other words, every possible means is justifiable [for them] to reach the goal, to reach the purpose. This is not a religious organisation; this is not a religious community at all. This is a completely political organisation that does everything, including espionage.”<sup>430</sup> He has conceded that the actions of the government amounted to a “witch-hunt” targeting the Gülen movement<sup>431</sup> on the grounds that the December 2013 investigation was carried out by a gang with connections abroad, acting as a sovereign being within the

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and ‘Hate Speech and Beyond: Targeting the Gulen movement’, Rethink Institute, Dec/Jan 2014, see n 34 above and <http://www.rethinkinstitute.org/hate-speech-and-beyond-targeting-the-gulen-movement-in-turkey/>

<sup>417</sup> ‘Cemaat değil ihanet şebekesi’, Yeni Akit, 25 June 2014, available at:

<http://www.yeniakit.com.tr/haber/cemaat-degil-ihanet-sebekesi-21896.html>; ‘Başbakan: Hoca, abi, abla dedikleriniz ihanet içinde’, MedyaGundem, 16 February 2014, available at:

<http://www.medyagundem.com/basbakan-hoca-abi-abla-dedikleriniz-ihanet-icinde/>; ‘Erdoğan: Vaiz Lobisi, Robot Lobisi ve Dublaj’, Bianet, 25 February 2014, available at: <http://bianet.org/bianet/siyaset/153740-erdogan-vaiz-lobisi-robot-lobisi-ve-dublaj>

‘Erdoğan: Bu Ne Cesaret, Bu Aşağılık Faaliyetin Hesabını Soracağız’, Haber Star, 16 February 2014, available at: <http://haber.star.com.tr/yazar/erdogan-bu-ne-cesaret-bu-asagilik-faaliyetin-hesabini-soracagiz/yazi-844046>.

<sup>418</sup> ‘Başbakan, bu kez ‘kan emici vampirler’ dedi’, Zaman, 21 February 2014, available at:

[http://www.zaman.com.tr/politika\\_basbakan-bu-kez-kan-emici-vampirler-dedi\\_2200964.html](http://www.zaman.com.tr/politika_basbakan-bu-kez-kan-emici-vampirler-dedi_2200964.html)

<sup>419</sup> ‘Turkish Parliament Votes to Shut Schools Run by Erdogan Rival’, Reuters, 1 March 2015, available at:

<http://www.reuters.com/article/2014/03/01/us-turkey-corruption-idUSBREA2005220140301>

<sup>420</sup> ‘PM Erdoğan’s Remarks on Hizmet Stir Animosity’, Today’s Zaman, 24 January 2014, available at:

[http://www.todayszaman.com/national\\_pm-erdogans-remarks-on-hizmet-stir-animosity\\_337584.html](http://www.todayszaman.com/national_pm-erdogans-remarks-on-hizmet-stir-animosity_337584.html)

<sup>421</sup> ‘Başbakan’dan Hizmet Hareketi’ne ‘Casus’ Suçlaması’, Zaman, 29 March 2014, available at:

[http://www.zaman.com.tr/politika\\_basbakandan-hizmet-hareketine-casus-suclamasi\\_2208005.html](http://www.zaman.com.tr/politika_basbakandan-hizmet-hareketine-casus-suclamasi_2208005.html)

<sup>422</sup> “Turkish PM Erdoğan Slams Gülen Movement as ‘Spy Ring Entering the Ruler’s Harem’,” Hürriyet, 24 March 2014, available at: <http://www.hurriyetdailynews.com/turkish-pm-erdogan-slams-gulen-movement-as-spy-ring-entering-the-rulers-harem.aspx?pageID=238&nID=64044&NewsCatID=338>

<sup>423</sup> ‘Erdoğanog top 15 insults world leaders don’t usually make’, Today’s Zaman, 14 March 2014, available at: [http://www.todayszaman.com/blog/mahir-zeynalov/erdogans-top-15-insults-world-leaders-dont-usually-make\\_342166.html](http://www.todayszaman.com/blog/mahir-zeynalov/erdogans-top-15-insults-world-leaders-dont-usually-make_342166.html)

<sup>424</sup> ‘Cibilliyetsiz bunlar’, Yeni Akit, 24 February 2014, available at:

<http://www.yeniakit.com.tr/haber/cibilliyetsiz-bunlar-11784.html>

<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

<sup>427</sup> ‘Erdoğan’dan Gülen Cemaatine: Türkiye Hasımlarının Maşasıdır’, CNN Turk, 28 January 2014, available at: <http://www.cnntrk.com/haber/turkiye/erdogandan-gulen-cemaatine-turkiye-hasimlarinin-masasidir>

<sup>428</sup> see n 405 above.

<sup>429</sup> ‘Bunlar cemaat değil terör örgütü’, Yenia Akit, 26 March 2014, available at:

<http://www.yeniakit.com.tr/haber/bunlar-cemaat-degil-teror-orgutu-13970.html>; ‘Kılıçdaroğlu: Consensus should set content of ‘Red Book,’ not AK Party’, 2 November 2014; ‘Pensilvanya yönetimindeki yeni Ergenekon...’, Hürriyet, 16 March 2014, available at: <http://www.hurriyet.com.tr/gundem/26013823.asp>; “Erdoğan: İnançlarından Şüphe Ediyorum”, available at: <http://www.yirmidorthaber.com/Dunya/erdogan-inanclarindan-suphe-ediyorum/haber-854622>

<sup>430</sup> ‘Hate Speech and Beyond: Targeting the Gulen movement’, Rethink Institute, Dec/Jan 2014, (see n 416 above).

<sup>431</sup> ‘Erdoğan says his gov’t will carry out ‘witch hunt’, Today’s Zaman, 11 May 2014, [http://www.todayszaman.com/anasayfa\\_erdogan-says-his-govt-will-carry-out-witch-hunt\\_347529.html](http://www.todayszaman.com/anasayfa_erdogan-says-his-govt-will-carry-out-witch-hunt_347529.html); ‘Herkes Konumunu Haddini Bilecek’, available at: <http://www.aa.com.tr/tr/manset/326351--basbakan-erdogan-istisare-toplantisinde-konusuyor>

structure of the state<sup>432</sup> and that “those who want to establish a parallel structure alongside the state, those who have infiltrated the state institutions . . . we will come into your lairs and we will [destroy] these organisations within the state.”<sup>433</sup> In a rally, he also accused the Gülen movement of blackmailing him: “They're busy [fighting] the prime minister. Why should they also be busy with the president now? But they wiretapped him, too. When it is time, they will release those tapes. These people are assassins, montage-makers, a gang, an organisation that amounts to a terrorist group”<sup>434</sup> In a speech to students, Mr Erdoğan claimed that Gülen supporters are so “mean” that they use Quran and Prophet for their benefit.<sup>435</sup>

189. In a speech to metropolitan city mayors, Mr Erdoğan called for further actions against Gülen activists, asking the Mayor to “wipe [them] out”.<sup>436</sup> Speaking to reporters following an official visit to Kuwait in April 2015, Mr Erdoğan reportedly said “They [referring to the Hizmet movement] will respect state authority or will perish”.<sup>437</sup> In a speech to prosecutors, judges, and other members of the judiciary, Mr Erdoğan also asked for help to “wipe out the Gülen movement activists”.<sup>438</sup> He had earlier called on the Turkish people to boycott any institutions established by members of the Gülen movement.<sup>439</sup> Following Mr Erdoğan’s call for a boycott, a Twitter account with almost 150,000 followers posted a list of institutions and businessmen who were said to be members of the Gülen movement.<sup>440</sup> In his speech at the Erzurum rally, Mr Erdoğan stated that he would not let members of the Gülen movement rent halls from the state for their events. After these remarks, the Gülen movement was not allowed to use state halls on some occasions.<sup>441</sup>

### *Conclusions on hate speech*

190. There can be little doubt that the 2013 corruption investigation has been followed by extensive hate speech targeted at the Hizmet movement to stigmatise and vilify supporters of the Hizmet movement. The characterisations, referred to above, have been used to create a climate of fear in which the AKP government has sought to persuade the Turkish people of the need to take pre-emptive action in order to defend

<sup>432</sup> “Power Struggle Racks Erdogan Government in Turkey”, 19 December 2013, available at: <http://edition.cnn.com/2013/12/19/world/europe/turkey-graft-probe/>

<sup>433</sup> “Investigation Secrecy Lifted as Turkish Government Slams Police for Hiding Corruption Operation,” *Hürriyet*, 22 December 2013. See also ‘İnlerine girip onları alacağız’, *Takvim*, 2 March 2014, <http://www.takvim.com.tr/siyaset/2014/03/02/inlerine-girip-onlari-alacagiz>

<sup>434</sup> “Turkish PM Erdoğan Slams Gülen Movement as ‘Spy Ring Entering the Ruler’s Harem’,” *Hürriyet*, 24 March 2014, available at: <http://www.hurriyetdailynews.com/turkish-pm-erdogan-slams-gulen-movement-as-spy-ring-entering-the-rulers-harem.aspx?pageID=238&nID=64044&NewsCatID=338>

<sup>435</sup> ‘Sahte şeyhlere prim vermeyin’, *Yeni Akit*, 31 May 2014, available at: <http://www.yeniakit.com.tr/haber/sahte-seyhlere-prim-vermeyin-19358.html>

<sup>436</sup> cited in ‘The Persecution of the Hizmet (Gülen) Movement in Turkey: A Chronicle’, Rethink Institute, December 2014, (see n 34 above).

<sup>437</sup> ‘Targeting Hizmet, Erdoğan says ‘obey state or perish’’, *Today’s Zaman*, 29 April 2015, available at: [http://www.todayszaman.com/national\\_targeting-hizmet-erdogan-says-obey-state-or-perish\\_379339.html](http://www.todayszaman.com/national_targeting-hizmet-erdogan-says-obey-state-or-perish_379339.html)

<sup>438</sup> ‘Cesur olun örgütü siz bitirin’, *Yeni Safak*, 11 April 2014, available at: <http://www.yenisafak.com.tr/politika/cesur-olun-orgutu-siz-bitirin-635846>.

<sup>439</sup> ‘Çocuğu Yok, Anlamaz!’, *Habertürk Gazetesi*, 28 February 2014, available at: <http://www.haberturk.com/gundem/haber/925497-cocugu-yok-anlamaz->

<sup>440</sup> See <https://twitter.com/GizliArsiv>, 19 March 2014.

<sup>441</sup> See ‘Hate Speech and Beyond: Targeting the Gulen movement’, Rethink Institute, Dec/Jan 2014, see n 416 above.

the State and that the 2013 corruption investigation, implicating senior members of the government, should be abandoned.

191. The danger of hate speech and the consequences to which incitement, instigation and hate speech may lead are readily perceived, and the need to restrict them or penalise them in one form or another is widely recognised. Article 7 of the 1948 Universal Declaration of Human Rights, for example, guarantees the right not to be discriminated against and states: “All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.<sup>442</sup> Article 20(2) of the ICCPR specifically proscribes “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Article 17 appears in the ECHR in the following terms:

“Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.<sup>443</sup>

192. In his concurring opinion in *Lehideux v France* Judge Jambrek explained that: “In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others”.<sup>444</sup> Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe on “hate speech” defines hate speech as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-semitism or other forms of hatred based on intolerance”.<sup>445</sup> The rights most likely to be infringed by hate speech are equality rights, such as the right to be free from

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<sup>442</sup> Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, G.A. Res. 217, U.N. Doc. A/810 (1948).

<sup>443</sup> The prohibition on hate speech as a matter of international law is also enshrined in core human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Elimination of Racial Discrimination (CERD). The ECtHR has emphasised in various judgments “that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued”: *Gündüz v Turkey*, 35071/97, Judgment of 4 December 2003, §40, *Erbakan v Turkey*, 59405/00, Judgment of 6 July 2006, §56. See Council of Europe ‘Manual on Hate Speech’, Anne Weber, September 2009.

<sup>444</sup> (GC), 24662/94, Judgment of 23 September 2008, (2000) 30 EHRR 665 at §2. The ECtHR has declared several applications alleging an infringement of freedom of expression in cases involving hate speech inadmissible, holding that the restrictions in question, mainly legislation criminalising hate speech, were justified and proportionate. In *Norwood v UK* the ECtHR held that “a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14: 23131/03, Judgment of 16 November 2004, (2005) 40 EHRR SE11.

<sup>445</sup> Recommendation No. R (97) 20 on “hate speech”, adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe. See also General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination.

discrimination. Hate speech denies the members of the victimised group the right to participate as members of equal worth in the community. It discriminates against them and humiliates them, thus violating their human dignity, a value whose importance is expressly recognised in the Universal Declaration of Human Rights, which states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

193. In the case of hate speech, therefore, a balancing exercise must be undertaken, weighing the speaker’s interest in being able to express his opinions freely against the victim’s interest in preserving his or her human dignity and not being discriminated against.<sup>446</sup> Neither the Gülen movement nor any other group in society is exempt from strong criticism, even if expressed in offensive or provocative language, and in the core area of discussion of political matters, the ECtHR has repeatedly emphasised that political expression enjoys the highest degree of protection under the ECHR given the role Article 10 plays in modern democratic societies. Further, the leaders of the Hizmet movement also need to demonstrate a higher degree of tolerance than those not in the public arena.<sup>447</sup> However, the widespread and systematic nature of the hate speech deployed by President Erdoğan and his government suggests that it does constitute hate speech within the ambit of Article 17 of the ECHR. As the authors of the Rethink Institute report on ‘Hate speech and Beyond’ conclude, “from the standpoint of human rights law, there is little doubt that some of Mr Erdoğan’s statements are fundamentally incompatible with the principles underlying the concept of human rights [and] amount to prima facie hate speech as understood by the ECtHR. A government leader’s perpetration of hate speech is unprecedented for Strasbourg jurisprudence. In [ECtHR] case law, there is not a single case in which a High Contracting Party to the European Convention on Human Rights has been convicted for failing to sanction individuals using hate speech, let alone for perpetrating hate speech itself”.<sup>448</sup>

### ***Discrimination and the right to property***

194. Article 1 of Protocol No. 1 of the ECHR guarantees the right to the peaceful enjoyment of property. Other international human rights instruments, such as the Universal Declaration of Human Rights, also recognise the right to enjoyment of property. Article 1 of Protocol No. 1 protects individuals or legal persons from arbitrary interference by the State with their possessions<sup>449</sup> but recognises the right of the State to control the use of or even deprive of property belonging to individuals or legal persons under the conditions set out in that provision.<sup>450</sup> An applicant claiming

<sup>446</sup> *Aydın Tatlav v Turkey*, 50692/99, Judgment of 2 May 2006, §26.

<sup>447</sup> *Nilsen and Johnsen v Norway* 23118/93, Judgment of 25 November 1999.

<sup>448</sup> ‘Hate Speech and Beyond: Targeting the Gulen movement’, Rethink Institute, January 2014 (see n 416 above).

<sup>449</sup> The applicability of Art 1 of Protocol No. 1 to enterprises extends to their clientele and goodwill, as these are entities of a certain value that have in many respects the nature of a private right and thus constitute ‘assets’ and therefore ‘possessions’ within the meaning of the first sentence of Art 1.

<sup>450</sup> Art 1 of Protocol No. 1 is the only article of the Convention which expressly mentions “legal persons”. Every applicant, whether a natural or legal person, must be able to demonstrate the existence of a right to property at

that he was discriminated against with regard to his property rights under Article 14, in conjunction with Article 1 of Protocol No. 1, will have to have a possession within the meaning of Article 1 of Protocol No. 1, but is not required to establish, that his property rights were violated in order to claim that he was discriminated against. It will suffice to prove that he was subject to treatment which interfered with his possession and that this treatment was unjustifiably different to the one offered to those in comparable situations. The burden then falls on the State to establish that the different treatment was in accordance with the law, pursued a legitimate aim and that the means employed were proportionate to that aim.

### *Bank Asya*

195. Following the corruption scandal of December 2013, Bank Asya, Turkey's largest Islamic bank founded by supporters of the Hizmet movement, has been relentlessly targeted by Mr Erdoğan as part of the crackdown on the Hizmet movement, including but not limited to,
  - the immediate withdrawal of all state and pro-government business owned deposits in Bank Asya, including by state-owned Turkish Airlines, after which the bank faced liquidity problems, triggering a move to raise \$100m (US) in capital in October 2014.<sup>451</sup>
  - the cancellation of all key state contracts with the bank, including in August 2014 the bank's standard agreements to collect taxes and permission to issue bonds. The state owned Eximbank of Turkey and the Postbank of Turkey ended banking operations with Bank Asya.<sup>452</sup>
  - In September 2014 President Erdoğan said "Bank Asya is already bankrupt" during his address at a meeting of the Turkish Industry and Business Association (TÜSİAD) in Istanbul, raising concerns about a run on deposits.<sup>453</sup> His comment was said by the chief executive of the bank to be by a clear violation of banking legislation.
  - In September 2014, public trading in Bank Asya was suspended three times, halting a recovery at the time in its share price. The head of the exchange, Borsa Istanbul, has denied the suspensions were politically motivated.<sup>454</sup>
196. Finally, on 3 February 2015, Turkey's banking regulator, the Banking Regulation and Supervision Agency (BDDK), ordered the seizure of Bank Asya and handed management control of 63 percent of the privileged shares of Bank Asya over to the Savings Deposit Insurance Fund (TMSF).<sup>455</sup> A new board of directors and chief

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issue in order to qualify as a "victim" under the Convention. It follows that companies fall within the scope of this right. However, company shareholders have generally no claim based on damage sustained by the company, unless they can show that it was impossible for the company or its liquidator to institute domestic proceedings. Very exceptional reasons will be required for a shareholder to be given standing as a victim.

<sup>451</sup> 'Bank Asya under pressure as Turkey's state businesses withdraw funds', Financial Times, 27 November 2014, available at: <http://www.ft.com/cms/s/0/19c5a3fa-4ef3-11e4-a1ef-00144feab7de.html?siteedition=uk#axzz3bFcoWELg>

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> 'Turkish regulator turns on Gulenist bank', Financial Times, 6 February 2015, available at: <http://www.ft.com/cms/s/0/a05fe078-adfe-11e4-8188-00144feab7de.html#axzz3bFcoWELg>

<sup>455</sup> The remaining shares were seized on 29 May 2015.

executive were appointed immediately and without consulting shareholders. According to a statement issued by the BDDK, it ordered the seizure of Bank Asya on the grounds that it had breached provisions of Turkey's banking law that stipulate banks should have "transparent and clear partnership structures and organisation schemes that will not prevent active audit of the institution" and that the bank did not respond on time to the banking regulator's additional request for information. The former chief executive and board of directors have responded by saying that they were asked for additional documents concerning some of their board members but that the banking regulator took the decision to seize control before they could reply and that decision was both unlawful and irrational.<sup>456</sup> Professor Sami Karahan described the action as unlawful: "I have been teaching banking law and commercial law for 29 years. I have never seen such an unlawful act, such a scandal."<sup>457</sup> Republican People's Party (CHP) parliamentary group deputy chairman, Engin Altay, stated: "What the government is doing now is bullying, illegal and banditry. There is no difference between robbing a bank's cash boxes with guns and intervening in a bank with unlawful practices. Both of them are the same. They are banditry".<sup>458</sup>

197. The Savings and Deposits Insurance Fund (TMSF) has long faced criticism for concentrating regulatory sanctions on government opponents and transferring assets to government allies. Under Mr Erdoğan, it has been involved in several contentious seizures and transfers, including the 2008 sale, partly financed by two state banks, of ATV-Sabah, a media group, to a conglomerate headed by Mr Erdoğan's son-in-law<sup>459</sup>; the fund's 2013 appointment of a former AKP deputy as editor of *Aksam*<sup>460</sup>; and an asset freeze during local elections in 2014 against the leading opposition candidate for mayor of Istanbul because of an allegedly unpaid loan dating back to 1998.<sup>461</sup>
198. The affair has also drawn attention to the independence from government of the Banking Regulation and Supervisory Agency (BDDK), which took the decision to hand the bank's management to TMSF, and which has also come under pressure from Mr Erdoğan. The President called for the regulator to "make a decision" and "take steps" on Bank Asya in September 2014, warning that "otherwise it is the BDDK that will be responsible".<sup>462</sup> While the BDDK said the action was also to avoid a "new failing bank", according to the former chief executive, Ahmet Beyaz, Bank Asya had a capital adequacy ratio of 18 per cent at the end of September 2014, compared with an industry average of 15 per cent and a legal requirement of 12 per cent.

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<sup>456</sup> Ibid.

<sup>457</sup> 'Bank Asya operation and violation of property rights', BGN News, 7 February 2014, available at: <http://www.bgnnews.com/bank-asya-operation-and-violation-of-property-rights-yazisi-3317>

<sup>458</sup> Ibid.

<sup>459</sup> See para 145 above.

<sup>460</sup> See para 145 above.

<sup>461</sup> Turkish regulator turns on Gulenist bank', Financial Times, 6 February 2015, available at: <http://www.ft.com/cms/s/0/a05fe078-adfe-11e4-8188-00144feab7de.html#axzz3bFcoWELg>

<sup>462</sup> On 15 September 2014 President Erdoğan told journalists: "The Banking Regulation and Supervision Agency [BDDK] needs to do what is necessary where Bank Asya is concerned. Otherwise, it will be the BDDK itself which will be held responsible".

### *Kaynak Holding*

199. Kaynak Holding (Kaynak) is the holding company of a group of companies, which mainly operate in the business sectors of educational tools, stationery, school uniforms, logistics, cargo and food products. It operates in 16 different sectors and employs over 8000 people. Until recently it had an annual average growth rate of 18% across its 23 companies. Kaynak Holding has been one of the primary targets of the AKP government by reason of its affiliation with the Hizmet movement.
200. Legal representatives for Kaynak Holding have made a number of complaints as to the effect of government interference with their business,<sup>463</sup> which deserve to be investigated, including the following:
- Three of the banks that Kaynak previously worked with, namely Kuveyt Türk Katılım Bankası, Albaraka Türk Katılım Bankası and Denizbank, have completely stopped providing banking services. Other banks have made the terms of business so onerous for Kaynak that it has practically become impossible to use their services or have abruptly and without explanation ended business relationships with the group.
  - In the case of NT Kitap Kırtasiye A.Ş., which operates in the retail sector, as a result of the campaign waged against Kaynak, growth has fallen far below the average industry rate. For the same reason, a third of the companies' stores failed to meet their net annual profit target for the year 2014.
  - Further, a number of companies in the group have had problems in agreeing reasonable payment terms and conditions with suppliers.
  - In the case of Işık Yayıncılık A.Ş., commercial activity with public bodies has all but ceased. A district director of the Ministry of Education wrote to school principals to warn them not to recommend their products to their students and to stop them from actually doing so.
  - Sürat Bilişim A.Ş. has been denied access to public procurements even for, for example, IT systems which the company had previously installed and/or maintained. Cancelled contracts and being unable to participate in public tenders has led to a total of 170 staff either resigning or being made redundant since December 2013.

### *Kimse Yok Mu*

201. Kimse Yok Mu is an Istanbul based international relief organisation affiliated with the Hizmet movement. It has more than 40 branches worldwide and operates in 113 different countries. In 2008 the Turkish parliament awarded Kimse Yok Mu a State Medal for Distinguished Service for its services for the people of Turkey. It has also been given consultative status in 2010 by the UN's Economic and Social Council in recognition of its work.
202. In the aftermath of the December 2013 corruption investigation, several pro-government media outlets carried out a smear campaign against the charity, accusing the charity of embezzling funds raised for international relief. An inspection carried

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<sup>463</sup> Statement of Av. Hürol Karadaş, the legal representative of Kaynak Holding.



out in April 2014 exonerated the charity. However, a second inspection carried out only months later, in August 2014, found that the charity had acted “in a misleading manner and contrary to the law” and advised that its right to collect charitable donations without prior official consent be rescinded, which was duly carried out by the Ministry of the Interior on 22 September 2014. This decision was subsequently stayed in November 2014 by the Council of State on the grounds that “the acts and omissions of the [charity] are not serious enough to suggest that the [charity] has lost its qualities as a ‘reliable, accountable and transparent institution’, and, as the acts and omissions may only be deemed procedural irregularities and not misconduct, the Cabinet decision to strip the charity of its status as a society which can collect donations without prior official consent was unlawful”. No decision on whether the Cabinet decision should be quashed has yet been reached. In April 2015 it was reported that the Ankara Chief Public Prosecutor's Office was investigating the charity on charges of being an "armed terrorist organisation".<sup>464</sup>

### *Business associations*

203. Smaller companies and business associations have also been targeted.

- In June 2014 it was reported that a meeting between prosecutors, Ministry of Finance officials, representatives of the Financial Crimes Investigation Board (MASAK) and Capital Markets Board (SPK), Turkey's exchanges watchdog, took place to discuss how to damage the credibility of 100,000 companies considered to be linked to the Hizmet movement, and that a unit operating under the National Police Department had identified all companies and businessmen affiliated with the Hizmet movement in the 81 provinces of Turkey, profiling some 100,000 firms.<sup>465</sup>
- The general secretary of TASIAD<sup>466</sup> described how his organisation had suffered a loss of membership: “A total of 50 businessmen have resigned from membership in the last year or so with almost identical resignation letters costing the organisation YTL 45,000. We have also lost YTL 150,000 in 2015 in lost sponsorship deals. Businesses who frequently sponsored our events have refrained from doing so in fear of pro-Erdoğan media and pressure from public bodies. Some of our sponsors have asked for their logos to be removed from our website. Public officials who used to attend almost all of our events do not do so anymore. Provincial representatives of the ruling AKP put pressure on AKP members whom we also have as members to resign from TASIAD saying it is a party policy. Some of our members said they were forced to resign by the AKP although they were happy with TASIAD.”<sup>467</sup>
- The chairman of GUSIAD, Mehmet Katar, states that GUSIAD, which is a member of the TUSKON confederation of business associations, has suffered similar problems as it is

<sup>464</sup> ‘Terrorist investigation against Kimse Yok Mu draws strong reactions’, Today’s Zaman, 1 April 2015, [http://www.todayszaman.com/anasayfa\\_terrorist-investigation-against-kimse-yok-mu-draws-strong-reactions\\_378311.html](http://www.todayszaman.com/anasayfa_terrorist-investigation-against-kimse-yok-mu-draws-strong-reactions_378311.html).

<sup>465</sup> ‘Secret meeting profiling 100,000 companies held at Finance Ministry’, Today’s Zaman, 11 July 2014, [http://www.todayszaman.com/national\\_secret-meeting-profiling-100000-companies-held-at-finance-ministry\\_352767.html](http://www.todayszaman.com/national_secret-meeting-profiling-100000-companies-held-at-finance-ministry_352767.html)

<sup>466</sup> TASIAD was founded 20 years ago by a number of businessmen and operates across a large span of sectors including construction, agriculture, food, machinery and chemical products. It organises national and international business trips as well as seminars and networking events in order to help develop business for its members.

<sup>467</sup> Statement of Hasan Yasa, general-secretary of TASIAD.

perceived to be a Hizmet-affiliated organisation: “Our association was founded in 2003 by eight businessmen. The number of member businessmen as of 2013 was approximately 600. The steady growth of our association stopped after December 2013. We used to get around 10 new members every month. Between January and September of 2014 however we had a total of 13 new members joining our association. On the other hand, the number of members who ended their membership used to be around five a year. In the same nine month period a total of 55 members have quit. They have all cited political pressure, fear of exclusion from public procurement processes and payment difficulties in public tenders they have won. Mr Ekrem Ateş, who had been our chairman for nine consecutive years and who runs a shuttle bus company named Ateş Tur, has quit membership saying they were even denied bidding in public tenders, let alone winning them, even for the type of procurements which in the past they could easily secure and their business was getting into financial difficulty. Another of our ex-members who also runs a shuttle bus business said he was told by the local authorities he worked with that unless he resigned from TUSKON as a member he would not be given any more contracts. He also said the same local authorities have not paid him millions of liras which he was owed and that he could not pay his drivers for a considerable time”.<sup>468</sup>

- In April 2015 five civil society organisations in Manisa were raided by police officers on the grounds that they were reasonably suspected of providing financial assistance to terrorist groups.<sup>469</sup> The Çanakkale Association for Entrepreneurial Businessmen and Industrialists (ÇAGIAD) was similarly raided by the Organised Crime Unit of the Çanakkale Police on 29 April 2015.

### *Arbitrary tax inspections*

204. More seriously, the Revenue Service has been accused of political profiling and arbitrary tax inspections. A number of documents leaked to *Taraf* reportedly showed that the Revenue Service blacklisted thousands of companies affiliated to opposition groups and used tax investigations as a systematic tool of oppression. Similar evidence was provided by business associations. The general-secretary of TASIAD stated: “All members who sit in the board of directors and board of auditors were asked by the revenue to submit their books for inspection. The head of tax inspectors have told them: ‘We will issue you fines no less than YTL 100,000 each.’ Businessmen close to AKP have [also] threatened our chairman by saying ‘Are you still a member? You had better resign. They [the government] will finish you.’ [Another] member was forced to pay all of the monies he owed to the state although he was not asked to do so previously.”<sup>470</sup> Mr Katar of GUSIAD stated that “Mr Eyüp Sabri Göncü, owner of Gapsan Construction and Göncü Yarn Co., said before he resigned [from GUSIAD] tax inspectors were sent in to all of his six companies and that he was concerned that he would receive hefty tax fines. Most of our ex members talked about similar concerns before they resigned. Similar statements were made by Mehmet Gökdeniz of ISIAD: “Due to the financial inspections that are initiated against our members and board members, many of our members were frightened and eventually forced to cancel their membership. Since 17 December 2013, 100 members and 3 board

<sup>468</sup> Statement of Mehmet Katar, chairman of GUSIAD.

<sup>469</sup> ‘Politicians, legal experts condemn raids against CSOs in Manisa’, Today’s Zaman, 1 May 2015, available at: [http://www.todayszaman.com/national\\_politicians-legal-experts-condemn-raids-against-csos-in-manisa\\_379569.html](http://www.todayszaman.com/national_politicians-legal-experts-condemn-raids-against-csos-in-manisa_379569.html)

<sup>470</sup> Statement of Hasan Yasa, general-secretary of TASIAD.

members quit our association due to the financial pressure. We had 650 members before the financial lynching which was carried out using state power. Our association encourages all its members to export their products. In this vein, we decided to host a business summit which was to be attended by 25 business men from Congo. All of our invitees were denied visas, which led to the cancellation of our summit”.<sup>471</sup>

### ***Conclusions on discrimination and the right to property***

205. If these claims by Hizmet-affiliated companies and associations, or associations suspected of being affiliated to the Hizmet movement, can be substantiated, it would appear the facts would be sufficient to establish a breach of the Convention, either on the basis that the interferences were not in accordance with the law, unjustified and disproportionate under Article 1 of Protocol No. 1, or that the interferences were unjustifiably different to the one offered to those in comparable situations under Article 14, in conjunction with Article 1 of Protocol No. 1. Interference with the right to peaceful enjoyment of possessions shall be allowed only if it is prescribed by law, in the public interest, and necessary in a democratic society. Interference with the right to property must firstly satisfy the requirement of legality. Should the court establish that interference with a property right was not in accordance with the law, there will automatically be a violation of Article 1 of Protocol No. 1 and it will be unnecessary for the court to consider whether such unlawful interference pursued and was proportionate to a legitimate aim and whether it was discriminatory.

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<sup>471</sup> Statement of Mehmet Gökdeniz, general-secretary of ISIAD.

## V. CONCLUSIONS

### *The Rule of Law*

206. The rule of law contains a number of ingredients.<sup>472</sup> Its main purpose is to promote accountability and to prevent arbitrariness. It requires certain and accessible laws, enforced equally against all individuals and groups, with the possibility of challenging decisions in the courts by means of a fair trial by independent judges. The rule of law also requires independent prosecuting authorities, as well as an independent legal profession. Each of these key features of the rule of law has been under significant attack in recent months in Turkey.
207. When police and prosecutors revealed a corruption investigation in December 2013 that implicated not only senior ministers, but also Mr Erdoğan's own family, he responded by taking unprecedented steps to exert executive control over Turkey's judiciary and prosecuting authorities. By the end of January 2014 alone thousands of police officers and public prosecutors had been reassigned from their posts, including the Istanbul chief public prosecutor, his deputy and three other prosecutors leading the December 2013 corruption probe. It is estimated that approximately 40,000 police officers, civil servants, judges and prosecutors have since been removed from their posts for having suspected links to the Hizmet movement. According to Professor Özbudun, the leading constitutional lawyer, the government's actions are "generally viewed as an effort to interfere with the on-going judicial process in order to cover up the corruption charges".<sup>473</sup>
208. The government has also moved to take control of the judiciary through a mass reassignment of judges, replacing those seen to have links with the Hizmet movement with pro-government supporters. The widespread dismissals and reassignments of police officers, public prosecutors and judges have adversely affected the effective functioning of the relevant institutions, and raise serious questions as to the independence of these institutions from executive control. The government's attempts to create a more supine judiciary were not limited to mass reassignments. Law No. 6545 adopted in June 2014 created Criminal Judges of the Peace, which President Erdoğan himself referred to as "project" courts. Serious doubts have been raised about the constitutionality of these courts, especially with regard to the principles of the rule of law and of the natural judge. Former chairman of the Constitutional Court, Haşim Kiliç, stated that judges today in Turkey are in constant fear of being relocated: "This will have a price and someone has to pay the price so that we can pass down a free and independent judiciary to future generations. Otherwise [the judiciary] will remain subordinate, as it is now."
209. More worryingly still, over the past month, two judges have been detained in custody as a result of decisions made in the proper exercise of their judicial duties. They have been detained in custody since 1 May 2015 on charges of "attempting to overthrow the Turkish government or hindering the government's operation in part or full" and

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<sup>472</sup> 'The Rule of Law', Tom Bingham (The Rt. Hon. Lord Bingham of Cornhill), Penguin, 2010.

<sup>473</sup> 'Pending challenges in Turkey's judiciary', Ergun Özbudun, Policy Brief, Global Turkey in Europe, January 2015.

"being a member of an armed organisation". Investigators from the High Council of Judges and Prosecutors (HSYK) reportedly requested the arrest of the judges without even hearing their defence statements. Further, the Court of Serious Crimes has accepted an indictment against two prosecutors and a judge who ordered the detention, seizure and arrest warrants against those implicated in the December 2013 corruption investigation on criminal charges of malpractice and negligence. They, along with two other prosecutors were subsequently disbarred by the HSYK for "damaging the influence and reputation of their public posts". A week later the HSYK recommended the arrest of another four prosecutors in Adana, who were also detained in custody, for involvement in an allegedly Gülenist planned attempt to overthrow the government.

210. The common feature of all of these cases is that the decisions that led to their arrests were all on issues pertaining directly or indirectly to allegations of unlawful activity against the AKP government. The response of the government and the willingness of prosecuting authorities and the judiciary to carry out these arrests have given rise to serious concerns as to the independence of the judiciary and the rule of law. It is crucial that corruption allegations against the government are investigated and the operational capabilities of the judiciary and prosecuting authorities are assured. As Professor Özbudun concludes, "The year 2014 can be described as a period when the AKP government made a sustained and systematic effort to establish its control over the judiciary. Through the laws of dubious constitutionality, it seems to have largely accomplished this aim. In this dark picture, the Constitutional Court seems the only beacon of hope".<sup>474</sup>
211. While the Constitutional Court appears to have become the sole institutional check on the executive, it has also become a victim of its success. Since September 2012 it has received more than 16,500 cases and, although it has reorganised its structure and working methods, it is only able to decide on the substance of a limited number of cases per year. Concerns have been raised about the Court's delay in reaching decisions and the readiness of the Court to deal with urgent cases. Critical outstanding cases include the detention in custody of Hidayet Karaca and others and the failure to implement a court order for their release on bail; the constitutionality of Criminal Judges of the Peace; legislation passed in April 2014 relating to the National Intelligence Organisation (MIT) which gave the agency sweeping powers for the surveillance and monitoring of citizens; and amendments to the Internet Law. This could lead, according to the 2014 European Union Peer Review Mission on Freedom of Expression, to a situation in which the ECtHR might consider the individual application to the Constitutional Court as ineffective on the grounds that justice delayed is justice denied. President Erdoğan is also threatening to alter the composition of the Constitutional Court in a way which would seem to undermine its future independence. However, at the time of writing he does not have the minimum three-fifths majority in the Assembly (TGNA) that is required to bring about constitutional change.

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<sup>474</sup> Ibid.

*Violations of the right to liberty and security, the right to a fair trial and the prohibition of torture and inhuman or degrading treatment*

212. The arrest and detention of journalists, media executives, police officers, public prosecutors and judges who are perceived to be supporters of the Hizmet movement, and their treatment in custody, has raised serious concerns about violations of their right to liberty and security under Article 5, their right to a fair trial under Article 6 and their right not to be subject to torture or to inhuman or degrading treatment under Article 3.
213. In the case of Hidayet Karaca, his arrest on highly dubious grounds and continued detention since 19 December 2014, notwithstanding that an order was made by a competent court for his release on bail, strongly indicates that his continued detention violates his rights under Article 5. The reasoned judgment of the 32<sup>nd</sup> Court of First Instance that there is no real risk that he would abscond and that his continued detention is a violation of Articles 5(1)(c) and 5(3) appears unassailable. The judgment also indicates that the reasons given by the Criminal Judges of the Peace in their decision to arrest him and dismiss appeals for his release would be considered wholly inadequate by the ECtHR.
214. The conditions of detention described by the lawyers for the police officers held since the July 2014 operations, which are widely believed in Turkey to be an act of retribution by the AKP government for the December 2013 corruption investigation, are debasing and violate notions of respect for human dignity. The Committee Against Torture (CAT) noted with concern in 2010 that allegations that torture and other cruel, inhuman or degrading treatment of detainees held in police custody are apparently still widespread.<sup>475</sup> According to Human Rights Foundation of Turkey (HRFT), while various safeguards have been introduced to prevent torture in detention centres, this has not significantly reduced torture as it was increasingly being applied in places other than official detention centres.<sup>476</sup> In particular, reference was made to the use of force and mass arrests carried out by security forces in response to the Gezi Park protests in June 2013 resulting in the death of eight protestors and one police officer, and more than 8,000 people injured.<sup>477</sup>

*Violations of freedom of expression*

215. The actions against Hizmet-affiliated media, such as criminal prosecutions of journalists, denying outlets accreditation to report on public events, calls for boycotts, dismissals of journalists and arbitrary tax inspections and regulatory fines, are just some examples of President Erdoğan's determination to suppress criticism of the

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<sup>475</sup> Compilation of UN information, 2010 Periodic review, para 32.

<sup>476</sup> UN Summary of Stakeholder submissions, 2015 Periodic Review, paras 26, 37, 30 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/191/56/PDF/G1419156.pdf?OpenElement>

<sup>477</sup> Submission from the Human Rights Foundation of Turkey, para 9, available at: [http://www.upr-info.org/sites/default/files/document/turkey/session\\_21\\_-\\_january\\_2015/hrft\\_upr21\\_tur\\_e\\_main.pdf](http://www.upr-info.org/sites/default/files/document/turkey/session_21_-_january_2015/hrft_upr21_tur_e_main.pdf)

government and public debate and have highlighted urgent concerns about freedom of expression in Turkey.<sup>478</sup>

216. Radio and TV stations have had their broadcasts suspended. Social media and other internet-based media have also come under draconian bans. Notably in January 2015, controversial amendments to the Internet Law No 5651 came into force reintroducing powers for the Turkish Telecommunications Authority (TIB) to order the removal of content from websites, in some cases without having first obtained a court order, notwithstanding that near identical provisions had been ruled unconstitutional by the Constitutional Court in 2014.
217. Criminal prosecutions of journalists are part of a worrying series of violations of Article 10 by Turkey, now symbolised by President Erdoğan successfully taking proceedings for defamation or insult against a journalist to curtail press criticism, with the Turkish courts again blatantly failing to apply the ECtHR's case law on criticising political figures. It is to be hoped that judgments such as *Tuşalp v Turkey* will provide sufficient guidance to the Turkish courts on adequate application of Article 10 principles, with a consequent strengthening of press freedom in Turkey.

#### *Discrimination, hate speech and property violations*

218. The various measures described above raise a strong presumption of discrimination against the Hizmet movement, in violation of domestic law and rights under Articles 8, 9 and 14 of the ECHR. The campaign of vilification and incitement to hatred directed at supporters of the Hizmet movement by President Erdoğan and his government appears to constitute hate speech within the ambit of Article 17 of the ECHR. The actions against Hizmet-affiliated companies, educational and humanitarian institutions and trading associations, notably the seizure of Bank Asya, seem clearly to constitute violations of the right to property under Article 1 of Protocol 1 of the ECHR.

#### *Concluding remarks*

219. The police raids that revealed a corruption scandal in Turkey in December 2013 involving the highest levels of government have led to a series of activities, either directed personally by President Erdoğan or by his close associates, to damage the Hizmet movement, its associated businesses and educational and humanitarian institutions. The activities disclosed in this report sharply reverse the reform process that had been taking place since Turkey began accession talks with the European Union in 2005. They represent a serious setback for Turkish democracy and its respect for human rights and the rule of law.
220. It follows therefore that our report makes clear that it should be possible to obtain ample evidence that would establish breaches of the ECHR and other treaties to which Turkey is a party that would justify proceedings, most likely before the European

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<sup>478</sup> The excessive use of police force during the Gezi Park protests in June 2013, as well as widespread media censorship and reprisals against journalists and users of social media, also starkly illustrated the government's disregard for fundamental rights of freedom of expression and assembly.