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TURKEY: 4TH JUDICIAL REFORM PACKAGE FAILS TO ADDRESS DEEP FLAWS IN THE JUDICIAL SYSTEM

Following the launch of the new Human Rights Action Plan,¹ the Turkish government introduced the fourth judicial package,² purportedly to bring about “priority activities in order to strengthen judicial independence and right to a fair trial, legal foreseeability and transparency, safeguarding the physical and moral integrity and private life of the individual and right to liberty and security,”³ as outlined in the Human Rights Action Plan Implementation Schedule. Ratified by the Turkish Parliament on 8 July 2021, the package includes amendments to the Code of Criminal Procedure, Code of Administrative Judicial Procedure and the Penal Code, and introduces provisions concerning judicial efficiency, fair trial procedures, pretrial detention and judicial control measures, and combating violence against women and domestic violence. The package, as its predecessors,⁴ was introduced to address the main problems of the judicial system and deteriorating human rights situation in the country. Amnesty International believes that the amendments introduced in this judicial package fail to bring Turkey’s laws in line with international human rights law and standards, and rather tinker at the edges of a system marked by the deepening erosion of independence of the judiciary. Unless legislative and judicial reforms bring about concrete measures to ensure an independent and impartial judiciary free from undue interference by the government and capable of performing their duties in full compliance with international human rights law and standards, this latest judicial package will represent nothing more than cosmetic changes, thus failing to fundamentally reform the country’s deeply flawed judicial system.

NEW REGULATIONS REGARDING JUDICIAL EFFICIENCY AND FAIR TRIAL PROCEDURES

The new reform package amends the Codes of Administrative Judicial Procedure and of Criminal Procedure to “strengthen the right to a fair trial in a reasonable time and to avoid delays in trials”. With the new amendments, under the Code of Administrative Judicial Procedure, the deadline for the administrative authorities to respond to submissions by individuals both in first and second instance was reduced from 60 days to 30 days and, in administrative disputes before administrative courts, these courts are required to issue their reasoned judgments within 30 days. Under the Code of Criminal Procedures, for a speedy resolution of financial crimes committed through the use of information systems, bank or credit institutions or bank or credit cards, the courts where the victim lives are also given jurisdiction in addition to the courts in the location where the crime was committed. The other amendments introduced bring about greater efficiency in communicating with the defendant and victim of the crime or complainant by ensuring information related to the prosecution such as details of the indictment and hearing dates are notified by telephone, telegraph, fax and email.

Although these new amendments are positive steps aiming to enhance the efficiency of judicial processes and to protect the right to a fair trial in a reasonable time, they remain limited to technical tools fixing shortcomings in the judicial practice and legislation. The cornerstone of an efficient, transparent and well-functioning judicial system is the guarantee of the independence and impartiality of judges and prosecutors. Turkey ranked 107th out of 128 countries in the World Justice Project’s Rule of Law Index 2020.⁵ Its ranking in relation to respect for fundamental rights was 123rd out of 128 countries. Independence of the judiciary is a core element of respect for human rights.⁶

The fourth judicial reform package, like its predecessors, fails to introduce measures that would reverse the backslide in the judicial independence and to protect the judiciary from interference by the executive in Turkey. Amnesty International

¹ Action Plan on Human Rights: Free Individual, Strong Society; More Democratic Turkey published on 2 March 2021.

<https://rayp.adalet.gov.tr/resimler/1/dosya/insan-haklari-ep-eng02-03-202115-16.pdf>; See Amnesty International, Turkey: New Human Rights Action Plan is a Missed Opportunity to Reverse Deep Erosion of Human Rights, 25 March 2021, <https://www.amnesty.org/download/Documents/EUR4438832021ENGLISH.PDF>

² Law Amending the Code of Criminal Procedure and Certain Laws (Law No:7331), <https://www.resmigazete.gov.tr/eskiler/2021/07/20210714-8.htm>

³ <https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss274.pdf>

⁴ See Amnesty International, Turkey: “Judicial Reform Package” is a Lost Opportunity to Address Deep Flaws in the Justice System, 8 October 2019, <https://www.amnesty.org/download/Documents/EUR4411612019ENGLISH.PDF>; Amnesty International, Turkey: Legal Reforms Fall Short on Freedom of Expression, 30 April 2013, <https://www.amnesty.org/en/latest/news/2013/04/turkey-legal-reforms-fall-short-freedom-expression/>

⁵ <https://worldjusticeproject.org/rule-of-law-index/country/Turkey>

⁶ Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev, 2011, para. 41.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

believes that the lack of independence and impartiality of the judiciary is the primary root cause that negatively impacts on the effective functioning of the judicial institutions in the country.

The composition of the Council of Judges and Prosecutors (CJP), which is in charge of the appointment, promotion, transfer, discipline and dismissal of judges and prosecutors, does not meet the international standards or offer adequate safeguards for the independence of the judiciary. Four of its 13 members are directly appointed by the President and seven members by the Parliament in which the President's governing party and its coalition partner hold the majority. The remaining two members are the Minister of Justice who chairs the Council and his/her deputy who are also appointed and dismissed by the President. None of the members of the Council are judges elected by their peers.⁷ Judges and prosecutors continue to be under undue pressure in carrying out their duties in the face of prosecutions, widespread arrests, summary dismissals, arbitrary transfers of judges and prosecutors, and abusive investigation and prosecution of lawyers.

The single most important reform to ensure judicial independence needs to be made to the composition of the CJP in order to ensure that it is free from undue political interference from the government. Any judicial reform initiative that does not address the independence of the judiciary will not be a solution to the systemic problems of human rights protection in Turkey.

Amnesty International is also concerned that the Parliament approved an omnibus bill⁸ on 18 July that included provisions extending the state of emergency powers⁹ for another year including powers to dismiss public sector workers for having alleged links to terrorist organizations and to hold suspects of "terror" acts in police custody for up to 12 days. With the extension of state of emergency powers, the CJP may continue to arbitrarily dismiss judges and prosecutors without specific evidence or due process. Over 4,000 judges and prosecutors, one third of the Turkish judiciary, were dismissed under these emergency powers following the attempted coup in 2016 for having alleged links to "terrorist" organizations, having resulted in a wide range of human rights violations including violations of the principle of presumption of innocence, the rights to a fair trial and to liberty and security of person, as well as the rights to work and freedom of movement, among others.¹⁰ Five years on from the attempted coup, Amnesty International calls on the authorities to end all measures related to the emergency powers that extend executive powers including on the judiciary.

COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

The fourth judicial package amends four articles of the Turkish Penal Code concerning the crimes of "intentional killing" (Article 82), "intentional injury" (Article 86), "torment" (Article 96) and "deprivation of liberty" (Article 109) committed against a spouse and expands aggravating circumstances by making them applicable to a former spouse, and increasing the penalties for these crimes when committed after a divorce. According to the reasoning for the amendments, penalties are increased in order to combat acts of violence against women more effectively and dissuasively. These amendments limit the applicability of aggravating circumstances to instances of violence perpetrated by former spouses; and increasing penalties accordingly does not provide an effective protection for *all* women and girls which was one of the requirements of the Istanbul Convention to which Turkey is not a party any more as of 1 July 2021. The amendment does not reflect a gender-based perspective to the issue of violence against women and domestic violence but associates the aggravating factors with the institution of the family and marriage excluding women who remain outside the family or are not married.

The Istanbul Convention, which is the most far-reaching international human rights instrument specifically designed to prevent and combat violence against women and domestic violence, offers protection to all women and girls without discrimination and sets out minimum standards for governments in Europe, and beyond, for prevention, protection, and prosecution of violence against women and domestic violence. The measures introduced by the Law No. 6284 (Law on the Protection of Family and Prevention of Violence Against Women), which was enacted in 2012 pursuant to the State parties' obligations under Istanbul Convention to combat and prevent violence against women and domestic violence, have not been effectively implemented in the nine years since the law came into force. The number of domestic violence victims remain persistently high in Turkey. According to women's rights groups, at least 300 women were murdered in

⁷ The Venice Commission in its opinion on the Amendments to the Constitution in 2017 found the proposed composition and procedures for appointing members of the CJP extremely problematic, putting independence of the judiciary in serious jeopardy and recalled that "according to European standards, at least a substantive part of the members of a High Judicial Council should be judges elected by their peers." See Opinion of Venice Commission on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13 March 2017.

⁸ Law No. 7333

⁹ Introduced by the Law No. 7145, which was adopted by the Turkish parliament in July 2018.

¹⁰ Amnesty International, No End in Sight: Purged Public Sector Workers Denied a Future in Turkey, 22 May 2017, <https://www.amnesty.org/download/Documents/EUR4462722017ENGLISH.PDF>; Amnesty International, Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers, 25 October 2018, <https://www.amnesty.org/en/documents/eur44/9210/2018/en/>

2020 and more than 200 have been killed so far this year.¹¹ As identified by the CoE Committee of Ministers, responsible for monitoring the execution of the judgments of the European Court of Human Rights, in its recent review of the *Opuz v Turkey* judgment, Turkey continues to fail to implement effective protective and preventive measures for victims of domestic violence or sanctions against perpetrators.¹² Turkey needs to effectively implement policies introduced by the Law 6284 for all women and girls without discrimination on any grounds to ensure no one is left behind and to identify and address the root causes behind the lack of tangible progress in preventing domestic violence in order to comprehensively combat the outstanding issues including the discriminatory judicial practices and the impunity enjoyed by the perpetrators.

AMENDMENTS RELATING TO PRISON DETENTION AND JUDICIAL CONTROL DECISIONS

Turkey ranks second among the Council of Europe member states for the number of violations in judgments issued by the European Court of Human Rights (ECtHR).¹³ The European Court found at least one violation under Article 5 (right to liberty and security) in the majority of its judgments related to cases arising following the 2016 coup attempt, most of which are noteworthy examples of repression on journalists and media in Turkey in the last half decade.¹⁴ Cases of violation of Article 5 of the European Convention on Human Rights (ECHR) concerned the pretrial detention of applicants on suspicion of terrorism-related offences under Turkey's overly broad counterterrorism legislation, such as "supporting" or "membership of a terrorist organization", "making propaganda for a terrorist organization", "committing a crime on behalf of a terrorist organization without being its member" or offences against the state such as "attempting to overthrow the government or constitutional order." ECtHR found in all these cases that pretrial detentions were unlawful without the reasonable suspicion that the alleged offences were committed by the applicants. In the cases of *Demirtas v Turkey* and *Kavala v Turkey* the ECtHR further ruled that their unlawful pretrial detention pursued an "ulterior purpose" (Article 18) namely to stifle pluralism and limit freedom of political debate in the case of Demirtas, and to reduce an NGO leader and a human rights defender to silence in the case of Kavala. In the face of these numerous long-standing human rights violations that arise as a result of lengthy and unjustified pretrial detentions and overly broad counterterrorism legislation to crack down on dissenting voices, the amendments brought in the 4th judicial package do not provide remedies to the well-documented flaws in the judicial system.

Measures to ensure implementation of binding judgments of the ECtHR by the Turkish judiciary in particular in certain politically motivated cases must be prioritized by the Turkish government in its reform initiatives. Osman Kavala and Selahattin Demirtaş are remanded in prison despite the decisions of the European Court finding their imprisonment to be a violation of Article 18 of the Convention. Similarly, prosecutors continue to prepare indictments under new trumped up charges against them based on "evidence" that was already deemed insufficient by the European Court to justify their continuing pretrial detention.

While the package, as a positive step, introduces a vertical appeal system to challenge the decisions related to pretrial detention and judicial control measures of criminal judgeships of peace, its effectiveness will be measured in the implementation and when judicial independence and impartiality can be assured. Amnesty International believes that more structural reforms that restore the independence and impartiality of the judiciary are needed for the vertical appeal system to function as an effective measure to secure the right to actively seek judicial review of detention decisions as required by Article 5.4 of the ECHR. As a minimum step, the executive authority should refrain from interfering with criminal proceedings and enable members of the judiciary to apply the law independently and in line with international human rights law and standards.

Another regulation introduced by the judicial package that seems ostensibly positive but may cause more serious problems in practice is the amendment made to the Article 100/3 of Code on Criminal Procedure (CCP). Article 100/3 provides a list of crimes (known as "catalogue crimes") part of which are defined in the Penal Code and include crimes against the security of the state and the constitutional order and for which the judge may authorize pretrial detention,

¹¹ <http://anitsayac.com/?year=2021>

¹² CM/Del/Dec(2020)1390/H46-24, 3 December 2020.

¹³ https://www.echr.coe.int/Documents/Stats_violation_2020_ENG.pdf

¹⁴ See for instance *Tercan v Turkey* (Application No:6158/18; Violation of Articles 5 and 8); *Bulac v Turkey* (Application No: 25939/17, violations of Articles 5 and 10); *Sabuncu and Others v Turkey* (Application No: 23199/17, violation of Articles 5 and 10); *Alpay v Turkey* (Application No: 16538/17, violation of Articles 5 and 10); *Ahmet H. Altan v Turkey* (Application No: 13252/17; violation of Articles 5 and 10); *Mehmet H. Altan v Turkey* (Application No: 13237/17, violation of Articles 5 and 10); *Ilıcak v Turkey* (1210/17); *Aksoy v Turkey* (Application No: 80/17, violations of Articles 5 and 10); *Tas v Turkey* (Application No: 72/17, violation of Articles 5 and 10); *Ogreten and Kanaat v Turkey* (Application Nos: 42201/17, 42212/17, violation of Articles 5 and 10); *Demirtas v Turkey* (Application No: 14305/17 (No 2), violation Articles 5, 10, 18); *Sik v Turkey* (Application No: 36493/17, violation of Articles 5 and 10); *Kavala v Turkey* (Application No: 28749/18, violation of Articles 5 and 18); *Alparslan Altan v Turkey* (Application No: 12778/17, violation of Article 5); *Bas v Turkey* (Application No: 66448/17, violation of Article 5), *Akgun v Turkey* (Application No: application no. 19699/18, violation of Article 5).

provided that there are strong grounds to believe that the suspect committed them. Over the years, Amnesty International has observed that in many cases where the “catalogue crimes” are concerned judges frequently presume that pretrial detention is the rule, rather than the exception, by simply referring to the crimes which are listed under Article 100/3 without seeking the existence of a strong suspicion based on concrete evidence that the accused has committed the offence. The abusive use of Article 100/3 of the CCP was highlighted by Nils Muižnieks, then Council of Europe Commissioner for Human Rights in third-party interventions in relation to 10 freedom of expression cases in front of the ECtHR.¹⁵

The judicial package introduces the explicit requirement of “concrete evidence” under Article 100/3 of the CCP. Under the amendments strong grounds for suspicion are a necessary requirement for pretrial detention orders in respect of catalogue crimes. While the new regulation supposedly aims to correct the wrong practice of Article 100/3, the new requirement in cases of “sexual assault” and “sexual abuse of children”, which are also listed among catalogue crimes¹⁶ might aggravate the problems in practice. Considering the difficulties in collecting concrete evidence in such cases, the requirement of a “strong suspicion based on concrete evidence” for detention decisions may diminish the protection provided to the victims of such crimes, undermine the deterrent effect of those provisions, and pave the way for impunity of perpetrators. As the problematic nature and application of Article 100 of the CCP is concerned, the third paragraph of which regulates the “catalogue crimes” should be repealed.

Another inadequate attempt to restore pretrial detention as a measure of last resort is in the amendment of Article 101 of the CCP. It is now a requirement that the court decisions should clearly demonstrate concrete evidence justifying a decision that judicial control measures would be insufficient when ruling for pretrial detention or continuation of pretrial detention is given. On 2 August, despite this amendment to Article 101, the Istanbul 30th Heavy Penal Court decided the continuation of Osman Kavala’s pretrial detention, in contravention of the requirement to “demonstrate concrete evidence” in its decision. This recent example indicates that the amendments in the 4th judicial package fall short of providing solutions to the problem of unjustified and lengthy pretrial decisions by Turkish courts. While the judicial package aims at presenting fundamental principles of law as major reforms to the justice system, in reality it exposes how the Turkish judiciary fails to apply even the basic principles of law.

This is also demonstrated in another provision of the package which amends the Article 170 of the CCP. With the amendment, information that is not related to the events that constitute the charged crime or the evidence of the crime, will not be included in the indictments. The main problem of the judicial system is not that prosecutors do not know how to draft indictments or judges fail to provide reasoned judgments, the main problem is rather that basic principles of law are not applied in practice because the independence of the judiciary is not safeguarded.

The package also introduces amendments to “improve the judicial control system in criminal cases”. According to the provisions introduced in the package, time spent under “house arrest”, a judicial control measure, will be reduced from the final sentence. While the amendment appears to be a positive step, the increasing application of “house arrest” measure, which is an essential interference with the right to liberty, in those cases where individuals are prosecuted for exercising their human rights without sufficient evidence of criminal wrongdoing, continues to be a major concern. The

¹⁵ Third party intervention by the Council of Europe Commissioner for Human Rights to cases of Ahmet Hüsrev Altan v. Turkey (no. 13252/17) Alpay v. Turkey (no. 16538/17) Atila Taş v. Turkey (no. 72/17) Bulaç v. Turkey (no. 25939/17) Ilıcak v. Turkey (no. 1210/17) Mehmet Hasan Altan v. Turkey (no. 13237/17) Murat Aksoy v. Turkey (no. 80/17) Sabuncu and Others v. Turkey (no. 23199/17) Şık v. Turkey (no. 36493/17) Yücel v. Turkey (no. 27684/17), <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>

¹⁶ Grounds for arrest with a warrant Article 100 – (1) If there are facts that tend to show the existence of a strong suspicion of a crime and an existing “ground for arrest”, an arrest warrant against the suspect or accused may be rendered. There shall be no arrest warrant rendered if arrest is not proportionate to the importance of the case, expected punishment or security measure. (2) At the below mentioned instances, a “ground for arrest” may be deemed as existing: a) If the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee. b) If the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt ; 1. To destroy, hide or change the evidence, 2. To put an unlawful pressure on witnesses, the victims or other individuals. do we need all this? (3) If strong grounds for suspicion are present, that the below mentioned crimes have been committed, the n “the ground for arrest with a warrant ” may be deemed as existing: a) Following crimes as defined in the Turkish Penal Code dated 26.9.2004 and No. 5237: 1. Genocide and crimes against humanity (Arts. 76, 77, 78), 2. Killing with intent (Arts. 81, 82, 83), 3. Intentional wounding committed by a gun (A rt. 8 6/3-a) and intentional wounding which has been aggravated by its result (Art. 87) 4. Torture (Arts. 94, 95), 5. Sexual assault (Art. 102, except for subparagraph 1), 6. Sexual abuse of children (Art. 103), 7. Theft (Arts. 141, 142), and aggravated theft (Arts. 148, 149) 8. Producing and trading with narcotic or stimulating substances (Art. 188), 9. Forming an organization in order to commit crimes (Art. 220, except for subparagraphs 2, 7 and 8), 10. Crimes against the security of the state (Arts. 302, 303, 304, 307, 308), 11. Crimes against the Constitutional order and crimes against the functioning of this system (Arts. 309, 310, 311, 312 , 313, 314, 315), b) Smuggling with guns, as defined in Law on Guns and Knives and other Tools, dated 10.7.1953, No. 6136, (Art. 12), c) The crime of embezzlement as defined in the Law on Banks, dated 18.6.1999, No. 4389, Art. 22, subparagraphs (3) and (4) , d) Crimes defined in Combating Smuggling Act, dated 10.7.2003, No. 4926, and carry imprisonment as punishment, e) Crimes defined in Act on Protection of Cultural and Natural Substances, dated 21. 7.1 9 83, No. 2863, Arts. 68 and 74, f) Crime of intentionally start a fire in forests, as defined in the Law on Forests, dated 31 .8. 1956, No. 68 3 1, Art. 1 10, subsections 4 and 5. (4) In cases where the committed crime is punishable with judicial fine, or with imprisonment not more than one year at the upper level, no arrest warrant shall be issued.

package also introduces the requirement for the court to review the continuation of judicial control measures every four months, at the latest, during the investigation phase upon the request of the Public Prosecutor and ex-officio during the prosecution phase. Another provision introduced by the package regulates the maximum time limits for the application of judicial control measures, which still remain too long. Judicial controls can be imposed for up to three years for matters that fall under the jurisdiction of heavy penal courts. For crimes against the state and under the Anti-Terrorism Law, the duration of judicial controls can be extended for an additional four years. As Turkey's counter terrorism legislation is routinely used to silence dissenting voices, the new amendment will exacerbate the unlawful restrictions of rights arising from the arbitrary/abusive implementation of judicial control measures.

CONCLUSION

The 4th Judicial Package fails to address the most significant and structural issues affecting human rights protection and does not provide concrete measures to reverse the deep erosion of human rights in Turkey. Any judicial reform initiative that does not aim to restore judicial independence will not be an effective solution to the systemic problems of human rights protection in the country.

In order to eliminate root causes of the violations of human rights safeguarded by the ECHR and other international human rights instruments to which Turkey is legally bound, Amnesty International calls on the Turkish authorities to urgently take concrete measures to ensure the promotion and protection of human rights including by:

- Refraining from interfering in criminal proceedings to enable members of the judiciary to apply basic principles of law;
- Restoring a judicial system that guarantees the respect for everyone's fundamental rights and freedoms in a fair and independent manner;
- Bringing the composition of the Council of Judges and Prosecutors, including through constitutional changes, in line with European standards in order to ensure it is free from undue interference by the government;
- Ensuring the implementation of the judgments of the ECtHR and in particular immediately and unconditionally releasing Osman Kavala and Selahattin Demirtaş from their arbitrary detention;
- Bringing all problematic provisions in the Anti-Terrorism legislation and other relevant laws that are currently used to restrict the fundamental rights of people in Turkey in line with international human rights law and ECtHR's case law;
- Ensuring that pretrial detention is a measure of last resort as acknowledged in the package and ending the routine use of arbitrary detention and prosecution of politicians, activists, journalists, human rights defenders and others solely for peacefully exercising their rights to freedom of expression, association and peaceful assembly;
- Ensuring effective implementation of protective and preventive measures for victims of domestic violence and of sanctions against perpetrators and the application of the provisions of Law No 6284.