



Strasbourg, 20 February 2012

Comments on the Turkish Bill on judicial reform of January 2012

Thomas Hammarberg
Council of Europe Commissioner for Human Rights

1. The following comments relate to the “Bill amending certain Acts with the aim of rendering judicial services more effective and postponing proceedings and sentences for offences committed through the press”,¹ which was presented to the Turkish Parliament on 30 January 2012 (hereinafter ‘the reform package’ or ‘the Bill’).
2. The Commissioner would like to express his gratitude to the Minister of Justice of Turkey, Mr Sadullah Ergin, for the information provided by his Ministry to the Commissioner’s Office on the contents of this Bill. The Commissioner was further informed that the Ministry of Justice is currently working on another reform package, dealing more substantially with issues relating to freedom of expression in Turkey, which the Commissioner is awaiting with interest. He would like to express his appreciation for the serious and constructive manner in which the Turkish Ministry of Justice has been dealing with the human rights issues that the Commissioner and other bodies of the Council of Europe have raised.
3. The Commissioner understands that the overarching goal of the present reform package is to relieve the excessive burden on the Turkish justice system. He notes that the package contains several components, including amendments affecting commercial, criminal and administrative law, as well as the postponement of proceedings and sentences in respect of those investigated, tried or convicted for breaking the law through the media or the expression of a thought or opinion. The package also includes several provisions which are likely to affect human rights issues raised by the Commissioner in his reports, including some of the major causes of violations of the European Convention on Human Rights (ECHR) which have been identified in the judgments of the European Court of Human Rights (ECtHR).
4. The following comments focus mainly on the letter of these provisions, and are based on the assessment contained in the Commissioner’s two recent reports concerning freedom of expression² and the administration of justice³ in Turkey. The Commissioner intends these comments as a part of the very constructive relationship he enjoys with the Turkish authorities on these issues.

¹ *Yargı Hizmetlerinin Etkinleştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılması ve Basın Yayın Yoluyla İşlenen Suçlara İlişkin Dava ve Cezaların Ertelelmesi Hakkında Kanun Tasarısı*, Esas No. 1/565.

² Report of the Commissioner for Human Rights following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, CommDH(2011)25.

³ Report of the Commissioner for Human Rights following his visit to Turkey from 10 to 14 October 2011, Issue reviewed: Administration of justice and protection of human rights in Turkey, CommDH(2012)2.

5. The Commissioner is aware that the present reform package is not intended as an exhaustive response to all the concerns highlighted in his reports. Accordingly, these comments are not meant to be a comprehensive review of those concerns. For the preparation of the next reform package, which should contain a more substantial review of the relevant legislation, the Commissioner therefore refers the Turkish authorities to the full set of recommendations contained in the aforementioned reports.
6. The Commissioner nonetheless considers it expedient to express his views on the present reform package. He considers that many provisions in this package represent an unquestionable step forward for compliance with ECHR standards. For a number of other provisions, the Commissioner is of the view that the amendments, while positive overall, do not go far enough to resolve the issues they seek to address or are unlikely to represent a substantial improvement regarding the human rights situation in Turkey. Improvements are therefore suggested with respect to these provisions. Finally, the Commissioner considers that the very wording of some of the amendments is a matter of concern, as these amendments may actually lead to an increase, rather than a decrease, in the number of criminal proceedings brought.

Amendments which constitute a step forward

7. The Commissioner welcomes the proposed amendment to Article 101 of the Turkish Code of Criminal Procedure (TCCP), which seeks to clarify the obligation of judges to reason their decisions authorising or extending detention on remand, or rejecting a request for the termination of such detention (Article 76 of the Bill). This issue was at the source of many violations of the ECHR, and figures very prominently in the case-law of the ECtHR.⁴ However, the Commissioner stresses that the decisive factor for putting an end to these violations will be the practical implementation of the revised Article 101 TCCP, bearing in mind that the current wording of this Article already includes this obligation implicitly, but has not been interpreted as such by judges, who instead rely on stereotyped wordings to justify their decisions.
8. Another positive feature of the package is the deletion of Article 6, paragraph 5 of the Turkish Anti-Terrorism Act (Article 86 of the Bill). This Article, which allows for the banning of future editions of a periodical, was the source of violations of Article 10 ECHR, as identified by the ECtHR in its judgment in the case of *Ürper and others v. Turkey*.⁵ The Commissioner would like to recall, however, that he had expressed his deep concerns on two other paragraphs of Article 6 of the Anti-Terrorism Act: paragraph 2, which concerns the publication of declarations emanating from terrorist organisations, the very wording of which was found to be the source of a violation of Article 10 ECHR by the ECtHR;⁶ and paragraph 4 providing for a kind of objective criminal liability for owners and editors of press and other media.
9. The Commissioner also welcomes the amendments to Articles 285 (breaching the confidentiality of criminal investigations) and 288 (attempting to influence fair trial) of the Turkish Criminal Code (TCC).⁷ The proposed amendments to Article 285 (Article 73 of the Bill) redefines the offence of breaching the confidentiality of criminal investigations, limiting its scope. With the proposed amendment, committing this offence through the media would no longer be an aggravating circumstance. The new wording also clarifies that imparting information on criminal investigations and proceedings within the limits of

⁴ cf. CommDH(2012)2, paragraphs 33-36.

⁵ cf. CommDH(2011)25, paragraphs 29-30.

⁶ cf. CommDH(2011)25, paragraph 28.

⁷ cf. CommDH(2011)25, paragraph 20.

journalistic reporting do not constitute an offence. As for Article 288, the Commissioner notes that the punishment for this offence will become a judicial fine, rather than imprisonment. The Commissioner also welcomes the corresponding deletion of Article 19 of the Press Act defining the offence of influencing the judiciary through the press (Article 86 of the Bill).

10. The introduction of a provisional article in the Press Act (Article 54 of the Bill), annulling all judicial decisions taken prior to June 2005 confiscating, prohibiting, or preventing the sale and distribution of printed materials is another welcome development, not least for its symbolic value.
11. The Commissioner is also pleased to note that the reform package introduces the possibility for parties to respond to the written opinion of the public prosecutor before the Council of State (Article 39 of the Bill), in accordance with the judgments of the ECtHR on this matter.⁸

Suggested improvements to the amendments

12. An important feature of the reform package is the amendment of Article 109 TCCP, extending the use of judicial control (i.e. measures such as bans on leaving the country, bail, or periodic visits to a place determined by the judge) as an alternative to detention on remand (Article 77 of the Bill). Previously only accepted for offences punishable by a maximum prison sentence of three years, the proposed amendment would extend the use of judicial control to offences carrying a punishment of imprisonment of up to five years.
13. While the Commissioner welcomes the will demonstrated with this amendment to extend the use of alternatives to detention on remand, he is of the opinion that such alternatives should be available for any offence, where they are considered sufficient to guarantee the integrity of the judicial proceedings (i.e. to avoid that the person concerned absconds, commits a serious offence, interferes with the course of justice, or poses a serious threat to public order).
14. The Commissioner underlines that, in accordance with the Recommendation of the Council of Europe Committee of Ministers on this matter⁹ and the principle of presumption of innocence, while the seriousness of the alleged offence is an important element to be taken into account when assessing the existence of the aforementioned risks concerning the integrity of the judicial proceedings, this assessment has to be based on the individual circumstances of the case, including, for example, the age, character, antecedents, social circumstances of suspects or accused persons or their past conduct.
15. Thus, the penalty likely to be incurred should not be the only decisive factor affecting the use of alternatives to remands in custody, since the availability of such alternatives would indisputably affect the decision of a judge on detention on remand. The Commissioner recommends that the use of alternatives to remands in custody not be limited according to the penalty attached to the alleged offence, but left to the discretion of judges, who should be empowered to take a decision on detention on remand or an alternative measure in the light of all relevant factors.

⁸ cf. CommDH(2012)2, paragraph 88.

⁹ Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse of 27 September 2006.

16. The proposed amendments to Article 220 TCC (Article 65 of the Bill) could be considered in conjunction with the previous amendment. These amendments concern paragraphs 6 and 7 of Article 220 TCC, which provide that a person shall be punished as a member of a criminal organisation, even if they are not a member of that organisation or part of its hierarchical structure, if they commit an offence on behalf of that organisation (paragraph 6), or help it knowingly and willingly (paragraph 7). With these amendments, the penalty is reduced by half for paragraph 6, and may be reduced by up to two thirds for paragraph 7. This would potentially allow persons being tried for these offences, especially where the criminal organisation is considered to fall under the scope of Article 314 TCC on armed criminal organisations, to benefit from alternative measures to remand in custody.
17. While acknowledging that this amendment can have short-term benefits for a number of ongoing trials, the Commissioner considers that it does not offer a lasting solution to serious problems caused by Article 220. As previously highlighted by the Commissioner,¹⁰ his main concern relating to Article 220 is the fact that it allows for a very wide margin of appreciation, in particular in cases where membership in a terrorist organisation has not been proven and when an act or statement may be deemed to coincide with the aims or instructions of a terrorist organisation. The Commissioner considers that this issue calls for a more substantial review of the definition of the offences concerned, and encourages the Turkish authorities to tackle this question in the context of their future reform package, along with other legislative problems identified by the Commissioner in his reports on Turkey.
18. Another noteworthy amendment in the reform package concerns Article 10.d of the Anti-Terrorism Act, which currently allows for total restriction of access by defence counsels to the prosecution file until the acceptance of the indictment by the court.¹¹ With the proposed change, total restriction of access to the file could only be applied for up to three months. Beyond this limit, the restriction regime would have to be aligned with the ordinary regime foreseen under Article 153 TCCP, i.e. access to certain documents, such as the suspect's or experts' statements could no longer be restricted.
19. However, the Commissioner had also expressed serious concerns about the restriction regime contained in Article 153 TCCP. As outlined in his 2012 Report on the administration of justice in Turkey, the principle should be the disclosure of *all* material evidence in the possession of the prosecution, apart from some well-defined exceptions in order to preserve the fundamental rights of another individual or to safeguard an important public interest.
20. The Commissioner is of the view that the positive effect of the proposed amendment will be minimal, if the restriction is not lifted at least for those pieces of evidence which serve as the basis for a decision to detain the suspect on remand. In the opinion of the Commissioner, this calls for further amendments to Article 10.d of the Anti-Terrorism Act, as well as Article 153 TCCP. The Commissioner would also like to recall the concerns he had expressed on numerous other restrictions to the right of defence contained in the Anti-Terrorism Act,¹² which have not been dealt with in the present reform package.

¹⁰ cf. CommDH(2012)2, paragraphs 63-70.

¹¹ cf. CommDH(2012)2, paragraphs 75-78.

¹² cf. CommDH(2012)2, paragraph 92.

Amendments raising new concerns

21. The Commissioner observes that Article 53 of the Bill will amend Article 26 of the Press Act. The previously established time limits foreseen in the Press Act to bring proceedings concerning the publication of articles in periodicals (2 months for dailies, 4 months for other publications) will be increased substantially (6 months and 1 year, respectively). The Commissioner understands that this amendment follows from a decision of the Turkish Constitutional Court, with respect to which the Commissioner, as well as the OSCE Representative on Freedom of the Media, had previously raised concerns.¹³
22. The Commissioner observes that the proposed increase in these time limits is considerable and is concerned about the potential negative effects of this development on media freedom and freedom of expression. He considers that such time limits would hamper Article 26 of the Press Act from serving its intended purpose, i.e. avoiding that journalists expose themselves to the risk of prosecution for long periods of time, which may create a chilling effect.
23. The Commissioner further observes that the main consideration in the reasoning of the Constitutional Court in its judgment of 28 April 2011 was the need to avoid depriving individuals of the possibility of seeking justice when they consider their rights to be infringed upon by a press article. The Commissioner considers that civil remedies, rather than criminal prosecution, may be appropriate in the majority of such cases. At any rate, the Commissioner understands that in the future these extended time limits would also apply to cases brought by prosecutors *ex officio*. In the context of the Turkish judicial practice, and in particular the relative ease with which prosecutors decide to bring proceedings,¹⁴ the Commissioner is concerned that the extended time limits may lead to an increase in prosecutions affecting freedom of expression.
24. Another set of amendments concerns offences relating to the violation of privacy or the confidentiality of personal communications (Articles 132 to 134 TCC, Articles 57-59 of the Bill). The Commissioner had previously expressed his concern about the use of these Articles.¹⁵ While it is positive that with the proposed amendments commission of these offences through the press or other media would no longer be considered an aggravating circumstance, the Commissioner considers that this benefit is offset by the fact that the amendments significantly increase the penalties carried by these offences. As long as the Turkish criminal law system does not include a public interest defence for journalists, the Commissioner fears that these amendments will not resolve the problem concerning the undue application of these provisions in connection with freedom of expression.
25. A related concern voiced by the Commissioner in his 2012 Report on the administration of justice in Turkey was the potential problems caused by the fact that transcripts of wiretaps, including those of a private nature with little relevance to the alleged offences, were often included in indictments. When such indictments are accepted by the court, the contents become available to the wider public, leading to concerns under Article 8 ECHR (right to respect for private and family life).¹⁶ The explanatory note to the present Bill clearly states that Articles 132 to 134 TCC would not apply to those cases. The Commissioner considers that this problem needs to be dealt with by the Turkish authorities in future legislative reforms.

¹³ cf. CommDH(2011)25, paragraph 31.

¹⁴ cf. CommDH(2012)2, paragraph 23.

¹⁵ cf. CommDH(2011)25, paragraph 23.

¹⁶ cf. CommDH(2012)2, paragraphs 24 and 80.

Final observations

26. An important feature of the present reform package is the introduction of a provisional article, which allows for the postponement of investigations, criminal proceedings as well as the execution of sentences for offences committed before 31 December 2011 through the media or through the expression of a thought or opinion. This provision would apply to those offences carrying a maximum prison sentence of five years. The legal consequences of the offences in question would be annulled after three years following the postponement. If persons concerned are convicted for a new offence committed within these three years, the postponement is cancelled for the earlier offence.
27. The Commissioner welcomes this provision, which he considers as a clear acknowledgement by the Turkish authorities of the need to reform the Turkish legal system regarding freedom of expression and freedom of the media, as well as their will to do so in the immediate future. He expresses his hope that this 'conditional amnesty' will create favourable conditions for future reforms, which are urgently needed to stave off further violations of the ECHR.
28. The Commissioner would like to stress again that these comments concentrate on the wording of the amendments contained in the present reform package, and are without prejudice to his opinions relating to a much wider array of problematic issues he identified in his reports on Turkey regarding the Constitution, the institutional framework and the judicial system in Turkey, as well as numerous other provisions in the Turkish statutory legislation, including notably the Turkish Criminal Code, the Code of Criminal Procedure, the Anti-Terrorism Act, the Internet Act and the Radio and Television Act. The Commissioner also considers that, despite the present reform package, there would still be a need to introduce effective domestic remedies both for lengths of proceedings and unlawful detentions, in accordance with the judgments of the ECtHR.¹⁷
29. Finally, the Commissioner would like to reiterate his view that some of the most serious human rights violations in Turkey emanate from the interpretation and application of the Turkish legislation by judges and prosecutors. Thus, the actual impact of even those amendments which the Commissioner considers positive, would very much depend on the practical implementation made by the Turkish judiciary of the amended legislation.

¹⁷ cf. CommDH(2012)2, paragraph 140.