



**Submission to the Committee against Torture
80th Session (08 - 26 July 2024)
For the consideration of the Turkey's fifth periodic report**

**Security Studies and Rule of Law
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1. Introduction

Security Studies and Rule of Law appreciates the Committee against Torture for its engagement with civil society organizations. We are pleased to present our reflections on Turkey, which will be examined in the upcoming session under the Convention.

Security Studies and Rule of Law is a non-governmental organization, founded by criminal justice professionals, based in Geneva, Switzerland in January 2023. Our association aims to defend democratic rights and freedoms, support practices that protect and preserve human rights and the rule of law, and investigate human rights violations, torture, genocide, and all kinds of illegalities and injustices, and make these violations public.

It will be presented that Turkey's insufficient and unpersuasive responses to the questions in the LOIPR (2018) will be critiqued with factual data in this submission.

2. Issues included in the list of issues prior to reporting (LOIPR)

(Regarding independence and impartiality of the judiciary/administration of justice)

Article 2

Concerned with absence of effective legislative, administrative, judicial or other measures to prevent acts of torture

In Para. 17 of the LOIPR (2018), Turkey was asked concerning appointment to the High Council of Judges and Prosecutors and on its independence from the executive and legislative branches.

In Para. 18 of the LOIPR (2018), Turkey was demanded updated information linked with basic principles on the Independence of the Judiciary.

3. State party's responses to LOIPR

(Regarding independence and impartiality of the judiciary/administration of justice)

In the State party's response (para 67), it is mentioned that the government further assesses that the subject does not exactly fall within the scope of this report.

Regarding the independence and impartiality of the judiciary, as it is important for the institutional pillar of the fight against torture and ill-treatment, it falls within the mandate of the Committee. For this reason, our report provides information on the current situation of judicial system's independence and impartiality, also examines the effects of the dependent and biased nature of the current system in terms of the aspects of torture and ill-treatment.

In the State party's response (para 68), it was said that article 159 of the Constitution states; "The Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges.". Article 3/6 of the Law No. 6087 on the Council of Judges and Prosecutors provides, "The Council is independent in performing its duties and exercising its powers. No organ, authority or person may give orders or instructions to the Council."

In the State party's response (para 68) mentions the independence of the Council of Judges and Prosecutors under Article 159 of the Turkish Constitution and that it will not take instructions from any institution. However, the existence of written legislative rules in Turkey does not mean that these rules are being followed in practice.

In its 2023 Türkiye Report, **the European Commission** state that "*Türkiye remains at an early stage of preparation in the area of judiciary. Serious backsliding continued and, despite several judicial reform packages in recent years, the structural deficiencies in the judicial system remained unaddressed. The continued refusal to implement certain rulings of the European Court of Human Rights (ECtHR) remains a matter of concern. There was no progress in eliminating undue influence and pressure by the executive on judges and prosecutors, which negatively affects the independence, impartiality and quality of the judiciary.*"¹ The Commission stressed the negative events continued on the independence of the judiciary.

In its 2024 Report, **Freedom House** expresse that "Judicial independence has been severely compromised, as thousands of judges and prosecutors have been replaced with government loyalists since 2016. Under the presidential system that took effect in 2018, members of Turkey's Board of Judges and Prosecutors (HSK), which oversees judicial appointments and disciplinary measures, are appointed by the parliament and the president rather than by members of the judiciary. As a result, prosecutors and judges often toe the government line. Judges who rule against the government's wishes have been removed and replaced, while those who convict Erdoğan's critics have been promoted."²

The last paragraph of Article 153 of the Constitution of Türkiye states that "The decisions of the Constitutional Court are binding on the legislative, executive and judicial organs, administrative authorities, real and legal persons." However, **Amnesty International** reports in April 2024 that "Can Atalay, detained in 2022 in connection with the Gezi Park protests, was elected as an MP for the southern

¹ <https://ab.gov.tr/siteimages/resimler/2023%20T%C3%BCrkiye%20Raporu.pdf>, Access Date: 14/05/2024

² <https://freedomhouse.org/country/turkey/freedom-world/2024>, Access Date: 14/05/2024

province of Hatay in the May parliamentary elections, but in July the court of cassation denied his appeal for release. In October and December, the constitutional court twice ruled that his continued detention was a violation of his rights.⁴ The court of cassation refused to implement the binding constitutional court rulings, claiming that the constitutional court judges who had ruled for Can Atalay's release had "acted unlawfully."

In sum, no Turkish citizen can enjoy his or her basic human rights under the rule of law, despite the Constitutional Court's decision in favor of them.

Therefore, the independence of the Council of Judges and Prosecutors should not be decided in terms of legislation (written laws) but in terms of practice. When asked for his opinions on the reinstatement of 450 judges and prosecutors who were dismissed on the grounds of FETÖ links by the 5th Chamber of the Council of State, President Erdoğan explained that;

"It is not possible for us to remain silent on this decision taken by the Council of State. Just as we, as the People's Alliance, do not remain unresponsive to some unsuitable decisions taken by the Constitutional Court, we cannot remain silent on this. The Council of State takes such decisions from time to time, it disturbs us with such decisions, also the Constitutional Court's several decisions disturb us seriously. For example, the Constitutional Court made a decision about the Information and Communication Technologies Authority (ICTA/ BTK). How can such a decision be taken? We will continue to pursue this matter. We will follow such decisions in the Council of State and in the Constitutional Court ." ³

Following the President's statement, Minister of Justice Yılmaz Tunç, regarding the Council of State's decision on judicial members dismissed from the judiciary due to FETO, stated that "the Council of Judges and Prosecutors (HSK) has initiated a re-examination regarding 387 names who have returned to their professions. "⁴

³<https://www.iletisim.gov.tr/turkce/haberler/detay/cumhurbaskani-erdogan-bae-ve-misir-ziyareti-donusunde ucakta-gazetecilere-konustu>

⁴ <https://www.aa.com.tr/tr/gundem/adalet-bakani-tunc-mesleklerine-geri-donen-387-isimle-hakim-ve-savci-alakali-hsk-olarak-yeniden-inceleme-baslattik/3140278>

In summary, when there is a finalized judicial decision, what will the Council of Judges and Prosecutors, an administrative board, review? It is obvious that judicial independence and impartiality cannot be mentioned if an administrative board is reviewing a finalized judicial decision.

ECtHR's landmark decision ([Yüksel Yalçınkaya v. Turkey](#))

The current situation regarding the independence of the judiciary and the supremacy of the law in Turkey can be analyzed in its most recent form with the judgment of the ECHR in "Yüksel Yalçınkaya v. Turkey".

Yüksel Yalçınkaya v. Turkey concerns the conviction of the applicant for membership of an armed terrorist organization, identified by the Turkish authorities as "FETÖ/PDY" ("Fetullahist Terrorist Organization/Parallel State Structure"), which is believed to have been behind the coup attempt in Turkey on 15 July 2016.

Following its assessment, on 26/09/2023, the ECtHR held unanimously that there had been a violation of Article 7 and Articles 6 and 11 of the Convention.

As will be explained below, the effect of this decision is not limited to the subject matter of the case. Therefore, this decision applies not only to those who are in the same situation as the applicant, but also to cases under investigation or pending trial, as well as finalized cases whose trials have been concluded. The only group that this decision does not make sense for, and that it excludes from its scope, are the perpetrators of the July 15 coup attempt.

In other words, from this decision, it can be concluded that before July 15, 2016, there were cases that did not constitute a crime in essence and even constituted the exercise of a right;

- Anyone who is under investigation, on trial or even convicted for peaceful acts such as using ByLock, - opening, depositing or withdrawing money from a Bank Asya account, -forming or becoming a member of a trade union, -forming or becoming a member of an association, -staying in a student's house, - attending meetings, -reading or subscribing to newspapers or magazines, -studying in a school or a tutoring center, -being a member of the "service movement" or the "Gülen community" and witness/confidential witness statements that imply participation in community activities will benefit.

Under Article 46 of the Convention, in the context of the enforcement of judgments, a judgment of the Court finding a violation of the Convention imposes an obligation on the respondent State to put an end to the violation found and to remedy its consequences in such a way as to restore as far as possible the situation as it existed before the violation. ⁵

(IV) The conclusions reached in **Yüksel Yalçinkaya v. Turkey** are also applicable to *cases of a similar nature*. Thus, under Article 46 of the Convention, in the context of the enforcement of judgments, a judgment of the Court finding a violation of the Convention imposes an obligation on the respondent State, not only in the present case but also in similar cases, to put an end to the violation found and to remedy its consequences so as to restore as far as possible the situation as it existed before the violation. (para. 418)⁶

It is a requirement of Article 90/545 of the Constitution that the findings in the ECtHR judgment be taken into account on a wider scale, including but not limited to the cases pending before the domestic courts, in order to find an appropriate solution to eliminate the structural problems identified in the ECtHR judgment within the scope of Article 6 (right to a fair trial) and Article 7 (legality and non-retroactivity of crimes and punishments) of the ECHR, which affect a large number of individuals in terms of the ECtHR's assessment in Yüksel Yalçinkaya v. Turkey for general measures to be taken.⁷

The Republic of Turkey should establish a general solution (including, for example, measures such as reinstatement of the proceedings pursuant to Art. 311/1-f of the Code of Criminal Procedure (CPC) and a change of jurisprudence for the currently pending proceedings) to eliminate the structural problems arising from Art. 6 (right to a fair trial) and Art. 7 (legality and non-retroactivity of crimes and punishments) of the ECHR's Yüksel Yalçinkaya v. Turkey judgment and similar FETÖ/PDY trials within the framework of the principle of *restitutio in integrum* (reinstatement). 311/1-f of the Code of Criminal Procedure, 46

⁵ (**Yüksel Yalçinkaya v. Turkey**, application no. 15669/20, para. 404

⁶ (**Yüksel Yalçinkaya v. Turkey**, application no. 15669/20, para. 418

⁷ Union of Turkish Bar Association, Evaluation of the decision of the European Court of Human Rights in Yüksel Yalçinkaya v. Turkey, (2024), p. 22 <https://tbbyayinlari.barobirlik.org.tr/TBBBooks/679.pdf>

including measures such as a change of jurisprudence in respect of pending proceedings), it is also a requirement of Article 148 and Article 46/1 of the ECHR.⁸

On the other hand, as explained above, while it is an obligation for Turkey to implement the Yalçinkaya Decision in all similar cases in the light of the ECHR judgment and scientific opinions, hundreds of people continue to be detained and arrested every week on the same grounds and this situation is announced on the official website of the Turkish Ministry of Interior.

Within the scope of the investigations against the Gülen community, we continue to see in the press that 611 people were detained across Turkey on charges such as "opening student houses, helping the families of detainees and using Bylock, etc." and for reasons found by the ECHR to be non-criminal, one month after the relevant decision (on 24.10.2023) with the statements of the Minister of Interior Ali Yerlikaya.⁹

After the Yalçinkaya Decision dated 26/09/2023, the Turkish Government, which should have provided a general solution by deciding to change the jurisprudence, instead of providing a solution, carried out 11 large operations across Turkey from 24.10.2023 to 29 March 2024 and detained hundreds of people for the grounds stated by the ECHR that cannot be a crime with the operations called "Pincer". These operations continue to be published daily on the official website of the Ministry of Interior.¹⁰

On March 29, 2024, following the latest operation in which 70 people were detained for allegedly using Bylock, Interior Minister Ali Yerlikaya stated that the operations would continue with determination.¹¹

In the State party's response (para 78), The Decree Law no. 667 states in Article 3/1 "Continuation in the profession of those who are considered to be a member of, or have relation, affiliation or contact with terrorist organizations or structure/entities, organizations or groups established by the National Security Council as engaging in activities against the national security of the State, shall be found to be unsuitable

⁸ Union of Turkish Bar Association, Evaluation of the decision of the European Court of Human Rights in Yüksel Yalçinkaya v. Turkey, (2024), p. 22 <https://tbbyayinlari.barobirlik.org.tr/TBBBooks/679.pdf>

⁹ <https://www.icisleri.gov.tr/77-ilde-fetoye-yonelik-kiskac-operasyonlari-duzenlendi>

¹⁰ <https://www.icisleri.gov.tr/fetopdyye-yonelik-12-ilde-kiskac-3-operasyonlari-duzenlendi>
<https://www.icisleri.gov.tr/kiskac-4-operasyonlari-ile-32-supheli-yakalandi>
<https://www.icisleri.gov.tr/20-ilde-fetoye-yonelik-olarak-son-bir-hafta-icinde-duzenlenen-kiskac-11-operasyonlarinda-70-supheli-yakalandi>

¹¹ <https://twitter.com/AliYerlikaya/status/1716736507128500236>
<https://www.icisleri.gov.tr/77-ilde-fetoye-yonelik-kiskac-operasyonlari-duzenlendi>

and their dismissal from the profession shall be decided by the Plenary Session of the High Council of Judges and Prosecutors in so far as judges and prosecutors are concerned".

In State party's response (para 79) Within the scope of Article 3/1 of Decree Law no. 667, the CJP has decided the dismissal of judges and prosecutors affiliated with FETO.

It is not legally possible to speak of "affiliation" to a criminal or terrorist organization as a general ground for dismissals. The positive legal texts that include this phrase do not specify what should be understood by it.

In many decisions of the 16th Criminal Chamber of the Court of Cassation, the term "affiliation" is used, and although it is accepted that a company or an association is "affiliated" with a terrorist organization, there is no explanation as to what this means.¹²

In a decision of this Chamber, the term "school affiliated with a terrorist organization" was used.¹³ No determination has been made as to which crimes were committed and which terrorist activities were organized within the framework of the activities of the school, which was established with the permission of the relevant public authorities and operates under the supervision and control of the State.¹⁴

In its report on dismissals by emergency decrees, the Venice Commission concluded that disciplinary liability or other similar measure must be "*foreseeable*" and that a public official must first understand that he or she has done something incompatible with his or her status before he or she can be punished.

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¹² Court of Cassation, Criminal Chamber 16, CD, 2.7.2019, E. 2018/7312, K. 2019/4638; 3.7.2019, E. 2019/1486, K. 2019/4719; 20.3.2019, E. 2018/2882, K. 2019/1926; 27.12.2019, E. 2019/5533, K. 2019/8459; 30.9.2019, E. 2019/1329, K. 2019/5631; 23.1.2020, E. 2019/6091, K. 2020/598

¹³ Court of Cassation, Criminal Chamber 16, 11.3.2020, E. 2019/501, K. 2020/1954

¹⁴ <https://izzetozgenc.com/makale/%E2%80%99Ciltisak%E2%80%99D-ibaresi-uzerine> OZGENC, Izzet (2022), "İltisak" İbaresİ Uzerine,

¹⁵ CDL-AD(2016)037-e, Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, page: 29-31

Likewise, with regard to dismissals during the State of Emergency, the Council of Europe Commissioner for Human Rights emphasized in his report that *"at the very least, individuals should have had access to the evidence against them and the right to present their arguments before a decision was taken"*.¹⁶

In this respect, it is contrary to the principle of proportionality to be subjected to a very severe sanction such as lifelong dismissal from the profession, disregarding all legal safeguards, based on concepts such as "liaison and affiliation", which were introduced in the literature with a decree law during the State of Emergency, which had no place in the law before and whose meaning is unclear.

3. Conclusion and Recommendations

We are honored to present this report to the Committee Against Torture, where we aim to highlight absence of effective legislative, administrative, judicial measures to prevent acts of torture in Turkey. Our goal is to help ensure that Turkey meets its obligations and commitments under the international conventions to which it is a signatory.

You are kindly be requested to:

- urge Turkey to implement the Yalcinkaya decision of ECtHR in national courts and to cease systematic threats of arbitrary arrest and detention.
- demand not only by written law rules but also the independence of the judicial authorities in practice
- urge Turkey to avoid the use of vague and unpredictable concepts such as "relation, affiliation or contact with terrorist organizations or structure/entities" in judicial proceedings

¹⁶ Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, **CommDH(2016)35, page: 30-32**