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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**TURKEY**

**OPINION**

**ON THE DUTIES, COMPETENCES AND FUNCTIONING  
OF THE CRIMINAL PEACE JUDGESHIPS**

**Adopted by the Venice Commission  
at its 110<sup>th</sup> Plenary Session  
(Venice, 10-11 March 2017)**

**On the basis of comments by:**

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**Mr Nicolae Esanu (Member, Republic of Moldova)**  
**Mr Johan Hirschfeldt (Substitute Member, Sweden)**  
**Mr Guido Neppi Modona (Substitute Member, Italy)**

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## I. Introduction

1. By letter of 25 May 2016, Mr Cesar Florin Preda, Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion on the duties, competences and functioning of the criminal peace judgeships (established by Turkish Law no. 6545, see document CDL-REF(2017)004).

2. The Commission invited Mr Barrett, Mr Esanu, Mr Hirschfeldt and Mr Neppi Modona to act as rapporteurs for this opinion.

3. On 24 January 2017, a delegation of the Commission, composed of Mr Esanu and Mr Hirschfeldt, accompanied by Mr Schnutz Dürr from the Secretariat, visited Ankara and met with (in chronological order) the Bar Association, the Ministry of Justice, two Ankara peace judges, the rapporteur judges of the Constitutional Court and the Court of Cassation. It was not possible to organise a meeting with the High Council of Judges and Prosecutors (HSYK). The Ministry of Justice presented to the delegation a memorandum on the peace judgeships (hereinafter, the “Memorandum”, CDL-REF(2017)004). The Venice Commission is grateful to the Ministry of Justice for the preparation of the visit and the information provided. In reply to the draft opinion, the Ministry of Justice also provided an opinion (hereinafter “the Government Opinion”).

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an unofficial translation of the applicable legislation. Inaccuracies may occur in this opinion as a result of incorrect translations.

5. Following an exchange of views with Mr Selahaddin Menteş, Deputy Undersecretary at the Ministry of Justice of Turkey, this opinion was adopted by the Venice Commission at its 110<sup>th</sup> Plenary Session (Venice, 10-11 March 2017).

## II. General remarks

6. From the outset the Venice Commission underlines that the President of the Venice Commission was among the first to firmly condemn the coup<sup>1</sup> and that both opinions relating to Turkey adopted in October and in December 2016 repeated this condemnation and expressed the sincere condolences of the Venice Commission for the numerous victims of the coup and their families.<sup>2</sup> While the creation of the peace judgeships in their present form predates the failed coup, the tasks of the peace judges have become even more relevant since, as tens of thousands of decisions on detention were made by them.

7. The present opinion has been prepared in parallel to two other [draft] opinions, on emergency decree laws on the media<sup>3</sup> and on the constitutional reform. Serious concerns voiced in the latter [draft] opinion over a reform of the HSYK that would limit the independence of the judiciary<sup>4</sup> are important also for this opinion, since all peace judges are appointed and will be appointed in the future by the HSYK.

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<sup>1</sup> <http://www.venice.coe.int/webforms/events/?id=2266>.

<sup>2</sup> CDL-AD(2016)027, Turkey – Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability), adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) and CDL-AD(2016)037, 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.

<sup>3</sup> CDL-AD(2017)007.

<sup>4</sup> CDL-AD(2017)005, section IV.D.1.

8. The Commission's opinion on the Internet Law,<sup>5</sup> adopted in June 2016, before the coup is particularly relevant for this opinion, because it deals with an important aspect of the work of peace judges, namely the blocking of Internet sites. In that opinion, the Venice Commission already criticised that appeals against decisions by peace judges were decided by other peace judges ("horizontal appeals") and not by the higher level courts (see section IV.D, below).

### **III. Reform of 2014**

#### **A. Origins of the peace judgeships – situation prior to Law no. 6545 of 2014**

9. The Memorandum explains that, before the entry into force of Law no. 6545 of 2014, which established the peace judgeships, criminal courts of peace had been established first by Criminal Procedure Code no. 1412 and, since 1 June 2005, under Code of Criminal Procedure no. 5271. Criminal proceedings are separated into two stages: the 'investigation' (before indictment) and 'prosecution' phases (after indictment). Law No. 5271 attributed the authority to decide upon 'protective measures' during the investigation phase, in principle, to the judges of the criminal courts of peace.

10. Until 2014, the now abolished criminal courts of peace were in charge of:

1. Taking protective measures for all crimes during the investigation phase (protective measures during the prosecution phase were decided by the trial judge - either the judge of the criminal court of peace, the judge of the criminal court of general jurisdiction or the judges of the heavy criminal court)
2. Deciding on the merits of the cases during the prosecution phase for all crimes with a maximum penalty of two years, or two years and a judicial fine, or with a judicial fine only.

11. The decisions of criminal peace courts on detention could be appealed to general criminal courts of first instance and further on.

12. Such 'protective measures'<sup>6</sup> include arrest, pre-trial detention, search, seizure, taking under custody, physical examination of the suspect and taking samples from the body, according to the Memorandum. Protective measures during the prosecution phase are issued by the trial court hearing the case of the alleged offence.

13. Another institution at the origin of the current form of the peace judgeships are the 'liberty judges' that were established under Law no. 6352 of 5 July 2012, amending Article 10 of the Anti-Terrorism Law. These liberty judges only dealt with 'protective measures,' but the scope of their jurisdiction was limited to criminal acts relating to terrorism under Turkish legislation.

14. The Memorandum points out that, in his report "Criminal Justice," the European Commission's independent expert, Mr Luca Perilli, had highly valued the work of the liberty judges in the years 2012-2014 and that he had recommended re-establishing these judgeships. According to the replies of the Ministry of Justice, the draft of this report was transmitted to the Ministry in June 2014, coinciding with the adoption of Law no. 6545.<sup>7</sup> The final version of the report, published in January 2016, takes note of the claim of the Turkish authorities that civil

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<sup>5</sup> CDL-AD(2016)011, Turkey – Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

<sup>6</sup> It should be pointed out that internationally the term 'protective measures' is often used in the framework of witness protection programmes (see for instance Article 68 of the Rome Statute of the International Criminal Court). For the purpose of this opinion, the Venice Commission will use this term for the rather invasive measures referred to in the Memorandum.

<sup>7</sup> [http://www.abgm.adalet.gov.tr/pdf/ceza%20adaleti%20\\_2\\_.pdf](http://www.abgm.adalet.gov.tr/pdf/ceza%20adaleti%20_2_.pdf).

judges of peace had replaced the liberty judges.<sup>8</sup> As there was a gap between February 2014<sup>9</sup> and the adoption of Law no. 6545 on 18 June 2014, the new peace judgeships were established by not extending the jurisdiction of the existing 'liberty judges,' but as a replacement of the previous peace courts. It should be noted that Mr Perilli's report only referred to liberty judges, a system without comparable horizontal appeals.

15. Less than two years after their establishment, with the entry into force of Law no. 6526 on 6 March 2014, the liberty judgeships were abolished and their competences under Article 10 of the Anti-Terrorism Law were – for a short period of time – attributed to the high criminal courts. In June 2014, the new peace judgeships were established with the power to decide on protective measures, including in terrorism-related cases.

## **B. Law no. 6545 of 2014**

### **1. Jurisdiction**

16. The criminal judgeships of peace were established by Law no. 6545, which entered into force on 28 June 2014. The criminal courts of peace were abolished and their jurisdiction on the merits – trying less serious crimes punishable by two years' imprisonment or less – was attributed to the criminal courts of general jurisdiction with the exception of decisions on traffic misdemeanours. On the other hand, the supervision of criminal investigations – for all types of cases – was given to the new peace judgeships.

17. Under the Law on Criminal Procedure, the judgeships of peace have the power to issue search and seizure warrants (including permitting 'wire-taps' for the interception of communications) and arrest and detention warrants. They also perform judicial review of the decisions of public prosecutors on non-prosecution.

18. According to the Memorandum, the reason for the establishment of the peace judgeships was to remedy earlier problems when decisions on protective measures had been taken without giving proper reasons and to avoid that the same judge decide first on protective measures, then on the merits. The new peace judges would be specialised and would enable a harmonisation in the application of these measures.

19. However, the judgeships of peace have been allocated additional powers under Turkish law. One such power is the removal of content from the Internet and the closing down of Internet websites. This aspect of Turkish law has been the object of the Venice Commission's Opinion on Law no. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law").<sup>10</sup> Some of the access-blocking procedures under Law no. 5651 cannot be regarded as protective measures, but are autonomous procedures through which substantive decisions on the merits are taken".<sup>11</sup>

20. Another such power attributed to the peace judgeships are the decisions on traffic misdemeanours (speeding penalties, etc.). The delegation of the Venice Commission learned that in Ankara, out of the 7700 decisions taken by the Ankara peace judges in average per year, about 700 concern detention (only in these cases are there hearings, all other decisions are taken in a written procedure), some 2000 relate to other 'protective measures' and Internet-related decisions, some 1500 are appeals against decisions of other peace judges and 3500

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<sup>8</sup> [http://www.avrupa.info.tr/sites/default/files/2016-11/Criminal\\_Justice\\_report\\_final\\_January\\_2015.pdf](http://www.avrupa.info.tr/sites/default/files/2016-11/Criminal_Justice_report_final_January_2015.pdf), FN. 6.

<sup>9</sup> Law n° 6526 of 21 February 2014 amending the anti-terror law, the criminal procedure code and various laws.

<sup>10</sup> CDL-AD(2016)011.

<sup>11</sup> Articles 8A, 9 and 9A.

decisions, nearly half of the total, concern traffic offences. Again, this is a competence on the merits, not a precautionary or protective measure.

21. A new power for the peace judges under the state of emergency is the competence to remove the right for a lawyer to exercise advocacy according to Decree Law no. 667.<sup>12</sup>

22. According to the information provided by the Ministry of Justice, there are 719 peace judges in Turkey. In the city of Ankara, there are nine peace judges for a population of 3.632.164. This means that peace judges in Ankara have to cater to a population of more than three times the national average.<sup>13</sup>

23. The delegation of the Venice Commission had the possibility to learn more about the situation of the peace judges in the Ankara court house (each peace judge is considered to be a court on his/her own, but they all have their offices in the Ankara courthouse). They have adjacent offices in the Ankara court-house, which the Venice Commission's delegation was able to visit. Each of the nine Ankara peace judges has a staff of five persons working for him/her.<sup>14</sup> Nearly all of their work is in writing only, they hold hearings only for detention cases in special hearing rooms equipped with video recording systems.

24. Decisions on traffic misdemeanours in general obviously take less time than hearings on detention, but nonetheless the peace judges have to deal with each case individually, e.g. examining the photos taken by speed cameras. Nonetheless, the peace judges themselves insisted that they can deal with their heavy workload (with the help of their staff). The Government Opinion too insists that the workload is not excessive because for traffic misdemeanours, the peace judges only have to examine photos. However, the number of traffic misdemeanours is likely to be much higher in big cities than in the country-side. This significantly adds to the excessive work-load of the peace judges in Ankara.

25. To sum up, the jurisdiction of the peace judgeships is therefore twofold; covering 'protective measures' and decisions on the merits. This is also relevant when examining the system of appeals against their decisions.

## **2. System of appeals – opposition – and organisation of work**

26. The decisions of a judgeship of peace can only be appealed horizontally, that is, to another judgeship of peace. Such an appeal is called 'opposition' (Article 268 of the Criminal Procedure Code). The number of these judgeships is very limited per province. The peace judgeships are numbered starting with one in each region and an opposition always goes to the peace judge with the next number. This means that an opposition against a decision by peace judge number one is decided by peace judge number two and so on. Oppositions by the peace judge with the highest number go to peace judge number one.

27. In Ankara, the peace judges take turns working also during night hours and on weekends. This system has been decided by the Ankara Judicial Council on the basis of Article 54 of "Law of Judges and Prosecutors" no. 2802.

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<sup>12</sup> For an example of such a case, see further in section IV.F below.

<sup>13</sup> For a population of some 75 million inhabitants, the average is roughly 100.000 inhabitants per peace judge. In Ankara this figure is close to 360.000 (calculating even with 10 peace judges in Ankara as one post is currently not filled, for the current nine judges this figure is 400.000).

<sup>14</sup> The delegation of the Venice Commission learned that in Ankara, the staff of two peace judges (i.e. ten persons) share an office but these are the staff of judges not dealing with each-others appeals. However, the offices of all peace judges and their staff are close together in the same part of the building.

### **A. Case-law of the Constitutional Court of Turkey**

28. The Constitutional Court of Turkey had to decide on several challenges against the establishment of peace judgeships in general and against individual decisions by peace judges.

29. In its judgment number 2015/12 of 14 January 2015, the Constitutional Court found in abstract proceedings brought by the Eskisehir 1<sup>st</sup> Criminal Judgeship of Peace that the establishment of peace judgeships does not contradict the Turkish Constitution. The judgment can be summarised as follows: peace judges are appointed by the HSYK in the same manner as the judges of general jurisdiction; they enjoy the same constitutional guarantees of independence. Establishing specialised judges for the investigation phase does not contradict the principle of the rule of law. The establishment of the peace judgeships is a general rule, which applies to all cases of criminal investigation and does not contradict the principle of the natural judge.

30. Considering their structure and functioning, there is no reason to suggest that peace judges cannot act independently. If a peace judge is not deciding objectively in the light of concrete, objective and convincing evidence, there are procedural provisions which prevent the judge from hearing the case.

31. The Constitutional Court also found that the legislator has discretion to determine the system of appeals against decisions of the peace judges. Appeals against decisions of a peace judge to another peace judge neither contradict the rule of law nor the right to a fair trial.

32. Following this judgment rendered in abstract proceedings and the similar judgment 2015/31 of 19 March 2015 (appeal by the Izmir Regional Administrative Court of Appeal), the Constitutional Court examined several individual complaints against decisions of peace judges.<sup>15</sup> The Court decided that criminal judgeships of peace perform their duties based on general norms and it is not possible to allege that peace judges are systematically prejudiced. On this basis, the Constitutional Court found several other individual applications inadmissible.<sup>16</sup>

### **B. Pending case at the European Court of Human Rights**

33. There is a pending Turkish case at the European Court of Human Rights concerning the criminal peace judgeships, Hidayet Karaca v. Turkey, application no. 25285/15. The case was registered on 7 May 2015 and has been communicated by the Court on 20 April 2016.<sup>17</sup>

34. The applicant alleges, *inter alia*, that judges of the ordinary criminal courts, who had decided to terminate his detention, were dismissed by the HSYK after the President of the Republic, Recep Tayyip Erdoğan, had stated at a press conference on 27 April 2015 that in this case certain courts had overstepped their competences.<sup>18</sup>

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<sup>15</sup> See Hikmet Kopar and Others, Appl. No. 2014/14061.

<sup>16</sup> Individual Applications Hidayet Karaca Appl. No. 2015/144, 14/7/2015; Mehmet Fatih Yiğit and Others Appl. No. 2014/16838, 9/9/2015; Mustafa Başer and Metin Özçelik, Appl. No. 2015/7908, 20/1/2016; Mehmet Baransu, Appl. No. 2015/7231, 17/5/2016.

<sup>17</sup> <http://hudoc.echr.coe.int/eng?i=001-162979> (available in French only).

<sup>18</sup> Relating to this case, referring to the dismissal of the trial judges, see also the comments by the Bureau of the Consultative Council of European Judge, CCJE-BU(2015)5, [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).

35. Among the questions in the communication are the following: whether the procedures for detention on remand are in conformity with Article 5.2 of the Convention; whether the (peace) judges who ordered the detention of Mr Karaca were impartial and independent; whether there was a guarantee for impartial decisions as the (peace) judges concerned declared themselves not subject to recusal contrary to the decision of a criminal court and the Code of Criminal Procedure; whether Mr Karaca was unable to appeal effectively against his detention in the absence of access to his file.

36. This case had been found inadmissible by the Turkish Constitutional Court on 14 July 2015<sup>19</sup> with two dissenting opinions.<sup>20</sup>

#### IV. Analysis

##### A. Standards of independence for the judicial system

37. The establishment and reform of the structure of the national judiciary is the responsibility of national authorities. Their margin of appreciation is wide, but not unlimited. When addressing this issue national authorities must act in compliance with their national Constitution and international commitments. The choice of the national legislator must ensure respect for the rule of law and guarantee the effective implementation of the right to a fair trial.<sup>21</sup>

38. The standards of judicial independence are extensively commented upon at a European and international level. It is worth recalling the Venice Commission's Report on the Independence of the Judicial System Part I: The Independence of Judges states: "*The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself.*"<sup>22</sup>

39. The Venice Commission has recommended that "[t]he basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts" and this accords with recommendation 7 of the Committee of Ministers Recommendation CM/Rec(2010)12 and CCJE Opinion No. 1.

40. Article 138 of the Turkish Constitution affords guarantees of independence: "*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 [...]*"

41. Such constitutional protection is necessary, but – as for any Council of Europe Member State – is not in itself sufficient to comply with the obligations imposed by the European Convention on Human Rights, other international human rights obligations and the traditions

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<sup>19</sup> Individual complaint Hidayet Karaca Appl. No. 2015/144 of 14/7/2015.

<sup>20</sup> By the two members who were later dismissed by the Constitutional Court after the failed military coup.

<sup>21</sup> CDL-AD(2007)028, Judicial Appointments – Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007); CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service – Adopted by the Venice Commission – at its 85th plenary session (Venice, 17-18 December 2010).

<sup>22</sup> CDL-AD(2010)004, para. 6.



of judicial independence in European democracies. Constitutional guarantees have to be implemented in legislation and in practice to live up to these standards.

## **B. Reform of the judicial system**

42. The criminal judges of peace are appointed in the same way as other members of the judiciary. Therefore, the establishment of the peace judgeships has to be examined in the wider framework of the judicial reforms in Turkey, notably those taking place in 2014.

43. In its Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors of Turkey (CDL-AD(2010)042), the Venice Commission had welcomed the 2010 constitutional amendments as a step in the right direction and had given an overall positive assessment of the reform of the High Council “*as a considerable improvement on the existing situation*”. The Commission encouraged the Turkish authorities to continue the reform by further amending Article 159 of the Constitution, *inter alia*, in order to make the High Council more independent of the executive.

44. Article 159 of the Constitution, amended in 2010, regulates the composition of the HSYK. Apart from the Minister of Justice and the Undersecretary to the Ministry, who are *ex officio* President and member of the Council, four regular members are appointed by the President of the Republic, three regular and three substitute members are appointed by the General Assembly of the Court of Appeals from among its members, two regular and two substitute members are appointed by the General Assembly of the Council of State from among its members; one regular and one substitute member are appointed by the General Assembly of the Justice Academy of Turkey from among its members. Seven regular and four substitute members are elected by civil judges and public prosecutors from among those who are first category judges, three regular and two substitute members are elected by administrative judges and public prosecutors from among those who are first category judges.<sup>23</sup>

45. The Interim Opinion, prepared upon request by the Ministry of Justice of Turkey as part of the implementation of the constitutional amendments in 2010, stated in its para. 18: “*In comparison with most European countries, the system for the organisation of the judiciary in Turkey is highly centralised, rather strict, provides for wide powers of supervision and inspection and has a large institutional framework. Combined with a certain tradition for politicising the administration and controlling the judiciary, this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general. Under this system, most aspects of the organisation of judges and prosecutors have been handled directly by the authorities in Ankara, including qualification, appointments, transfers, dismissals, complaints, disciplinary actions, etc.*”

46. Both in its Interim Opinion on the draft Law on the High Council for Judges and Prosecutors and the Opinion on the draft law on Judges and Prosecutors CDL-AD(2011)004, the Venice Commission also expressed concerns that some elements of the reform may not be sufficient to guarantee the independence of the judiciary. The conclusion of the Interim Opinion reads (para. 84): “*The eventual success of the new HSYK rests not only on the new legal provisions, but on the way they are going to be implemented and applied in the years to come. The considerable powers of the new HSYK should be exercised in an objective, impartial and professional manner in order to prove as unfounded the criticism that the new system still remains under political control, and to ensure that the judiciary in Turkey is an organ for society at large and not only for the state.*” The Interim Opinion was not followed by a request for a final opinion.

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<sup>23</sup> If the draft constitutional amendments were adopted, the Executive would have an ever stronger influence over the HSYK.

47. In February 2014, a further reform brought about a considerable strengthening of the role of the Minister of Justice in the HSYK. Important elements of this reform were found unconstitutional by the Constitutional Court on 10 April 2014, as being contrary to the principle of judicial independence. The Court held that the amendments “transformed the [HSYK] into a Directorate General factually affiliated and dependent upon the Ministry of Justice”.<sup>24</sup>

48. In its declaration of 20 June 2015, the Venice Commission noted 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.”<sup>25</sup>

49. As a result of this reform, it was alleged that notably the First Chamber of the High Council was composed of members close to the political majority in Parliament.<sup>26</sup> This Chamber is competent to appoint, *inter alia*, the new Criminal judgeships of peace.

50. The Ankara peace judges who met the delegation of the Venice Commission, informed the delegation that they did not apply themselves to become peace judges, but they were asked by the HSYK to take up this position.

51. Further, in reply to the question of whether it had been possible to avoid the appointment of persons belonging to the ‘parallel state’ to the newly established peace judgeships in 2014, at a time when the existence of such a structure was already publicly discussed, the Venice Commission’s delegation was informed that a screening had been performed and that following the failed coup, with one exception, peace judges were not among those dismissed.

52. Taken together with the system of closed, horizontal appeals, the method of selecting the peace judges appears to be worrying.

### **C. Establishment of peace judgeships – specialisation**

53. According to the Government Memorandum, “the establishment of the criminal judgeships of peace aimed specialization and to form a unity in implementation about the investigatory proceedings and also, to standardize the decision-making concerning the protective measures across the country.” One of the main arguments for the establishment of Criminal judgeships of peace was this necessity to ensure the specialisation of the judges.

54. It is not a requirement of the European Convention on Human Rights that judges dealing with pre-trial matters be part of a separate court from those dealing with trial matters. It is not

<sup>24</sup> Constitutional Court, Judgment no. 2014/81 of 10 April 2014.

<sup>25</sup> <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>.

<sup>26</sup> International Commission of Jurists briefing paper: Turkey: the Judicial System in Peril follows (<https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/>); British Institute of International and Comparative Law, Human Rights and the Rule of Law in Turkey, A Scoping Report, [http://www.biicl.org/documents/852\\_turkey\\_scoping\\_report\\_-\\_biicl\\_-\\_final.pdf?showdocument=1](http://www.biicl.org/documents/852_turkey_scoping_report_-_biicl_-_final.pdf?showdocument=1).

Report on the rule of law and respect for human rights in Turkey since December 2013 by the Rt. Hon. the Lord Woolf C.H. Professor Sir Jeffrey Jowell KCMG QC the Rt. Hon. Sir Edward Garnier QC MP Sarah Palin, July 2015 ([http://www.onebrickcourt.com/files/report\\_combined\\_2\\_60576.pdf](http://www.onebrickcourt.com/files/report_combined_2_60576.pdf))

*prima facie* incompatible with the requirements of impartiality if the same judge is involved in two different stages of a trial process. In *Warsicka v Poland* (App. No. 2065/03) the ECtHR commented at para. 40: “[T]he Court is of the view that the requirements of a fair hearing as guaranteed by Article 6 § 1 of the Convention do not automatically prevent the same judge from successively performing different functions within the framework of the same civil case. In particular, it is not *prima facie* incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (Eur. Comm. HR, *R.M.B. v. the United Kingdom*, No. 37120/97, dec. 9 September 1998). The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case.”

55. In *Hauschildt v Denmark*<sup>27</sup> the Court stated in para. 49: “*In the instant case the fear of lack of impartiality was based on the fact that the City Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case on appeal had already had to deal with the case at an earlier stage of the proceedings and had given various decisions with regard to the applicant at the pre-trial stage (see paragraphs 20-22 and 26 above). This kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.*”

56. Where the involvement of the same judge at pre-trial stage of criminal proceedings could raise questions about the fairness of the ultimate trial, this could be, and has been in other countries, overcome by simply assigning a different judge to the trial where appropriate.

57. In its Opinion on the regulatory concept of the Constitution of the Republic of Hungary the Venice Commission stated: “*Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. [...] The answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future [...] society [concerned].*”<sup>28</sup> As a general principle, the creation of specialist courts seems unobjectionable; specialist courts are a common feature of European democracies in areas such as administrative law, immigration and asylum law, employment law and land law. Specialist courts offer potential benefits such as specialist expertise in niche areas, improving consistency of judgments and dealing more efficiently with litigation. However, the creation of specialist courts presents corresponding dangers that the courts become too institutionalised and therefore lack the necessary independence and impartiality required to fulfil human rights obligations.

58. The benefit of a broad outlook and experience is more nuanced and rounded decision making. Specialist courts, notably when they are single-judge courts that do not allow for exchange between the judges, risk a compartmentalisation of legal thinking and, particularly in the context of controversial areas of law that have the potential of deeply affecting the rights of individuals, may not foster an environment where human rights are protected and promoted at an adequate level. Rather, it seems beneficial that the judges be generalists and it is easy to see how an understanding of criminal litigation would give rise to better decision making at a pre-trial stage.

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<sup>27</sup> Application no. 10486/83, (1990) 12 EHRR 266

<sup>28</sup> CDL-INF(1996)002, p. 34.

59. The arguments for specialisation are notably weak when it comes to central matters of criminal jurisdiction. Measures against individuals suspected of having committed a crime are an important part of criminal procedure. In most countries, criminal judges take such decisions during the investigation phase and in Turkey, even after the establishment of the peace judgeships, criminal judges continue to do so during the prosecution phase. For this reason, all criminal judges must be fully competent to take decisions on such matters.

60. The creation of a specialist court to deal with pre-trial criminal matters does not appear to be a tradition of judicial systems in many European democracies. The Turkish authorities point to the French system as a reference for establishing the judgeships of peace.

61. In France, the judges of freedoms and detention decide as single judges on pre-trial detention (or its extension) and on applications for the release of the person (Article 137 Code of Criminal Procedure). The judges of freedoms and detention intervene before the case is referred to a court for trial. The judges of freedoms and detention also decide on house arrest with electronic surveillance measures in some cases. In other cases, the investigating judge in charge of the case is competent. They are also responsible for various searches, interception of communications, search or seizure in certain areas (taxation, public health, firearms, etc.) as well as entries in court files (rectification or erase). When individual liberty is at stake, the judges of freedoms and detention also intervene in areas other than criminal matters, notably the detention of foreigners and the assignment to psychiatric care without consent. They are assisted by a clerk. Appeals against the decisions of the judge of freedoms and detention are directed to the Investigation Division of the Court of Appeal.<sup>29</sup>

62. In the French system, the judges of freedom and detention act as a check on the investigative judges, who carry out functions which in Turkey are reserved to the prosecutors. In the French system, it makes sense to establish an external control of the most important decisions to be taken by the investigative judges. In Turkey, the system is completely different following the abrogation of the institution of the investigative judge and the French system is therefore not an appropriate reference. Crucially, in France there is an external appeals system to a higher court.

63. Notwithstanding the explanations given by the Turkish authorities, it is difficult, therefore, to understand why the creation of judgeships of peace in Turkey would have been a necessary or proportionate response to difficulties in having pre-trial matters determined effectively and in compliance with human rights standards,. The choice to split the competence on the same issue between criminal judgeships of peace and the trial court can hardly be considered suitable for achieving this goal. The factual and legal grounds for taking measures are basically similar at both stages and the requirements for judges dealing with them must also be more or less similar. It is difficult to argue that the specialisation of the judges is necessary at the investigation phase and not necessary at the trial phase.

64. Even if the argument of specialisation were accepted, it is hard to see why the specialisation of the peace judges in protective measures has not been followed through in practice. The peace judges have been assigned significant powers relevant to Internet communications. There is no correlation between the judicial expertise relevant to assessing whether certain materials should be removed from the Internet and the expertise relevant to assessing pre-trial matters in criminal trials. Indeed, the Venice Commission noted in its Opinion on Law no. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”) that the powers allocated to the judgeships of peace are quite distinct from decisions on pre-trial criminal matters.<sup>30</sup>

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<sup>29</sup> <http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/juge-des-libertes-et-de-la-detention-25302.html>.

<sup>30</sup> CDL-AD(2016)011, para 35.

65. This is even more important with respect to the huge workload of the peace judges related to simple traffic offences, which seem to bog down the peace judges, even if these are more simple matters than decisions on 'protective measures'. The Government Opinion insists that the previous system, the peace courts, was overloaded and could not properly deal with protective measures. If the establishment of peace judgeships was made in order to allow them to focus on a sufficient reasoning in human rights matters, why have they been burdened with traffic offences (but also blocking internet sites and prohibiting advocacy), which defeat the purpose of specialisation?

66. Finally, the Memorandum also points out that the criminal peace judgeships have been able to examine the investigation files comprehensively. The peace judges are in charge of 'protective measures' during the investigation phase. The trial courts are competent for the same measures during the prosecution phase, which starts with the acceptance of the indictment. As opposed to the parties, the peace judges are not informed when the investigation phase is over. From then on, the prosecutor simply does not direct his or her requests to the peace judges, but to the trial court. The Government Opinion points out that this happens rarely as in practice evidence has already been collected but the trial courts are also competent to terminate any measures imposed by the peace judges. For the investigation phase, this means that a peace judge does not follow a case; he or she only replies to specific requests of the prosecutor or the parties. The peace judge cannot act on his/her own motion and therefore does not supervise a criminal case providing *ad hoc* control only.

67. To sum up, specialisation seems to not be a convincing reason for establishing the peace judgeships and the goal to enable peace judges to devote sufficient time to the drafting of the reasoning of human rights sensitive matters was not implemented properly, with the peace judges getting bogged down with work not related to protective measures. This does not leave them sufficient time to provide sufficient individualised arguments, notably in cases of detention and when shutting down Internet sites. The peace judgeships cannot provide comprehensive control of the investigative phase as they only intervene *ad hoc* after application.

#### **D. Appeal procedures – oppositions**

68. According to Article 268 of the Criminal Procedure Code, the decisions of a criminal judgeship of peace can only be reviewed horizontally by means of 'opposition' to another judgeship of peace.

##### **1. Detention**

69. As concerns detention, Article 5.3 ECHR requires that everyone arrested or detained on reasonable suspicion of having committed an offence, or when this is necessary to prevent the person from committing an offence or fleeing after having done so, has to be brought promptly before a judge or another authorised officer authorised by law to exercise judicial power. This judicial control must be prompt in order to allow for a remedy against possible ill-treatment and to keep to a minimum any unjustified interference with individual liberty.<sup>31</sup> The "officer" referred to in Article 5.3 ECHR must offer guarantees befitting the "judicial" power conferred on him or her by law.<sup>32</sup> The person detained must be heard by the judge or legal officer before he or she takes the decision on detention.<sup>33</sup> It is essentially the object of Article 5.3 ECHR, which forms a

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<sup>31</sup> ECtHR, *De Jong, Baljet and Van den Brink v. the Netherlands*, nos. 8805/79, 8806/79, 9242/81 of 22.05.1984, para. 51; *Aquilina v. Malta* [GC], no. 25642/94 of 29.04.1999, paras. 48-49.

<sup>32</sup> ECtHR, *Schiesser v. Switzerland*, no. 7710/76 of 04.12.1979, para. 29.

<sup>33</sup> ECtHR, *Schiesser v. Switzerland*, no. 7710/76 of 04.12.1979, para. 31; *De Jong, Baljet and Van den Brink v. the Netherlands*, nos. 8805/79, 8806/79, 9242/81 of 22.05.1984, para. 51; *Nikolova v. Bulgaria* [GC], para. 49; *Aquilina v. Malta* [GC], no. 31195/96 of 25.03.1999, para. 50.

whole with Article 5.1.c, to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5.3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons.<sup>34</sup> In other words, Article 5.3 requires the judicial officer to consider the merits of the detention.

70. Under Article 5.4 ECHR a detained person has the right to request a court to control the lawfulness of his or her detention. This provides the right to actively seek judicial review of detention.<sup>35</sup> By virtue of Article 5.4, a detainee is entitled to apply to a “court” having jurisdiction to decide “speedily” whether or not his deprivation of liberty has become “unlawful” in the light of new factors which have emerged subsequently to the initial decision depriving a person of his liberty.<sup>36</sup> The fact that applications for release might be repeatedly determined by the same magistrate is not incompatible with the Convention. According to Article 5.4 ECHR there is no obligation for a State to establish a second degree of jurisdiction for the examination of the lawfulness of detention but a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance.<sup>37</sup>

71. Criminal peace judgeships are judicial bodies, which must comply with the requirements of Article 5.3 and 5.4 ECHR. A problem arises however in connection with the horizontal appeal against their decision. Where the court deciding the appeal is “higher” it has the authority and experience to reverse the first decision. “Higher” does not necessarily mean “*of a higher degree*” but it means “*of a higher authority*”: it may be a higher or specialised formation of a court, for example, but it cannot be a single judge of the same level. In the Venice Commission’s view, the Turkish system of “opposition” to a single peace judge of the same level does not offer sufficient guarantees that the appeal will be impartially examined. Criminal peace judges are colleagues of equivalent experience and qualifications, sharing premises and examining each other’s appeals; they form a closed circuit. It is not unreasonable to imagine that they trust each other and to expect that they tend to respect each other’s decisions. They are indeed likely to naturally defend the reputation of competence of their own colleagues, their own and of their institution as a whole. This system does not offer sufficient prospects of an impartial, meaningful examination of the appeal against applications for review of the legality of detention. The Government Opinion insists that there is no such danger.

72. It is not a general human right to litigate to an appellate court. However, the lack of an appeal to a superior court of general jurisdiction exacerbates the difficulties that were identified above regarding the dangers of a specialist court; it also removes the common safety-net of an appeal to an independent superior court that is present in most European systems. The Venice Commission emphasised in its Opinion on Articles 216, 299, 301 and 314 of the Criminal Code of Turkey<sup>38</sup> that the highest courts’ guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. It is evident that an appeal procedure before a superior court would provide for better guarantees to the interested parties compared to an appeal procedure before a same level judgeship.

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<sup>34</sup> See the *De Jong, Baljet and Van den Brink v. the Netherlands*, nos. 8805/79, 8806/79, 9242/81 of 22.05.1984, paras. 44, 47 and 51.

<sup>35</sup> ECtHR, *Mooren v. Germany* [GC], no. 11364/03 of 09.07.2009, para. 106; *Rakevich v. Russia*, 58973/00 of 58973/00, para. 43

<sup>36</sup> ECtHR, *Abdulkhanov v. Russia*, no. 22782/06 of 03.10.2013, para. 208; *Azimov v. Russia*, no. 67474/011 of 18.04.2013, paras. 151-52.

<sup>37</sup> ECtHR, *Kučera v. Slovakia*, no. 48666/99 of 17.07.2007, para. 107; *Navarra v. France*, no. 48666/99 of 17.07.2007, para. 28; *Toth v. Austria*, no. 48666/99 of 17.07.2007, para. 84.

<sup>38</sup> CDL-AD(2016)002, para. 31.

73. The Government Opinion insists that as the peace judgeships are specialised and that they only exist at a single level, it would not be possible to envisage a vertical objection system. This argument refers to the existing system and seems to rule out hierarchy in a specialised system. The Government's Memorandum sets out that one of the goals of the establishment of the peace judgeships was to "*to standardize the decision-making concerning the protective measures across the country.*" It is hard to see how the system of horizontal appeals can contribute to the objective of standardisation. On the contrary, the horizontal appeals appear to be problematic from the viewpoint of the unification of case-law.

74. The delegation of the Commission was informed that the peace judges undergo regular training for that purpose. However, the absence of a judicial hierarchy will probably lead to divergent interpretations of the legal norms and divergent assessment of the facts which will raise an issue under Article 5 ECHR. In the opinion of the European Court of Human Rights divergent interpretation of legal norms and assessment of fact at some point are inevitable. But, the state bears responsibility to organise its judicial system in such a way as to ensure uniformity of interpretation and application of the legislation. The system of horizontal appeals within many separate regions cannot achieve that.

75. According to Article 6.1.1 of Emergency Decree Law no. 667<sup>39</sup> "*[r]eview of detention, objection to detention and requests for release may be concluded over the case file.*" This means that there is no hearing required, which is obviously problematic from the viewpoint of Article 5 of ECHR; indeed, according to the case-law, in the case of a person whose detention falls within the ambit of Article 5.1.c ECHR, a hearing is required.<sup>40</sup> The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty.<sup>41</sup> However, as of 21 July 2016 the Secretary General of the Council of Europe was informed by the Turkish authorities in accordance with Article 15 ECHR that the measures, *inter alia*, contained in Emergency Decree Law no. 667 may involve derogation from the obligations under the ECHR. It will belong to the European Court of Human Rights to assess whether the removal of the right to be heard in the context of applications for review of the legality of detention may be justified in the light of the state of emergency.

76. The length of pre-trial detention remains a serious problem in Turkey.<sup>42</sup> The Ministry of Justice provided statistics showing that the rate of detained persons as compared to the number of convicted persons was reduced from 50 per cent to 14 per cent between 2007 and 2014, before the establishment of the peace judges. However, this rate remained stable until the coup.<sup>43</sup> These statistics thus show that the establishment of peace judgeships and the system of horizontal appeals between peace judgeships of the same level has not succeeded in reducing the problem of the length of pre-trial detention.<sup>44</sup>

77. Against the decisions of the peace judgeships, there is, in principle, an appeal to the Constitutional Court. The question is whether this appeal is sufficient under Article 5 ECHR

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<sup>39</sup> See CDL-REF(2016)061.

<sup>40</sup> ECtHR, *Nikolova v. Bulgaria* [GC], no. 31195/96 of 25.03.1999, para. 58.

<sup>41</sup> ECtHR, *Kampanis v. Greece*, no. 17977/91 of 13.07.1995, para. 47.

<sup>42</sup> Mr Luca Perilli, Report "Criminal Justice", [http://www.avrupa.info.tr/sites/default/files/2016-11/Criminal\\_Justice\\_report\\_final\\_January\\_2015.pdf](http://www.avrupa.info.tr/sites/default/files/2016-11/Criminal_Justice_report_final_January_2015.pdf), p. 34 seq.

<sup>43</sup> CDL-REF(2017)004, Annex XII.

<sup>44</sup> The same statistics also show that the total number of detained persons remained mostly stable at about 25.000 persons, between 2000 and 2016. There was an important increase of the number of detained persons (up to 40.000 persons) in 2008 and 2009. What the statistics also show is that between 2000 and 2016, the number of convicted persons has risen dramatically, from some 40.000 persons to 190.000 per year. The Government Opinion explains this increase with increased population, acts of terrorism, variety of crime, increase in cyber-crimes and amnesty laws (Law No. 4616).

(see on the requirements for a review of detention above). In judgment *Sabeur Ben Ali v. Malta* the Court recalled that “... Article 5 § 4 of the Convention refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled (see the *Sakik and Others v. Turkey* judgment of 26 November 1997, Reports 1997-VII, p. 2625, § 53). Moreover, the Court recalls that the aim of Article 5 § 4 is to ensure a “speedy” review of the lawfulness of detention. The Court has considered, for example, that a period of approximately eight weeks from the lodging of an application to judgment appears *prima facie* difficult to reconcile with the notion of “speedily” (the *E v. Norway* judgment of 29 August 1990, Series A no. 181 A, p. 27, § 64). (...) 40. The Court has also examined the cases invoked by the parties in which constitutional applications were lodged on the basis of Article 5 § 4 of the Convention, which is part of domestic law. The Court notes that, according to the Government’s own description, lodging a constitutional application involves a referral to the Civil Court and the possibility of an appeal to the Constitutional Court. This is a cumbersome procedure especially since practice shows that appeals to the Constitutional Court are lodged as a matter of course. Moreover, recent practice shows that the relevant proceedings are invariably longer than what would qualify as “speedy” for Article 5 § 4 purposes (see § 24 above). It follows that lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicant’s detention.” The requirement of “speediness”<sup>45</sup> under Article 5 ECHR is very strict and, therefore, an appeal to the Constitutional Court in ordinary times cannot be considered a “speedy” review under Article 5 ECHR. Currently, this is even more true as the Constitutional Court has 80.000 cases pending since the military coup.<sup>46</sup>

78. To sum up, detentions ordered by peace judgeships are problematic due to the system of horizontal appeals. Furthermore, for persons who remain under detention in the investigation phase and who have been detained by peace judgeships on the basis of insufficiently reasoned decisions (see also below, section IV.E) Prosecution should request their release as soon as possible.

## 2. Blocking of Internet sites

79. Already in its Opinion on Law no. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), the Venice Commission examined the powers of peace judgeships to block Internet sites: “According to Article 8(2), an objection to an access-blocking decision taken as a precautionary measure (i.e. taken by a judge or public prosecutor, as opposed to administrative measure taken by the Presidency (art. 8(4)) may be made under the Code of Criminal Procedure. According to Article 268 (3)a of the CCP (amended on 18 June 2014) the appeal against a decision given by a peace judgeship can be made, in places where there are several peace judgeships, to the peace judgeship bearing the next number. If there is only one peace judgeship in a given place, the appeal should then be made to the peace judgeship which is within the competence zone of the closest assize criminal court. The decision given by a peace judgeship in appeal procedure is final. Thus, as in other access blocking procedures under Law No. 5651 (i.e. procedures under Articles 8A, 9 and 9A – see below), the measure of access blocking taken by a peace judgeship cannot be appealed against before the Court of Cassation, but only before another peace judgeship and the only appeal mechanism is the framework of an individual application to the Constitutional Court.” (para 50).

80. The Commission criticised that the precautionary measure taken by the peace judge in the investigative phase could not be lifted by the trial court – that it was therefore not a precautionary measure, but a final decision: “paragraph 8 of Article 8, which states that the decision to block access shall be invalidated ‘if the prosecution results in an acquittal’ appears

<sup>45</sup> ECtHR, *Sabeur Ben Ali v. Malta*, no. 35892/97 of 29/06/2000.

<sup>46</sup> <http://www.haberler.com/15-temmuz-sonrasi-aym-ye-60-bin-basvuru-oldu-9077770-haberi/> (in Turkish).



*to exclude any possibility for the trial court judge to review the necessity of the blocking measure and to lift it before the end and during the criminal trial. It is not acceptable that the decision taken by a peace judgeship as a "precautionary measure" should be binding on the trial court judge in the substantive criminal proceedings.*<sup>47</sup>

81. It is important to underline that while some access-blocking procedures in Law no. 5651 are "precautionary measures" or an "interlocutory measures", taken within the framework of criminal proceedings<sup>48</sup> others "constitute fully-fledged, autonomous procedures through which substantive decisions on 'access-blocking' are taken".<sup>49</sup>

82. The Commission re-states its concerns about the lack of appellate procedures to a superior court where the relevant measures go beyond pre-trial or interim measures and amount to final decisions with no review by a trial court.

### **3. Other measures**

83. Peace judgeships decide not only on detention or on the blocking of the Internet, but they also have other competences; for example, upon a request by the public prosecutor, a peace judge may restrict the rights of a defence lawyer to examine the file and take copies of the documents from the file, if it would endanger the purpose of the investigation. A peace judge may also appoint trustees as part of the criminal procedure on charges of financing terrorism, which results in the seizure of private property.

84. In such cases, the fact that appeals move horizontally is also problematic in Article 6 ECHR terms. As was noted above, while there is no obligation to provide for an appeal where one is provided, it must comply with the requirements of Article 6 ECHR. The arguments, developed above, about the insufficient nature of the opposition in detention cases also apply in this respect.

85. This is of considerable significance in the many criminal investigations arising after the coup. Without an appeal to a more generalist court with a wider perspective than the adjacent peace judgeship, this jurisdiction is capable of becoming an instrument of oppression.

### **4. Conclusion on the appeal procedures**

86. The system of horizontal appeals against decisions by the criminal peace judges does not offer sufficient prospects of an impartial, meaningful examination of the appeals.

87. In addition, the fact that there is no outside appeal concentrates important judicial powers in the hands of relatively few peace judges, notably in big cities. This shields them from the rest of the judiciary and makes their selection by the First Chamber of the HSYK particularly problematic. This Chamber was negatively affected by the unconstitutional 2014 reform (see above). If the current constitutional reform were successful, this concern would be even greater.

88. To sum up, if the criminal peace judgeships are maintained, the system of horizontal appeals among a small number of peace judges within each region or courthouse is very problematic and cannot be justified with the need for specialisation. The Venice Commission is of the view and strongly recommends that the power to decide appeals against decisions by the criminal peace judges be given to either a different court, a criminal court of first instance for example, or to a higher court (the courts of appeal are being established in Turkey).

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<sup>47</sup> CDL-AD(2016)011, para. 52.

<sup>48</sup> Article 8.

<sup>49</sup> Articles 8A, 9 and 9A.

### E. Motivation and reasons in judgments of judgeships of peace decisions

89. The reasons for a decision on detention must be adequately communicated to the party concerned. According to the European Court of Human Rights' judgment in *A. and others v. United Kingdom* of 19 February 2009: "*in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him (see Becciev v. Moldova, no. 9190/03, §§ 68-72, 4 October 2005). This may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention (ibid., §§ 72-76, and Turcan v. Moldova, no. 39835/05, §§ 67-70, 23 October 2007). It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him (see Włoch, cited above, § 127; Nikolova, cited above, § 58; Lamy v. Belgium, 30 March 1989, § 29, Series A no. 151; and Fodale v. Italy, no. 70148/01, ECHR 2006-VII).*"<sup>50</sup>

90. In remand cases, the arguments for and against release must not be "general and abstract",<sup>51</sup> but refer specifically to the facts of the case and the detainee.<sup>52</sup> Reasons are required in order to allow for public scrutiny of the decision.<sup>53</sup> Four criteria can justify detention:<sup>54</sup> (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, or (c) commit further offences, or (d) cause public disorder. The decision on detention should set out how these criteria apply in the concrete case.

91. The requirement for a reasoned decision is implicit in the requirement for a fair hearing. In *Van de Hurk v The Netherlands*<sup>55</sup> it was noted that Article 6.1 ECHR does not require a detailed answer to every argument, but it does oblige courts to give reasons for their decisions. The requirement for a fair trial requires a decision which answers the fundamental and material questions that were raised. A failure to give such a reasoned decision is a breach of Article 6 ECHR.

92. Already in its Opinion on Law no. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") the Venice Commission, had stated that "*[s]ome decisions of the peace judgeships which the Venice Commission has been able to see during the meetings in Ankara, do not provide for any motivation and reasons to justify the interference with the right to freedom of expression. The Venice Commission does not have at its disposal sufficient examples of judgeship decisions. However, it reiterates the crucial importance of the statement of reasons in a court decision in order not only to respect the principle of proportionality under Article 10 ECHR, but also to satisfy the requirements of fair trial under Article 6 ECHR.*"<sup>56</sup>

<sup>50</sup> ECtHR, *A and others v. UK*, no. 3455/05 of 19.02.2009, para. 204.

<sup>51</sup> ECtHR, *Boicenco v. Moldova*, no. 41088/05 of 11.07.2006, para. 142; *Khudoyorov v. Russia*, no. 6847/02 of 08.11.2005, para. 173.

<sup>52</sup> ECtHR, *Aleksanyan v. Russia*, no. 46468/06 of 22.12.2008, para. 179.

<sup>53</sup> ECtHR, *Tase v. Romania*, no. 29761/02 of 10.06.2008, para. 41

<sup>54</sup> ECtHR, *Tiron v. Romania*, no. 17689/03 of 07.04.2009, para. 37; *Smirnova v. Russia*, nos. 46133/99, 48183/99 of 24.07.2003, para. 59; *Piruzyan v. Armenia*, no. 33376/07 of 26.02.2012, para. 94; see also [http://www.echr.coe.int/documents/guide\\_art\\_5\\_eng.pdf](http://www.echr.coe.int/documents/guide_art_5_eng.pdf).

<sup>55</sup> ECtHR, *Van de Hurk v The Netherlands*, no. 16034/90 of 19/04/1994.

<sup>56</sup> CDL-AD(2016)011, para. 38.

93. In other appeal cases reasoning is absent<sup>57</sup> or not sufficient to justify serious interferences with human rights.<sup>58</sup> Often standard templates are used, which simply state that the justification of the first decision was not contrary to the law.

94. The Government Opinion rightly points out that cases of insufficient reasoning can arise in any court system. Therefore, the peace judgeships should not be criticised in general for insufficient reasoning. However, the way of establishment of the peace judgeships and the system of functioning examined above are conducive to insufficient motivation of their decisions. Individual examples are thus very likely to be indicative of a wider problem. The fact that the decisions of peace judgeships can be appealed to the Constitutional Court does not remedy this structural problem.

95. To sum up, there are numerous instances where peace judges did not – and probably were not even able to due to their workload – sufficiently reason decisions which have a drastic impact on human rights of individuals.

#### **F. Specific problems of the functioning of judgeships of peace during the state of emergency**

96. Following the failed military coup, peace judges decided on the detention of thousands of alleged Gülenists. Emergency Decree Law no. 667 allowed detention without hearing, on the basis of the case-file.<sup>59</sup> The Government Opinion insists that these powers and the power to restrict the rights of a defence lawyer to examine the case file are appropriate and proportionate measures, necessary for a democratic society during a state of emergency. The government Opinion also points out that in practice the requests for detention are always granted only following a hearing. Nonetheless, the Venice Commission is of the opinion that in view of the high number of detentions, the concerns expressed above have even more weight.

97. The problematic power under Article 6.1.g of the Emergency Decree Law no. 667 to remove the right for a lawyer to exercise advocacy becomes even more problematic in the practice of the peace judgeships. According to this provision: *“Within the scope of the investigations performed, the defence counsel selected under Article 149 of the Criminal Procedure Code no. 5271 of 4 December 2004 or assigned under Article 150 thereof may be banned from taking on his/her duty if an investigation or a prosecution is being carried out in respect of him/her due to the offences enumerated in this Article. The Office of Magistrates’ Judge shall render a decision on the public prosecutor’s request for a ban without any delay. Decision on banning shall be immediately served on the suspect and the relevant Bar Presidency with a view to assigning a new counsel.”* The term Office of Magistrates’ Judge is an inexact translation of peace judgeships.

98. For instance, in the case 2016/5120 M., the Istanbul Criminal Peace Judgeship No. 2 decided that Mr Ömer Kavili no longer has the right to exercise advocacy. This decision is astonishing. It first explains that Mr Kavili was the advocate for five persons accused of the crime of *“being member of FETÖ/PYD armed terrorist organisation”*. The fact which justifies the prohibition to act as attorney at law is that *“there are investigation files numbered 2014/104753 and 2016/7933 within our Chief Public Prosecutor’s Office”*. In the decision it is not even

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<sup>57</sup> See also Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey of 15 February 2017 (CommDH(2017)5), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961658&SecMode=1&DocId=2397056&Usage=2> (paragraphs 19, 66, 69-71, 85-89, 102, 106-107 and 129 refer to the role of peace judges).

<sup>58</sup> See below for instance as concerns the power to prohibit the exercise of advocacy under the emergency regime.

<sup>59</sup> CDL-AD(2016)037, para. 151.

explicitly stated against whom these files are directed (the Government Opinion explains that they are directed against Mr Kavili) and there is no indication relating to the content of the files. The very fact that according to the prosecutor a file exists is used to justify the decision on the merits. In addition, instead of banning the advocate from acting as a defence counsel in a specific case as foreseen in Article 6.1.g, the peace judge imposed a general and permanent ban on exercising advocacy. There is not a single argument of reasoning to justify such a drastic measure.

99. The Government Opinion insists that *“Offenses against the security of the State, the Constitutional order and the functioning of this order listed in the Volume Two, Chapter Four of the Turkish Criminal Code, are also among the offences that constitute impediment to attorneyship pursuant to Article 5 titled ‘impediments to admission into attorneyship’ of the Attorneyship Law”* and *“This authority is only concerned with criminal courts, and there is no restriction on lawyers to exercise their profession in civil courts. The right to exercise advocacy of a lawyer who has been investigated for the mentioned offenses shall not be automatically banned and shall be decided upon, where necessary, after the separate evidence assessment has been made for each file.”* It seems that in practice, at least in the case at hand, the peace judgeships do not apply such limits.

100. Among the tens of thousands cases of detention decided by the criminal peace judgeships following the coup, the numerous detentions of judges are an important issue because the peace judgeships do not even have jurisdiction to detain other judges. Depending on their rank, judges can only be detained by the ordinary courts.<sup>60</sup> However, following the failed coup, many judges were first dismissed and then detained by decision of the peace judges as ordinary citizens. The Government Opinion points out that judges can be detained for private offences (not related to their judicial duties) when they are caught “red-handed”. It is doubtful whether the detention of judges who did not actively participate in the military coup can be considered as caught red-handed. This circumvents the specific guarantees for judges and amounts to an abuse of the procedures.

## **V. Conclusion**

101. Peace judges are formally lawful judges and are appointed by a judicial council. However, upon close examination their jurisdiction and their practice give rise to numerous concerns.

102. The official purpose of establishing peace judgeships was to enable peace judges to devote sufficient time to the drafting of the reasoning of human rights sensitive matters. However, this goal was not implemented properly and the peace judges are bogged down with work not related to ‘protective measures’.

103. Another official purpose of establishing peace judgeships was to avoid that the same judge decide first on protective measures, then on the merits. According to this reason, it is difficult to understand why the criminal judgeships of peace are necessary at the investigation phase, while at the prosecution (trial) phase the same judge can take protective measures and then decide on the merits without being biased.

104. The system of horizontal appeals among a small number of peace judges within each region or courthouse is problematic, prevents the unification of case-law, establishes a closed system and cannot be justified with the need for specialisation.

105. There are numerous instances where peace judges did not sufficiently reason decisions which have a drastic impact on human rights of individuals. Their heavy workload does not

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<sup>60</sup> Articles 85, 90 and 91 of Law no. 2802 of 24/02/1983 on Judges and Prosecutors.

leave them sufficient time to provide sufficiently individualised reasoning, notably in cases of detention and when shutting down Internet sites.

106. Therefore, the Venice Commission recommends:

1. The competence of the criminal judgeships of peace on protective measures during the investigation phase ('protective measures') should be removed. Ordinary judges should be entrusted with the protective measures on personal liberties during the investigation and prosecutorial phases.
2. If the system of peace judgeships were retained, in order to live up to the goal of specialisation of the peace judges, they should be relieved of all duties that do not relate to 'protective measures', notably the blocking of Internet sites and traffic offenses which take up a considerable amount of their time. Consequently, they should no longer have any jurisdiction on the merits and real appeals should be introduced in these matters, including the blocking of Internet sites.
3. The horizontal system of appeals between the peace judges should be replaced by a vertical system of appeals to either the criminal courts of first instance or possibly to the courts of appeal.
4. For persons who have been detained on the basis of insufficiently reasoned decisions by peace judges prosecution should request their release as soon as possible, unless a trial court has taken over responsibility for their detention.

107. The Venice Commission remains at the disposal of the Turkish authorities and the Parliamentary Assembly for further assistance in this matter.