



Submission to the Special Rapporteur on the independence of judges and lawyers

*Call for input to the Special Rapporteur's thematic report on
"The independence of judicial systems in the face of
contemporary challenges to democracy"*

**International Association for Human Rights Advocacy in
Geneva (IAHRAG)**

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1. Introduction

1. IAHRAG is a Swiss-based NGO created in 2017. The purpose of the organization is to assist, support, guide, and sustain victims of human rights violations. One of its main sources of concern, as well as its activities, are the violations of human rights in Türkiye. As such, IAHRAG supports a large range of persons including former judges or lawyers in Türkiye, victims of dismissal or judiciary harassment.

2. General context

a. Judges and prosecutors

2. It is now notorious that in the aftermath of July 15, 2016 in Türkiye, 4.362 judges and prosecutors were dismissed, including members of the Court of Cassation, Council of State and Constitutional Court. Criminal investigations were opened against 4.370 judges and prosecutors, 1.311 of them were taken into custody and 2.431 were arrested for their links with the Hizmet /Gülen Movement (see [AL TUR 10/2019](#), [AL TUR 2/2019](#), [OL TUR 5/2017](#)),

3. With more than 1 third of the judiciary dismissed and detained overnight, the Turkish executive achieved dismantlement of the rule of law and transformed the judiciary into a political weapon to silence all voices. Let alone concerns over the objectivity and quality of new judges and prosecutors recruited in a hast, this massive purge had a chilling effect on the judiciary system, remaining judges and prosecutors practicing at best self-censorship in a general climate of fear.

b. Lawyers

4. As mentioned in the former Special Rapporteur Diego García-Sayán' report, ([A/HRC/50/36](#), para. 42) lawyers do not escape to the daily abuses of the counter-terrorism legal frameworks from the Prosecution services in Türkiye (see also [OL TUR 13/2020](#)). Between 2016 and 2022, more than 1.600 lawyers were prosecuted and 615 were placed in pretrial detention. A total of 474 lawyers have been sentenced to 2.966 years of imprisonment on the grounds of membership in a “terrorist organization,” in reality for exercising their profession and defending their clients (see [AL TUR 18/2020](#), on the detention and prosecution of 48 lawyers, 7 trainees lawyers, 4 dismissed judges and a law graduate for alleged links with the Hizmet/Gülen Movement). Not only do such measures affect the liberty and security of lawyers, but they also have long-lasting adverse consequences on the rule of law and the related rights of everyone to legal defense. They also instigate a climate of impunity enhancing attacks on lawyers from security forces (see situation of Aytekin Aktaş, [AL TUR 5/2023](#)).

5. Efforts to silence lawyers also take more subtle forms as did the 2020 Law on lawyers No. 7249 introducing the possibility to create competing bar associations in large cities, resulting in politicization of the bar associations and in weakening the unified voices of lawyers defending human rights and criticizing the executive power (see Joint Opinion of the Venice Commission, [n° 991/2020](#), CDL-AD(2020)029).

c. Global concerns regarding the independence of the judiciary, separation of power and weaponization of the judiciary

6. The situation of the judiciary in Türkiye would require extensive development to fully depict the destruction of its independence consciously operated since 2013 (see [AL TUR 1/2014](#)), with 2016 as a point of culmination. The reform of the former High Council of Judges and Prosecutors has been particularly pivotal in doing so. Introduced with the 2017 Constitutional reform (Act No. 6771), the new Council of Judges and Prosecutors is now reduced to 13 members (22 previously) and fully in charge of general responsibilities on the organization and functioning of the judiciary, including appointments, transfers, promotions, sanctions, and dismissals. While no member of the Council is actually appointed by judges or prosecutors, the President of the Republic appoints 4 members from ordinary judges and prosecutors and the National Assembly elects 7 members, among Court of Cassation (3), Council of State (1) and legal academics or lawyers (3). The Minister of Justice, appointed by the President of the Republic, and his/her Undersecretary constitute the 2 remaining members, with the Minister presiding the Council. Hence, with almost half of the Council appointed by the President of the Republic (6), with the Ministry of Justice presiding the Council, the careers of judges and prosecutors across the country is *de facto* under the control of the executive power (see [OL TUR 15/2020](#)).

7. The instrumentalization of the new Council of Judges and Prosecutors was particularly obvious in the case of the lawsuits regarding Türkiye's withdrawal from the Istanbul Convention by a presidential decision (see [AL TUR/2022](#)).

8. During the past seven years, in view of the change in concentration of political and constitutional power, judges across the country, including at the highest level, had to approach their rulings with one criterion in mind: not infuriating or provoking the President and majority party. The Turkish executive and legislature have indeed repeatedly criticized judges who dared not following the executive narrative line, publicly expressing their disapproval of ongoing judicial cases, and undermining the principle of innocence until proven guilty. Such comments, in a context of recent massive purges, detentions and condemnations, arbitrary removal of judges and prosecutors, not only cast doubt on the respect for due process but also risk prejudicing the outcome of the cases in question.

9. Turkish courts are no longer in a position to efficiently protect the fundamental rights and freedoms, and domestic remedies are more and more perceived as ineffective: citizens are left at the disposal of the arbitrariness exercise of power from executive authorities.

3. Specific concern brought to the knowledge of the Special Rapporteur for the purpose of this call for input: the role of the Turkish Constitutional Court in the defense of democratic standards and imminent threats

10. For the purpose of this call for inputs, IAHRAG respectfully brings to your knowledge the case of Mr. Şerafettin Can Atalay, lawyer sentenced to 18 years in prison, revealing the crucial importance of the Constitutional Court to protect rule of law, human rights and democratic standards, and the recent attacks to destroy it.

a. The role of the Turkish Constitutional Court to defend democratic standards in a context of weaponization of the judiciary by the executive

11. In the context of constant attacks against the judiciary in Türkiye, the Constitutional Court appeared for a long time as the ultimate safeguard to protect and defend human rights and democratic standards. One of the highlights of the Constitutional Court was the 2010 reform introducing the procedure of individual complaints, which can be lodged by any citizen claiming to suffer violation by State authorities of any of his / her fundamental rights and freedoms protected by the Constitution and the European Convention of Human Rights and its protocols.

12. Thought as a mechanism to provide remedy and redress for victims and human rights violations, the individual application system entered into force in September 2012 and was initially expected to induce a considerable decrease of Turkish cases before the European Court of Human Rights (for your information, as of November 30, 2023, Türkiye has the higher number of pending cases (23.750) before the European Court, constituting 33.2% of all pending cases).

13. Initially, the Court had been praised for rendering judgements promoting the rule of law, fundamental rights and freedoms and democracy in Türkiye.

b. Post 2016 first signs of erosion of the Turkish Constitutional Court's ability to defend democratic standards: the selective approach of the Court

14. It is worth noting that on August 4, 2016, the Constitutional Court dismissed two of its members, Judges Alparslan Altan and Erdal Tercan, after they had been taken into custody on July 16, 2016, for their links with the Hizmet/Gülen Movement. On the basis of Emergency Decree No. 667, the Plenary of the Court decided:

“establishing the evidentiary link between the members and the structures, organizations or groups [...] is not sought in the Article [of Decree Law no. 667]. ‘Assessment’ of such link by the Plenary Session of the Constitutional Court is deemed sufficient. The assessment in question means a ‘conviction’ formed by the absolute majority of the Plenary Session. Undoubtedly, this conviction is solely an assessment on whether the person concerned is suitable to remain in the profession irrespective of whether there is criminal liability. Article 3 of the Decree Law prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction.”

15. In a context of wild witch hunt against Hizmet/Gülen Movement sympathizers, the Court under pressure, departing from its case law, refused to review the constitutionality of the emergency decrees issued by the executive, *de facto* enhancing the authoritarian drift that has been going on ever since.

16. Since July 2016, the Constitutional Court had also taken a selective approach, contributing to its loss of credibility. It is particularly notable that in the *Kavala* case for instance, while the European Court found multiple violations of the Convention, the Constitutional Court found none. Similarly, it is widely recognized that the Constitutional Court, for individual claims of arbitrary detentions from Hizmet/Gülen Movement sympathizers, cannot provide any remedy (only between January 2023 and December 2023, 9.696 persons were arrested and 1.689 detained for alleged links with the Movement). The Human Rights Committee found in *Mukkader Alakus v. Türkiye*, an Hizmet/Gülen Movement sympathizer, that:

“in the circumstances of the author’s case, the State party has not shown that an individual complaint to challenge the author’s detention before the Constitutional Court would have been effective, in practice” (CCPR 3736/2020, para. 9.5).

17. However, in spite of solid pressures, the Constitutional Court managed to render judgements enhancing the rule of law and democratic standards during the period (see Academics for peace, [2018/17635](#)), resulting in serious backlashes against the Judges supporting the case and public dissenting opinions of “loyal” judges to the Executive.

c. 2023, the Can Atalay case: refusal to implement the Constitutional Court’s decisions and criminal complaint against Constitutional Court’ judges

18. Şerafettin Can Atalay, lawyer, was sentenced to 18 years in prison on April 25, 2022 in the Gezi Park trial, where he was charged with “attempting to overthrow the Government of the Republic of Turkey”. His sentence was upheld by the Court of Cassation on September 28, 2023 and he is currently being held in Silivri Prison. In the 2023 general elections, he was elected as a Parliamentarian for Hatay from the Workers' Party of Turkey (Türkiye İsci Partisi).

19. On October 25, 2023, the Constitutional Court ruled that Atalay’s rights to “be elected” and to “personal liberty and security” had been violated and ordered the file to be sent to the Istanbul 13th High Criminal Court, the court of first instance, for necessary action to be taken (majority of 9 votes to 5).

20. The Istanbul 13th High Criminal Court forwarded the Constitutional Court’s decision to the Court of Cassation for consideration. On November 8, 2023, the Court of Cassation decided to not comply with the Constitutional Court's decision. It also filed a criminal complaint to the Chief Public Prosecutor's Office of the Court of Cassation against the 9 members of the Constitutional Court who voted in favor of violation on the grounds that they violated the Constitution and forwarded its decision to the Presidency of the Grand National Assembly of Türkiye to initiate the procedures for Atalay’s dismissal from the Parliament.

21. On December 21, 2023, the Constitutional Court issued a second violation of rights verdict on Can Atalay case, finding that his “right to individual application”, “right to be elected” and “right to personal liberty and security” had been violated. On December 27, 2023, Istanbul 13th High Criminal Court sent the file back to the Court of Cassation. On January 3, 2024, the Court of Cassation decided not to comply with the Constitutional Court’s decision.

22. On January 30, 2024, the Turkish Parliament stripped Can Atalay, voting to revoke his parliamentary status, as a ultimate act of defiance against the Constitutional Court’ authority.

d. “A coup attempt against the constitutional order”: the total denial of the Constitutional Court authority

23. Any observer of the life of the judiciary in Türkiye knows that it is not the first time that the Constitutional Court and the Court of Cassation enter into a fight regarding the implementation of decisions.

24. What distinguishes this crisis from others is the criminal complaint against constitutional judges first, but also the explicit negation of the Constitutional Court’s authority. The Court of Cassation indeed stated that the Constitutional Court “*exercised unconstitutional authority*”,

that it “assumed an unprecedented role as a “super-appeal authority” and that it should function “solely as a filtering body within its jurisdiction, serving as a domestic remedy that must be exhausted before individual applications to the ECtHR, without intervening in matters falling under the purview of other high courts”.

e. Explicit support to the Court of Cassation expressed by President Erdoğan and call for constitutional change to curtail the power of the Constitutional Court

25. President Erdoğan, commenting on the judicial crisis, qualified the Constitutional Court’s decision of “erroneous” and lamented that it was not the first mistake of the Court. He expressed his preference for a new constitution. The media reported the President’s will to limit the power of the Constitutional Court regarding individual applications, limiting it to awarding compensation.

26. The greatest added value of the individual application process resides in the fact that the Constitutional Court has the power to ask for the reopening of proceedings with a view to put an end to human rights violations, including arbitrary detentions.

27. The open and clear refusal of the Court of Cassation to implement the Constitutional Court’ decision, supported by a criminal complaint and endorsed by President Erdoğan, reveals a crisis without precedent that might lead to the eradication of the last judiciary mechanism that could serve as a check and balance power to the executive.

4. Recommendations

28. IAHRAG hereby respectfully requests Ms. Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers, to consider:

- recalling the crucial importance of constitutional courts in putting into practice democracy, the rule of law and the protection of human rights, notably by preventing the arbitrariness of the authorities;
- recalling the crucial importance of individual access to constitutional courts to safeguard rule of law, democratic and human rights standards;
- recalling the crucial importance for constitutional courts endowed with the power to receiving individual complaints lodged against administrative, but also judicial acts, including from supreme courts, to be in a position to quash those individual acts, to order the reopening of proceedings and to award compensation;
- recalling the crucial importance to recognize the binding character of the constitutional courts’ decisions on all other state organs, including lower courts;
- lamenting the trends to curtail the powers of constitutional courts, including through political interference, open refusal of lower courts to implement constitutional courts’ decisions, and criminal proceedings against constitutional courts’ members for carrying their function;
- expressly mentioning Türkiye and the Can Atalay case as an illustration of these trends.