Third Party Intervention

In the Case of Mustafa Karadağ and others v. Türkiye (no. 55549/20)
by

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I. Introduction

1. İFÖD will address in its intervention in the case of *Mustafa Karadağ and others v. Türkiye* **(no. 55549/20)** the issue of the limits of freedom of expression of judges concerning matters of public interest.

2. It is understood from the Court's communication that the applicants, the members of the Judges' Union, were sanctioned of reprimand by the Council of Judges and Public Prosecutors, on account of a visit they allegedly made as representatives of their organization to the premises of the daily newspaper, Cumhuriyet. At the time of their visit, Cumhuriyet was the subject of strong reactions and threats, after the newspaper had reproduced certain cartoons that had previously been published in the satirical weekly Charlie Hebdo, following the murderous terrorist attack against the French weekly.

3. Following the events concerning Charlie Hebdo in Paris on 7 January 2015, which left twelve people dead and eleven injured, the national daily Cumhuriyet published on 14 January 2015 an article in which it expressed its opposition to the attack, by reproducing some cartoons, and this publication provoked a strong reaction from a large part of society in Türkiye. An investigation was launched by the public prosecutor's office against two of the journalists working for Cumhuriyet. Demonstrations were also organized against the paper, and statements were made on social media threatening the lives and safety of the paper's staff and the security of its property.

4. The applicants who were members of the Judges' Union went to the newspaper's building after these events to support and defend freedom of expression and press of the newspaper as did several other organizations and unions. One of the applicants delivered a brief speech in front of the building and had his picture taken. The speech summarised that the press was being repressed via the judiciary, that this situation was unacceptable under a democratic state governed by the rule of law and that as judicial organizations, they had come to support press freedom.

5. Following a complaint made by Mr. Y.T. who was serving as a judge at the Antalya Court in 2016, the Council of Judges and Prosecutors took disciplinary action, resulting in the applicants being reprimanded. The reason was their behaviour, both on and off duty, which was considered potentially damaging to the reputation and trust required for their official roles. Specifically, the Council of Judges and Public Prosecutors highlighted their visit to a newspaper immediately after an investigation had been launched against journalists working for the newspaper. The applicants' visit was publicized by the media, and they were photographed after one of them made a statement to the press outside the newspaper's building. This action was seen as an expression of their opinion on a matter under judicial investigation which led to social unrest.

6. The applicants, relying on Articles 10 and 11 of the Convention, complain that their right to freedom of expression and freedom of association have been infringed by the sanction imposed on them. Moreover, they claimed that their rights protected under Article 6 of the Convention had also been violated. They claim that they were not informed at the investigation stage of the standard applicable to their alleged offence; that they were not given the opportunity to defend themselves effectively because of the late disclosure of the documents in the case file; that they were punished on the basis of an erroneous finding of fact, while in no way they supported the two journalists who made the accusations and that they were sanctioned after the statute of limitations had expired.

7. The Court asked the parties, whether the applicants had had the opportunity, in accordance with their right to a fair trial under Article 6 of the Convention, to examine and challenge all the documents on which the disciplinary sanction was based and whether the applicants had had effectively assessed the allegations of prescription of the 5-year period from the commission of the act. More importantly, the Court asked whether there was an interference with the applicants' right to freedom of expression and freedom of association, and whether this interference was prescribed by law and necessary within the meaning of Articles 10 and/or 11 of the Convention. Finally, the Court asked whether the applicants' visit and support for the two journalists under investigation had any impact on the proceedings against the journalists and which behaviour and statements of the applicants caused insecurity and damage to the performance of their official duties.

8. In this submission **İFÖD** will only deal with the question related to Articles 10 and 11 of the Convention. The exercise of the rights to freedom of expression, association and peaceful assembly by judges has been one of the **most critical debates** recently both at the United Nations and Council of Europe bodies. Judicial officers in Türkiye have also faced serious challenges about the exercise of their fundamental rights lately. Following the failed coup attempt, thousands of judges and prosecutors were dismissed from public service. A significant number of dismissed judicial officers have also been prosecuted and detained. Furthermore, following the Constitutional amendment of 2017, the structure of the Judges and Prosecutors Board was changed despite the serious concerns of the Venice Commission.[1]

9. It is considered that the **present case should be examined against this background**. İFÖD, in its submission, will therefore examine the recent developments concerning the regulation of the exercise of the rights to freedom of expression and freedom of association of judges in Türkiye in the light of international standards developed by intergovernmental institutions.

10. The intervention will first provide the relevant international standards concerning the freedom of expression and freedom of association of judges **(Section II**). The submission will then discuss the jurisprudence of the European Court of Human Rights on the subject (**Section III**). In the fourth section, the submission will focus on the subject matter of the speech of the judges generally, with a special focus on the speeches concerning freedom of expression issues. (**Section IV**). In the final section, the submission will discuss the problems concerning the system of organisation for the judiciary and judicial review of the decisions of the HSK (**Section V**).

II. International Standards on the Freedom of Expression of Judges

11. A number of documents adopted both at the UN and the Council of Europe levels contain provisions concerning the freedom of expression of judges. The UN Basic Principles on the Independence of the Judiciary[2] provide that members of the judiciary, like other citizens, are **entitled to freedom of expression**, belief, association and assembly (principle 8) and

[1] Venice Commission, Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 207, adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e.

[2] Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

are **free to form and join professional associations** to represent their interests, to promote their professional training and to protect their status (principle 9).

12. The Bangalore Principles of Judicial Conduct[3] echoes the same principle at 4.6. The Universal Charter of the Judge[4] includes two different provisions concerning the exercise of freedom of expression. Article 3-5 provides that judges have the right to freedom of expression and the right to join professional associations to defend their legitimate interests and their independence.

13. However, although judges' rights are protected as everyone, they are subject to different restrictions due to their profession. The exercise of fundamental freedoms, and particularly the freedom of expression, carries special responsibilities and duties. As civil servants, judges should show restraint in exercising their freedom of expression, and conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. The requirement in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") that courts and certain tribunals be "independent and impartial", means that in addition to being free of actual bias "the tribunal must also appear to a reasonable observer to be impartial".[5] This in turn implies potential for certain special restrictions on judges' exercise of expression, association or assembly for the purpose and to the extent necessary to guarantee these qualities.[6]

14. At the regional level, the Council of Europe's Committee of Ministers recommendation on *Judges: Independence, Efficiency and Responsibilities*,[7] although not including a direct provision on the right of judges to freedom of expression, states that judges exercise restraint in their relations with the media[8] and that their engagement in activities outside their judicial mandate is compatible with their impartiality and independence. The Consultative Council of European Judges' opinion on the standards of conduct applicable to judges provides a guidance on legitimate restrictions on the right to freedom of expression.[9] According to the Consultative Council, to decide whether a restriction on the fundamental freedom of a judge is consistent with the requirements of articles 9 to 11 of the European Convention, the question that should be posed is "whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality."

15. In other words, whilst on the one hand judges' right to freedom of expression should be protected, on the other hand independence and impartiality of judiciary should not be affected from the exercise of this right. The UN Special Rapporteur on the independence of judges and lawyers, in his report on the subject observed that

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3 Bangalore Principles of Judicial Conduct, 2002 (adopted by the Judicial Integrity Group and recognised by among others UN ECOSOC resolutions 2006/23 and 2007/22, Human Rights Council resolution 35/12 (2007)

4 Universal Charter of the Judge (International Association of Judges, updated 2017).

5 Human Rights Committee, General Comment no. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial), UN Doc CCPR/C/GC/32 (2007), § 21.

6 International Commission of Jurists, Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly, February 2019, p. 2.

7 Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17.11.2010.

8 *Ibid*., § 19.

9 Opinion No. 3 to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality (19 November 2002), § 28.

> "In defining the appropriate degree of involvement of the judiciary in public debate, two factors need to be taken into account. The first is whether the judge's or prosecutor's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge or the prosecutor to political attacks or be inconsistent with the dignity of his or her office. If either is the case, the judge or the prosecutor should avoid such involvement".[10]

16. In the light of these international standards, it is considered that **there is an important difference** between speeches made on cases reviewed by judges and general topics of public interest that affect judges' profession as well as rule of law standards. As the former, the Commentary to Bangalore Principles notes that in addition to avoiding *ex parte* communications with anyone involved in a case before him or her, "out of court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality". However, in contrast, with regard to the latter, the same commentary states that there exist some exceptions. These include "comments by a judge, on an appropriate occasion, in defence of the judicial institution, or explaining particular issues of law or decisions to the community or to a specialized audience, or defence of fundamental human rights and the rule of law".[11]

17. It follows then, although a judge should avoid making comments that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, comments of judicial officers about the legal developments that might affect the role of judiciary are protected by international law.

III. The European Court's Case Law

18. The Consultative Council of European Judges ("CCJE"), in its Opinion no. 3 on "the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality" stated that **a reasonable balance needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their dutie**s.[12]

19. The European Court of Human Rights emphasizes that the protection of Article 10 of the Convention extends to the workplace in general and to civil servants in particular, including the judiciary, albeit the judiciary is not part of the ordinary civil service. The Court's most recent jurisprudence extends the protection offered to the members of the judiciary even to the expressions made on the social media platforms.[13] However, the Court has recognised that public officials serving in the judiciary may be expected to exercise restraint in the exercise of their freedom of expression in all cases where the authority and impartiality of the judiciary may be called into question.[14]

20. According to the jurisprudence of the Court, in assessing whether the national authorities have struck a fair balance between the right to freedom of expression of the individual judge

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[10] Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29.4.2019, § 67.

[11] Commentary on the Bangalore Principles of Judicial Conduct (UNODC/Judicial Integrity Group, 2007), pp. 57 and 62. See further Consultative Council of European Judges ("CCJE") Opinion No. 25 (2022) on freedom of expression of judges.

[12] Consultative Council of European Judges ("CCJE"), in its Opinion no. 3 on "the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality", CCJE (2002), 19.11.2002, §§ 27-40.

[13] See *Danilet v. Romania*, no. 16915/21, 20.02.2024.

[14] *Eminağaoğlu v. Türkiye*, no. 76521/12, 09.03.2021, § 121.

and the legitimate interest of the authorities to protect the authority and the impartiality of the judiciary, the impugned statement should be considered in the light of all the concrete circumstances of the case as a whole. [15] In this assessment, a number of factors are taken into account, including the **office held by the applicant**, the **content of the impugned statement**, **the context in which the statement was made**, the **nature and severity of the penalties** imposed and **whether there were procedural safeguards**.[16] Considering the subject matter of the present case the position of the applicants as the president and members of the Judges Union, the content of the impugned statement, the context in which the statement was made, and whether there were procedural guarantees seem to be the most important elements of the test that should apply to the cases of judges' freedom of expression.

21. In 2016, the Grand Chamber of the European Court of Human Rights adopted a judgment in the case of *Baka v. Hungary*[17] and recapitulated the case-law on the freedom of expression of judges. In that judgment, the European Court first explained why judges are subject to different criteria with regard to restrictions imposed on freedom of expression:

> "it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question… The dissemination of even accurate information must be carried out with moderation and propriety… The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties"[18]

22. However, the European Court made a distinction between **speeches that might affect other judges** and **pending cases** and **remarks that concern a matter of public concern**. The Court went on to state that "the applicant's position and statements, which clearly fell within the context of a **debate on matters of great public interest, called for a high degree of protection** for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State."[19]

A- The Office Held by the Applicants

23. The Court attributes great importance to the position of the applicants when evaluating whether interference with their freedom of expression was necessary in a democratic society. In the *Eminağaoğlu* case, the Court has taken into consideration the position of the applicant as a member of the public prosecutor's office attached to the Court of Cassation and his status as the chair of Yarsav which defended the interests of members of the judicial professions and the principle of the rule of law.[20]

24. In view of the fact that the applicant had made the contested statements in his capacity as chairman of that association, the Court emphasised that, when an NGO draws attention to matters of public interest, it performs a public watchdog role of similar importance to that

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15 *Żurek v. Poland*, no. 39650/18, 16.06.2022, § 224.
16 See among others; *Eminağaoğlu v. Türkiye*, §§ 132-152; *Sarısu Pehlivan v. Türkiye*, no. 63029/19, 06.06.2023, § 39.
17 *Baka v. Hungary* [GC], no. 20261/12, 23.06.2016.
18 *Ibid*., § 162.
19 *Ibid*., §§ 171 and 175.
20 *Eminağaoğlu*, § 132.

of the press and can be described as a "**social watchdog**" deserving of protection under the Convention similar to that afforded to the press. It recognised that civil society makes an important contribution to the discussion of public affairs. Accordingly, the Court found that, on the one hand, the applicant was bound by the duty of discretion inherent in his position as a judge/prosecutor and, on the other hand, as the President of an association of judges and prosecutors, he had a role as an actor in civil society. Thus, it was part of his role and duties to express his views on the legislative reforms that were likely to have an impact on the courts and on the independence of the judiciary.[21]

B- Subject Matter of the Speech

25. Although judges are subject to a stricter regime than other public servants with regard to the exercise of freedom of expression, statements made by them on matters of public interest, in particular, on matters that concern the independence of judiciary, constitutes a significant exception.

26. The Commentary on Bangalore Principles emphasizes that, "there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge".[22] The Commentary also notes that "in certain special circumstances, a judge's comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality".[23]

27. In line with these observations, the European Court, in *Kudeshkina v. Russia*, where the applicant had been dismissed following her fierce criticism of the judiciary in the media, held that the applicant had raised "a very important matter of public interest, which should be open to free debate in a democratic society."[24] In *Wille v. Liechtenstein*, the applicant delivered a lecture concerning matters of constitutional law, which had political implications. The European Court, considering that the applicant's lecture did not contain any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince concluded that his lecture concerning constitutional law problems fell within the protected speech.[25]

28. The Special Rapporteur on the independence of judges and lawyers asserted that "in general terms, judges and prosecutors are allowed to make comments in defence of fundamental human rights and the rule of law, or to participate in activities or debates concerning national judicial policy or the administration of justice in the country. Judges and prosecutors should also be consulted and play an active part in the preparation of legislation concerning their status and, more generally, the functioning of the judicial system".[26] The CCJE also shares this view. The Council is of the opinion that judges should be able to be consulted and play

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21 *Ibid.*, §§ 134-135
22 Commentary on the Bangalore Principles, p. 96.
23 Commentary on the Bangalore Principles, p. 96-97.
24 *Kudeshkina v. Russia*, No. 29492/05), 26.02. 2009, § 94.
25 *Wille v. Liechtenstein*, No. 28396/95, 28.10. 1999, § 67. Compare *Kyprianou v. Cyprus*, No. 73797/01, 15.12.2005, § 122.
26 Report of the Special Rapporteur on the independence of judges and lawyers, note 10, § 69.

an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system.[27]

29. The Grand Chamber affirmed this position in its *Baka* judgment. The Court held that "questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10". The Court also observed that "the applicant expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary."[28]

30. The Court has applied and developed these principles in recent Turkish cases.[29] In the *Eminağaoğlu* case, the HSYK decided to impose a disciplinary sanction on the applicant mainly for three series of statements. The first set of statements consisted mainly of criticisms of certain measures taken during the criminal investigation against the organisation known as "Ergenekon". As to the second series of statements, they related mainly to remarks made by the applicant on the various aspects of criminal proceedings brought against a Turkish journalist of Armenian origin. The third series of statements dealt with certain topical issues. The applicant's remarks in the third category included both matters concerning the judicial system and other political topics. In assessing the distinction between statements on judicial and non-judicial matters, the Court observed that "in its decision on the merits, the HSYK made no distinction between the applicant's statements which related directly to the judicial system and those concerning different issues. Furthermore, the Court takes the view that account should have been taken of the fact that the applicant was also speaking in his capacity as the chair of an association of judges and prosecutors. Although political statements by members of the judicial professions may give rise to reservations, it must be noted that, in its decision of 19.07.2011, the HSYK did not explain how the political statements in question were such as to undermine "the dignity and honour of the profession" and to cause the applicant to forfeit "dignity and personal esteem".[30]

31. The Court also took into account the lack of procedural guarantees during the disciplinary proceeding before the HSYK and the lack of judicial review of the disciplinary decisions of the HSYK.[31]

32. In the *Kozan v. Türkiye*[32] case the applicant, who was a judge at the material time, shared a comment critical of the HSYK in a closed Facebook group. In the *Sarısu Pehlivan v. Türkiye*[33] case the applicant, who was a judge and the Secretary General of the Judges Union at the material time gave an interview to a newspaper critical of 2017 constitutional amendments in Türkiye. The Court applied the same standards in these two cases as well.

IV. The system of organisation for the judiciary in Türkiye and judicial review of the decisions of the HSK

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27 Consultative Council of European Judges (CCJE), §§ 27-40.
28 *Baka v. Hungary*, § 168.
29 *Eminağaoğlu v. Turkey*, no. 76521/12, 09.03.2021; *Kozan v. Türkiye*, no. 16695/19, 01.03.2022; *Sarısu Pehlivan v. Türkiye*, no. 63029/19, 06.06.2023.
30 *Eminağaoğlu v. Turkey*, § 148.
31 *Ibid.*, §§ 149-151.
32 *Kozan v. Türkiye*, no. 16695/19, 01.03.2022
33 *Sarısu Pehlivan v. Türkiye*, no. 63029/19, 06.06.2023.

33. It is well-established under the Strasbourg jurisprudence that in order to assess the justification of an impugned measure, it must be borne in mind that the fairness of proceedings and the existence of procedural safeguards are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.[34]

34. In *Eminağağlu v. Turkey*, the Court found an opportunity to examine the former composition of the HSYK and the compliance of the review of disciplinary decisions before that Council with Article 6 of the Convention. The Court, in *Eminağaoğlu* observed that

> "Any judge and prosecutor who face disciplinary proceedings must be afforded safeguards against arbitrariness. He or she must in particular be able to have the measure in question scrutinised by an independent and impartial body competent to review all the relevant questions of fact and law, in order to determine the lawfulness of the measure and censure a possible abuse by the authorities. Before that review body the person concerned must have the benefit of adversarial proceedings in order to present his or her views and counter the arguments of the authorities".[35]

35. The Court, in view of the fact that the decision-making process followed was highly defective and did not afford the safeguards that were indispensable to the applicant's status as a judicial officer and as the chair of an association of judges and prosecutors, considered that the impugned restrictions on the applicant's right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.[36]

36. However, the name and the composition of the HSYK were changed since the events in the *Eminağaoğlu* case had been taken place. It is necessary, therefore, to examine whether at present, similar problems as to effective and adequate safeguards provided to judges concerning disciplinary measures continues.

37. The independence of the Turkish judiciary, already under threat before the attempted coup of 15.07.2016[37] and strained by the dismissal of a third of its members in the aftermath,[38] has been further imperilled following the constitutional amendments approved by the referendum on 16.04.2017. The Council of Judges and Prosecutors' powers to summarily dismiss judges and prosecutors continued even after the end of the state of emergency. Law No 7145 of 31.07.2018 amended the Decree Law No 375 dated 1989. A temporary article (article 35) was added to the Decree. On the basis of this article, the General Assembly of the Council of Judges and Prosecutors was authorized to take dismissal decisions for public officials/judges and prosecutors under their mandate for three years from the date of the

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[34] *Castells v. Spain*, 23.04.1992, §§ 47-48, Series A no. 236; *Association Ekin v. France*, no. 39288/98, § 61, ECHR 2001 VIII; *Colombani and Others v. France*, no. 51279/99, § 66, ECHR 2002 V; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II; *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 171 and 181.

[35] *Eminağaoğlu v. Turkey*, § 150.

[36] *Ibid.*, § 152.

[37] ICJ, Turkey: The Judicial System in Peril - A Briefing Paper, Geneva, June 2016, available at https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings- Mission-Reports-2016-ENG.pdf.

[38] ICJ, Justice Suspended: Access to Justice and the State of Emergency in Turkey, Geneva, July 2018, available at https://www.icj.org/wp-content/uploads/2018/07/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf.

endorsement of the law No 7145. This power was extended once more until July 2022 and has been used several times by the CJP.[39]

38. Moreover, one of the constitutional reforms introduced as a result of constitutional referendum modified the composition and appointment of the institution responsible for the self-government of judges and prosecutors, now called the Council of Judges and Prosecutors (previously preceded by "High"). Of the thirteen members, six are now effectively appointed by the President of the Republic, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. None of the members of the Council is appointed by judges or public prosecutors.

39. The remaining seven members of the Council are appointed by the National Assembly (the Parliament). The selection process in the Parliament is complex. However, if a party or a *de jure/de facto* political coalition has 3/5 majority in the Parliament, members of the Council can be appointed by this qualified majority according to Article 159 of the Constitution.

40. In April and May 2017, the ruling party, AKP, and its supporter, the Nationalist Movement Party had more than 330 MPs in the Parliament, i.e. more than 3/5 of the parliamentary seats. Since the opposition parties protested against the new provision and did not attend the final vote in the Parliament, seven members of the Council were elected by this majority.[40]

41. The Council of Europe's Commissioner for Human Rights found that the new composition of the Council did not "offer adequate safeguards for the independence of the judiciary and considerably increased the risk of it being subjected to political influence."[41] The Venice Commission echoed these concerns, noting that this "composition of the CJP is extremely problematic. [This] would place the independence of the judiciary in serious jeopardy ... Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice."[42]

42. The UN Special Rapporteur on freedom of expression also raised concerns "about structural changes to the judicial system which undermine the independence of the judiciary, even those that predate the emergency declared in 2016."[43] In this connection, the Office of the UN High Commissioner for Human Rights concluded that "the new appointment system for the members of the Council of Judges and Prosecutors ... does not abide by international standards, such as the Basic Principles on the Independence of the Judiciary. [Because] of the Council's key role of overseeing the appointment, promotion and dismissal of judges

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39 https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-fundamentally-unfair/.

40 Reuters, "Turkish MPs elect judicial board under new Erdogan constitution," 17.05.2017, at https://www.reuters.com/article/us-turkey-politics/turkish-mps-elect-judicial-board-under-new-erdogan-constitution-idUSKCN18D0T9.

41 Council of Europe Commissioner for Human Rights, Statement, 07.06.2017, at https://tinyurl.com/4kj4kwez

42 Venice Commission, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 207*, adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e, para. 119.

43 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey*, UN Doc. A/HRC/35/22Add.3, 21 June 2017, 2017, § 68.

and public prosecutors, the President's control over it effectively extends to the whole judiciary branch."[44]

43. As can be seen from these observations the **new composition of the Council of Judges and Prosecutors**, rather than resolving the problems raised by the Court in *Eminağaoğlu* judgment, **exacerbated the complex problem**. It is therefore submitted that, under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered structurally independent due to the excessive degree of political control of appointments to the Council.
44. As under Article 159 of the Constitution, disciplinary sanctions imposed on judges and prosecutors are not subject to judicial review except for the sanction of dismissal, the composition and process before the CJP become all the more important.
45. A recent example pictures the real control of the executive (The President) over the judiciary. The President Erdoğan targeted two top courts namely the Council of State and the Constitutional Court upon the decision of the Council of State to reinstate some judges who were dismissed by CJP during the state of emergency. Erdoğan said that he "can't stomach" the decisions of top courts. He stated that "However, it is not possible for us to remain silent on this decision of the Council of State." The President also added that they would give the exact reaction they gave to the AYM when the high court have taken "strange decisions."[45]
46. IFÖD, therefore, submits that the present formation of the CJP should be taken as one of the decisive elements whilst examining the present case.

V. Conclusions

47. As noted by the Court in the assessment of whether a statement of a judge is protected under Article 10 of the Convention, a number of factors should be taken into account, including the office held by the applicant, the content of the impugned statement, the context in which the statement was made, the nature and severity of the penalties imposed and whether procedural safeguards were guaranteed.
48. IFÖD considers that in cases where judges are sanctioned for their statements on constitutional issues, three main points should be subject to close scrutiny. **Firstly**, a distinction between speeches that might affect other judges and pending cases and remarks that concern a matter of public concern should be made. Speeches that clearly fell within the context of a debate on matters of great public interest, calls for a high degree of protection for the judge's freedom of expression. **Secondly**, since judges, like other professions, have a right to association, judicial officers who have a title to represent a professional organisation or an NGO should have a right to make statements on legal developments. **Thirdly**, when a judicial officer faces a disciplinary sanction, s/he should benefit from the proceedings concerning the impugned disciplinary sanction that is compatible with the requirements of independence and impartiality.
49. İFÖD submits that the present case should be reviewed according to these principles developed under international law and the Strasbourg jurisprudence. İFÖD also considers that the circumstances of the present application is almost identical to that of *Eminağaoğlu* application.

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[44] OHCHR, *Second Report on Turkey*, *op. cit.*, § 34

[45] https://www.duvarenglish.com/president-erdogan-says-he-cant-stomach-turkish-high-court-decisions-news-63843.

07.03.2024

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.