Third Party Intervention

In the Case of Urfa v. Türkiye (No. 14788/22)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

An independent non-governmental organization specialized in defending and promoting freedom of expression

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

I. Introduction and Background

1. İFÖD will address in its third-party intervention in the case of *Urfa v. Türkiye* (no. 14788/22)[1] the procedure of appointment of judges to the Turkish Constitutional Court ("TCC"), the constitutional or statutory provisions which enable individuals to challenge the impartiality of or remove a judge for reasons of alleged bias against an applicant in the context of individual application to the TCC and their implications for freedom of expression.

2. It is understood from the Court's communication that the applicant, a lawyer by profession, claimed that he had suffered from ill-treatment during a police intervention to disperse a demonstration which consisted of a group of hundred lawyers who stood at the hall of the Istanbul Courthouse, protesting the placement in police custody of their two colleagues on the grounds of their participation in the Gezi Park protests. The applicant has filed a criminal complaint against the police officers who caused the applicant's injury during the police intervention at the protest and the Istanbul Public Prosecutor, R.I., issued a decision not to prosecute. The applicant lodged an individual application to the Constitutional Court alleging that his constitutional rights had been violated. The first section of the TCC, composed of five judges including the newly elected Irfan Fidan ("I.F."), found no violation of Article 17 of the Turkish Constitution ("TC") (Article 3 of the Convention) and dismissed the applicant's complaint under Article 34 of the TC (Article 11 of the Convention) as manifestly ill-founded.

3. The applicant complained, *inter alia*, under Article 6 § 1 of the Convention that the TCC was not impartial because, at the time of consideration of his application by that court, the Section included judge I.F. who served as the Chief Prosecutor of Istanbul from 2015 to 2020. The decision not to prosecute was issued on 24.04.2018 by the Istanbul Prosecutor's Office, while I.F. was the Chief Prosecutor of Istanbul.

4. The Court asked the parties, having regard to the participation of Judge I.F. in the proceedings before the TCC, whether the Section which examined the applicant's appeal was an "impartial tribunal" within the meaning of Article 6 § 1 of the Convention (see, inter alia, *Morice v. France [GC]*, no. 29369/10, §§ 73-78, ECHR 2015). The Court further asked whether Judge I.F. had taken part in the examination of the criminal complaint lodged by the applicant during the term of office as Chief Prosecutor of Istanbul which can likely call into question the objective impartiality of the TCC (*Morel v. France*, no. 34130/96, § 45, ECHR 2000-VI, and *Toziczka v. Poland*, no. 29995/08, § 36, 24.07.2012). Lastly, having regard to the participation of Judge I. F., the Court asked whether the internal regulations of the Constitutional Court provide for the dismissal of a judge whose lack of impartiality can legitimately be feared because of his previous functions exercised in the context of a case he has already had to hear (compare *Micallef v. Malta [GC]*, no. 17056/06, §§ 98-99, ECHR 2009, and *Scerri v. Malta*, no. 36318/18, §§ 78-79, 07.07.2020), within the meaning of Article 6 § 1 of the Convention.

5. It must be stated from the outset that, the fact that vast executive duties are usually fulfilled by the judges of the TCC prior to their appointment to the TCC has the potential of impeding the independence and impartiality of the Court. It is not unusual for the TCC judges to hold high-level public positions within the executive before being appointed to the TCC. İFÖD is of the opinion that this raises serious questions about the independence as well as the impartiality of the

[1] İFÖD submitted its request for leave to intervene on 11.04.2023 in the case of Urfa v. Türkiye (no. 14788/22), communicated on 10 February 2023 and made public on 27 February 2023. The President of the Second Section has granted leave under Rule 44 § 3 of the Rules of Court, for İFÖD to make written submissions to the Court on 17.05.2023.

Court. Judges are, occasionally, compelled to adjudicate on various allegations of rights violations of which the timeline of the events may overlap with their exercise of executive powers.

6. In this third-party intervention, İFÖD will first briefly summarize the European Court's case-law on the principles for an impartial tribunal. Secondly, İFÖD will inform the Court of the establishment and structure of the TCC. Subsequently, İFÖD will provide the Court with detailed information on the appointment procedure of judges to the TCC. Moreover, the constitutional and statutory regulations guaranteeing the independence and impartiality of judges and prosecutors in general and with regard to the TCC judges, particularly conditions for the recusal of judges in case of concerns of partiality will be conveyed. Finally, the case-law of the TCC concerning the applications lodged therewith in cases of perceived or alleged bias of its members will be brought to the Court's attention.

II. The Court's Case-Law on the Principles for an Impartial Tribunal

7. First of all, the right to an "independent and impartial tribunal established by law" includes three main characteristics which are closely interrelated. The concept of a "tribunal established by law", together with the concepts of "independence" and "impartiality" of a tribunal, forms part of the "**institutional requirements**" of Article 6 § 1. The Court has held, in particular, that a judicial body which does not satisfy the requirements of independence - **in particular from the executive** - and of impartiality may not even be characterised as a "tribunal" for the purposes of Article 6 § 1 (*Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18, 12.03.2019, §§ 232-233). Moreover, when establishing whether a court can be considered to be "independent" within the meaning of Article 6 § 1, the Court has regard, inter alia, **to the manner of appointment of its members**, which pertains to the domain of the establishment of a "tribunal". Accordingly, while they each serve specific purposes as distinct fair trial guarantees, there is a **common thread** running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the **fundamental principles of the rule of law** and the **separation of powers** (*ibid*., §§ 232-233).

8. Within this context, the Court found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (*Advance Pharma Sp. Z O.O v. Poland*, no. 1469/20, 03.02.2022, § 294). Therefore, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (*Morice v. France [GC]*, no. 29369/10, 23.04.2015, § 78; *Škrlj v. Croatia*, no. 32953/13, 11.07.2019, § 43). It is the responsibility of the individual judge to identify any impediments to his or her participation and either to withdraw or, when faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge (*Sigríður Elín Sigfúsdóttir v. Iceland*, no. 41382/17, 25.02.2020, § 35).

9. According to the Court, there are two possible situations in which the question of a lack of judicial impartiality arises (*Kyprianou v. Cyprus [GC]*, no. 73797/01, 15.12.2005, § 121):

i. The first is functional in nature and concerns, for instance, the exercise of **different functions within the judicial process by the same person**, or hierarchical or other links with another person involved in the proceedings;

ii. the second is of a **personal character** and derives from the conduct of the judges in a given case.

10. With regard to functional impartiality, the European Court found that the fact that a judge was once a member of the public prosecutor's department is not in and of itself a reason for fearing that he lacks impartiality (*Paunović v. Serbia*, no. 54574/07, 3.12.2019, §§ 38-43). Nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public is entitled to fear that he does not offer sufficient guarantees of impartiality (*Piersack v. Belgium*, 01.10.1982, Series A no. 53, § 30 (b) and (d)). As will be mentioned below, the appointment of judges to the TCC after holding extensive administrative prerogatives and responsibilities makes occurrences of this sort very probable. The Council of Judges and Prosecutors (CJP) plays an indirect role in appointment of some members of the TCC since it has an important role in appointment of members of the Court of Cassation and the Council of State. Combined with the composition of the Council of Judges and Prosecutors and the fact that the Minister of Justice and their deputy are natural members of the council, the shadow of the executive is very likely to be cast on the judiciary branch.

11. On personal impartiality, the Court stressed that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. (*Lavents v. Latvia*, no. 58442/00, 28.11.2002, § 118).

III. An Overview of the Turkish Constitutional Court's Establishment and Structure

12. The TCC's power to receive individual applications was introduced with the amendments made on the 12.09.2010 referendum. Thereby, the working procedures and principles of the TCC were redetermined by Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court on 30.03.2011. With the 2010 amendment, the number of members of the Constitutional Court was increased to 17 and it was adopted to work in two Sections *("Bölüm")* and a Plenary *("Genel Kurul")* session. Sections have the authority to convene under the deputy president with the participation of four members and make decisions regarding individual applications. In addition to its existing duties, the Court established Commissions *("Komisyon")* to decide on the admissibility of individual applications.

13. The establishment, duties, and powers of the Constitutional Court were reorganized on 21.01.2017 (Law No. 6771) and once again on 30.03.2011 (Law No. 6216). Therefore, the number of members of the Constitutional Court was reduced to 15. The Plenary convenes with a minimum of 10 members under the chairmanship of the President or Deputy President, and the Sections are composed of a Section President (Deputy President of the Court) and five members.

14. Article 27 of the Rules of the Court (12.07.2012, amended on 06.11.2018) holds that "the members who will serve in the Sections except for the Deputy Presidents shall be determined by the President according to the source through which they have been elected and the principle of balanced distribution between the Sections. Upon the request of the relevant member or upon the proposal of one of the Deputy Presidents, the President may decide to change the members of the Section."

15. According to article 29 of the Rules of the Court, "for the purpose of forming the committees in the Sections, the members of the Section, except the Deputy President, shall be listed in order of seniority. The first month's meetings shall be held by the committee consisting of the first four members and the Deputy President according to the order in the list. In the following months, **each member shall rotate in order of seniority**, starting with the most senior member who does not attend the meetings. The head of the Section prepares a list showing the schedule for this rotation **at the beginning of each year**. In case a new member joins the section, he/she makes the

necessary arrangements accordingly. **These lists are announced to the members.** In the event that the quorum for the meeting of the Section cannot be met, the Head of the Section shall appoint members from within the Section, and if this is not possible, upon the proposal of the Head of the Section, the President shall appoint members from the other Section who do not attend the meetings to attend the meeting alternately."

16. As can be inferred from the above-presented constitutional, statutory, and regulatory legislation, the two Sections are bestowed upon with the prerogative of adjudicating on the individual applications. The composition of the Sections is subject to the appreciation of the President of the court and is based on rotation. The assessment conducted by the President is not subject to review, aside from the members' and deputy presidents' incidental proposals to reassign a member to the other Section. The yearly allocation and arrangement list is to be shared with the members of the Court, and not the public or any individual applicant. Even if the members of a given section can be assumed via the published individual application decisions, it is not entirely possible to do so, because the composition of a section is changed every month by rotation.

17. Moreover, in the case of inability to reach a quorum from within the Section, a member of the other Section is to be assigned. As a corollary, one cannot be cognizant of the composition of a certain section even in a given year, due to the rotation, proposal, and reassignment procedures envisaged. This point was stressed by the Venice Commission[2] which states that the composition should be predetermined in advance for a certain period of time in order to exclude the possibility to influence a case through an *ad hoc* composition. Moreover, it is also noted with regard to the failure to meet a quorum in a Section and assignment of members from the other Section, that it should be done by lot or by a list agreed upon in advance.[3]

18. Finally, it is worth noting that although the agendas of the Sections are published on the Constitutional Court's website along with the application number each week, they are only published once the Sections include them in their agenda to decide upon an application. The publication of the incumbent Section to which a specific case is assigned at this late stage renders it impossible for applicants to be informed of which Section, hence which judges will handle their applications in a timely manner, and hamper the possibility of challenging their impartiality. More importantly, at any stage, the **applicants do not know which judges are included in the relevant formation of the sections**. The applicants only find out the names of the judges once the decisions are either communicated to the applicant or published by the TCC.

IV. The Appointment Procedure of Judges to the Turkish Constitutional Court

19. In terms of appointment of the judges to the TCC, the President of the Republic, who is also the chair of a political party, shall elect three members from among the members of the Court of Cassation, two members from among the members of the Council of State, three members from among three candidates nominated by the Council of Higher Education from among the academics, four members from among senior executives, independent lawyers, first-class judges and prosecutors, and Constitutional Court rapporteurs who have served as rapporteurs for at least five years (Article 146/2 of the Turkish Constitution).

20. The remaining three members of the TCC are elected by the majority of the Grand National Assembly of Türkiye. In short, this means that the majority of the Parliament, which has been controlled by the ruling party since 2017, will decide the three remaining members. As a result,

2 Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, Adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), p. 6.

3 *Ibid.*, p. 7.

all fifteen members of the Constitutional Court are directly or indirectly appointed by the same political party.

21. In terms of presidential appointments, the appointment procedure of judges to the Court of Cassation and the Council of State becomes decisive and salient in assessing the independence and impartiality of the TCC. It should however be recalled that the members of the Court of Cassation as well as the Council of State, amongst which the President appoints members of the TCC are elected by the Council of Judges and Prosecutors ("the CJP"). However, the formation of the CJP as well as the appointees to the CJP also includes appointments directly or indirectly by the President.

22. Since the 2017 amendments to the Constitution, the President has the right to appoint four members of the CJP, which is almost a third of its members. Two other members of the CJP, the minister of justice and his/her undersecretary, are also directly appointed by the President (minister and undersecretary as a high official). As a result, almost half of the members of the CJP are appointed by the President. The remaining seven members would be appointed by the Grand National Assembly. The Venice Commission stressed in this respect that the President will no more be a *pouvoir neutre*, but will be engaged in party politics, hence, his choice of the members of the CJP will not have to be politically neutral.[4]

23. It should also be noted that Türkiye's highest appeal courts (the Court of Cassation and the Council of State) have undergone four separate structural reforms to their composition and functioning between 2011 and 2017. The number of members of both the Court of Cassation and the Council of State and their structure were substantially altered in 2011, 2014, 2016 and 2017.[5] All new members of the Court of Cassation and the Council of State have been appointed following the coup attempt and mass dismissals of judges and prosecutors. Within a period of seven years, hundreds of judges in the highest courts of the country were replaced by the CJP and thousands of judges and prosecutors were arrested and detained. Moreover, the presidents of both high courts have close relations with the President, a fact which reinforces the impression that the judiciary is under political influence.[6]

24. The changes regarding the manner of appointment of the members of the CJP as well as the reformed Court of Cassation and the Council of State have repercussions on the formation of the Constitutional Court. The CJP is responsible for the elections of the members of the Court of Cassation and the Council of State (articles 154 and 155 of the Constitution). Both courts are entitled to choose two members of the TCC by sending three nominees for each position to the President, who makes the appointments.

25. This inevitably creates an intriguing vicious circle. In other words, the President and the ruling party that is presided over by the President appoint the members of the CJP. The CJP then appoints the members of the Court of Cassation and the Council of State. These two high courts then select and nominate their candidates for membership to the TCC. Finally, the President and his ruling party appoint the members of the TCC amongst the candidates nominated by the high courts. As a corollary, the influence of the Executive over the Constitutional Court is increased.

---

4 Venice Commission, Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21.01.2017 and to be Submitted to a National Referendum on 16.04.2017, Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

5 ICJ, Turkey's Judicial Reform Strategy and Judicial Independence, Briefing Paper, Geneva, November 2019, p. 7.

26. One of the recent examples of such a politically motivated appointment involves the appointment of Judge Irfan Fidan. Mr Fidan was Istanbul's Chief Public Prosecutor between 26.07.2016 and 26.11.2020. He was then elected as a member of the Court of Cassation by CJP on 27.11.2020. Mr. Fidan was issued with the certificate of election as a member of the Court of Cassation on 11.12.2020. During this process, the General Assembly of the Court of Cassation scheduled to hold an election on 01.12.2020, to determine the three candidates to the TCC to be proposed to the President. However, the Presidency of the Court of Cassation postponed the election to 17.12.2020, due to Covid-19-related reasons. Subsequently, on the day of the elections, two candidates declared their withdrawal from candidacy. Mr. Fidan, who was only a judge at the Court of Cassation for six days and who has not handled or decided a single appeal case announced his candidacy and was included in the three candidates who received the highest number of votes. On 22.01.2021, the President appointed Mr. Fidan, as a member of the Constitutional Court. The appointment of Mr. Fidan generated a heated debate. Prof. Gözler, a prominent constitutional law professor in Türkiye, found that on average, the 44 former Constitutional Court judges who were elected and appointed from the Court of Cassation served nine and a half years before joining the TCC.[7]

27. The framework of the regulations conferring vast executive powers to Mr Fidan, in his capacity as the chief public prosecutor, is to be found in Law No. 5235 on the Establishment, Duties and Powers of the Courts of First Instance and Regional Courts of Justice. As is regulated in Law No. 5235, the chief public prosecutors are bestowed upon with great judicial and administrative duties, in the form of supervision and control over the prosecutors. According to article 18 of Law No. 5235, the chief public prosecutors of the criminal assize courts have the authority to supervise and control the public prosecutors, deputy public prosecutors, public prosecutors and affiliated units within his/her jurisdiction. Paragraph 4 of this provision (amended with article 2 of the State of Emergency Decree no. 328 on 17.0/6.2021) states that "the chief public prosecutor is authorized and responsible for the elimination of the differences that may arise between the decisions of the public prosecutors terminating the investigation and for the supervision of the compliance of these decisions with the law". This rule, in practice, translates into a prerogative of the chief prosecutor to interfere with the decisions of the prosecutors working under him/her.

28. As the chief public prosecutor has vast administrative duties and powers, it is without question that they exercise control over the prosecutors of lower ranks. Accordingly, during his term at the office of the chief public prosecutor, Mr. Fidan enjoyed a wide range of control and supervision over the prosecutorial branch of the Istanbul courthouse. In high-profile cases investigated and prosecuted by the prosecutors, Mr. Fidan was involved highly in many cases. For example, he prepared the criminal indictment for journalists Can Dündar and Erdem Gül, the Academics for Peace as well as the human rights defenders and civil society leaders of the Gezi Park case. As highlighted by Dr. Sen, "a look at recent TCC judgments finding violations of constitutional rights reveals that almost all of them originate from criminal cases either directly prosecuted by Fidan, or which he was indirectly involved in, in his former capacity as the Istanbul Chief Public Prosecutor. To illustrate, these decisions include *Z. Füsun Üstel and others (Academics for Peace), Can Dündar-Erdem Gül, Mehmet Altan, Şahin Alpay, Enis Berberoğlu and Atilla Taş. He*

[6] See further Y. Akdeniz & K. Altiparmak, *Turkey: Freedom of Expression in Jeopardy: Violations of the Rights of Authors, Publishers and Academics Under the State of Emergency*, July 2020, https://www.englishpen.org/wp-content/uploads/2020/07/Turkey_Freedom_of_Expression_in_Jeopardy_ENG.pdf

[7] Kemal Gözler, "Elveda Anayasa Mahkemesi: İrfan Fidan Olayı", Annex-1, (available at: www.anayasa.gen.tr/irfan-fidan-olayi.htm) (Published: 23 January 2021).

was also the main actor behind very important criminal cases, such as Gezi Park, Businessman Osman Kavala, Sledgehammer, FETO media trial and Büyükada."[8]

29. Mr. Fidan's appointment process is extremely problematic when assessed against the European Court's standards with regards to Article 6 § 1 of the European Convention. The European Court's case-law on the matter foresee a **higher threshold** on the merit of the judges appointed to the high courts and takes into consideration the moral integrity and professional competence of the appointees. However, the above-summarized chain of events raises serious questions regarding the moral positions and qualifications of the respective TCC judges. More importantly, the European Court recalled on many occasions that in order to establish whether a tribunal can be considered as "**independent**", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (*Findlay v. the United Kingdom*, no. 22107/93, 25.02.1997, § 73). As to the question of "**impartiality**", there are **two aspects** to this requirement. **First**, the tribunal must be subjectively free of personal prejudice or bias. **Secondly**, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (*Pullar v. the United Kingdom*, 10.06.1996, Reports 1996-III, p. 792, § 30). As noted by the Court, the concepts of **independence** and **objective impartiality** are closely linked.

30. Strikingly, Mr. Fidan's appointment is not unique. Another similar trend of this sort of politically motivated appointment to the TCC involves the appointment of Muhterem Ince. While Mr. Ince was holding the position of Deputy Minister of Interior, on 23.05.2022, he applied as a candidate for the Court of Audit membership. He was elected as a member of the Court of Audit on 29.06.2022. He was then nominated for a judgeship at the TCC and was elected by the Grand National Assembly of Türkiye on 05.10.2022, after almost three months of being appointed to the Court of Audit. This is yet another fast-track politically motivated appointment to the TCC.

31. Similarly, before his appointment as a member of the TCC, Selahattin Menteş served as the Chairman of the State of Emergency Inquiry Commission between May and October 2017. Between 18.10.2017 and 21.07.2018, he served as Undersecretary of the Ministry of Justice. On 21.07.2018, he was appointed as Deputy Minister of Justice. Mr. Menteş was elected as a member of the Constitutional Court directly by President Erdoğan on 06.07.2019. As the individuals lodge with the TCC thousands of applications following the dismissal decisions of the *ad hoc* organ of the State of Emergency Inquiry Commission, the position held by Mr. Menteş holds great importance.

32. Finally, Yıldız Seferinoğlu was elected as Istanbul MP for the Justice and Development Party in the general elections held on 01.11.2015. He served as a member of the Justice Commission in the Grand National Assembly of Turkey. Between 23.07.2018 and 25.01.2019, Mr. Seferinoğlu served as the Deputy Minister of the Ministry of Justice. He was then elected as a member of the Constitutional Court on 25.01.2019 by President Erdoğan directly. Similar to the backgrounds of the other members of the court, holding of the office of the deputy ministers by the TCC judges points to a trend where the executive has been the main source of recruitment. It is deemed important to highlight the fact that the roles occupied by the TCC judges are ones that come with great political responsibilities as well as a hierarchical position over the lower levels of the state apparatus.

---

8 I.G., Sen, "The Final Death Blow to the Turkish Constitutional Court", Verfassungsblog, 28.01.2021, at https://verfassungsblog.de/death-blow-tcc/.

33. It must be reiterated that it is a common practice in Türkiye to be assigned as a judge when one is a prosecutor and vice versa. Moreover, there exists no threshold for judge and prosecutor members of the Court of Cassation and the Council of State when applying for nomination as a prospective TCC judge.

34. In addition to that, no esteemed time period is spelled out for candidates to be able to be nominated to the TCC from their respective institutions. Out of the elected three nominees that acquire the highest votes from the two high courts, the President is not obliged to consider the existing composition of the TCC with regard to the backgrounds of the judges and their past roles in the executive or judiciary branches. Similarly, each of the four members elected from among senior bureaucrats (such as governors, envoys, and undersecretaries), independent lawyers, first-class judges, and prosecutors, and Constitutional Court rapporteurs are not necessarily elected while bearing in mind the existing and future dispersion of the Court. The lack of safeguards and balancing criteria leads to a possible majority of members who have backgrounds predominantly in the executive branch and prosecutorial office. The fact that vast executive powers are usually held by the judges of the Turkish Constitutional Court prior to their appointment to the TCC has the potential of impeding the independence and impartiality of the tribunal.

V. Regulations Guaranteeing the Independence and Impartiality of Judges in General and with Regard to the Constitutional Court Judges

35. Articles 146-153 of the Turkish Constitution regulate the formation of the TCC. The rules for the judiciary in general and specifically the principle of judicial independence are enshrined in articles 138 *et. seq.* As noted by the Venice Commission, the principle of the independence of judges applies to both the judges of the ordinary judiciary and those of the constitutional courts. It is even more important to adhere closely to these principles so far as judges of constitutional courts are concerned.[9]

36. On the statutory level, Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court (30.03.2011) specifically envisages the claims for the recusation of a TCC judge. Pursuant to article 59/1-ç of the Law, the president and members, *inter alia*, shall not hear cases and proceedings in which **they have acted as judges, prosecutors, or arbitrators**, or in which they have testified as witnesses or experts. Article 60 holds that the President and members may be recused on the grounds that there are circumstances justifying the belief that they cannot act impartially. In this case, a final decision shall be taken in the Plenary or Sections without the attendance of the member concerned.

37. Finally, in the event that the President and members abstain from hearing the case or matter based on the reasons set forth in articles 59 and 60, the Plenary shall render its final decision on the matter. However, the member who was requested to withdraw may not participate in the voting.

38. It is not clear from the wording of the Law when and how recusations should be submitted by the applicant. Similarly, the procedure is not precisely defined. As the Law stipulates that the Plenary *or* Sections will take a final decision on the recusation claims, it is not clear whether such claims can be assessed by the Plenary in case the application is referred to it by a Section pursuant to article 25/1-d of the Rules of the Court. It is similarly not clear whether the Sections would hold a final decision on recusation claims entailed in an application which is then referred to the Plenary. In any event, the rule stipulating that the decision of a Section regarding a recusation claim is final

[9] Venice Commission, Opinion on draft amendments to the Law on the Constitutional Court of Latvia, CDL-AD(2009)042.

is concerning, as the Plenary could have been entrusted with the power to review such decisions of the Sections.

39. Most importantly, in light of the above-analysed ever-changing composition of the Sections, it must be submitted that an individual cannot presuppose in advance whether the allegedly partial member of the TCC will sit at the appointed Section and handle a specific case. Moreover, bearing in mind the fact that it takes a considerable amount of time between the lodging of an application and the TCC coming to a decision about a specific application, it is not always probable for applicants to challenge the impartiality of a member pre-emptively. As the applicants cannot know *ex ante* when their applications are going to be handled, up until the point where the Sections announce their weekly agendas, and as this process may take up to 8 years in some instances,[10] it is burdensome to confer upon the applicants the responsibility to keep track of the weekly agendas over such a long time period.

VI. The Case-Law of the TCC with Regard to the Applications Lodged Therewith in Cases of Alleged Bias of Its Members

40. The case-law of the TCC on the recusation claims cannot be said to be extensive. To put it precisely, there exists no example of the Sections or the Plenary assessing such recusation claims put forward by an applicant within the procedure of individual application. Therefore, the above-mentioned ambiguity of the recusation process in the individual application system is not resolved via the case-law of the TCC.

41. As explained above, in the event that individuals cannot know in advance the composition of Sections and Commissions of the Turkish Constitutional Court which handle their applications, the judges in question should withdraw themselves *proprio motu* due to the obligation imposed on the judiciary with the Court's above-mentioned case-law. However, İFÖD is not aware of any such instance in the history of the Turkish Constitutional Court. Bearing in mind that it is a common practice that the members of the TCC perform vast executive duties before their work at the TCC begins, it is without question that the lack of such precedence is not because such occurrences never took place, but rather due to the inefficiency of the procedure of withdrawal.

42. As elucidated previously, a matter of great concern arises in relation to the appointment procedure employed for the judges of the TCC, as it impinges considerably upon the institutional independence of the TCC from the executive. The manner in which judges are appointed plays a pivotal role in safeguarding the autonomy and impartiality of a judicial body. However, in the case of the TCC, the existing appointment procedure raises substantial apprehensions about the potential encroachment of executive influence or control over the judiciary. This jeopardizes the fundamental principle of the separation of powers, which underpins the democratic system and ensures the proper functioning of an independent judiciary. The vulnerability of the TCC's institutional independence in light of the appointment procedure warrants careful examination and consideration in order to uphold the integrity and credibility of the judicial system.

43. Therefore, İFÖD disputes that the appointment procedures comply with the European Court's standards set in its *Findlay v. the United Kingdom* (no. 22107/93, 25.02.1997, § 73) case and the more recent cases of *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18, 12.03.2019) and *Advance Pharma Sp. Z O.O v. Poland* (no. 1469/20, 03.02.2022) with regards to impartiality.

[10] *Hüseyin El ve Nazlı Şirin El* [GK], App. No: 2014/15345, 7/4/2022.

VII. Conclusion

1. As noted by the Court in *Cumhuriyet Vakfı and Others v. Türkiye*, obligations imposed on the state parties under Article 6 of the Convention also offer an important procedural safeguard against arbitrary interferences with the rights protected under Article 10 of the Convention.

2. As submitted above, one cannot be cognizant of the composition of a certain Section of the Turkish Constitutional Court even in a given year, due to the rotation, proposal, and reassignment procedures envisaged. This hampers the ability of the applicants to assess whether they should challenge a member's bias even before being informed of the actual involvement of the said member of the TCC in their application.

3. İFÖD is of the opinion that the ambiguous wording of the relevant provisions of Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court fails to provide for a foreseeable procedure for recusal claims against a member of the TCC.

4. The lack of balancing safeguards leads to a majority of members of the TCC whose backgrounds are predominantly consisting of the executive branch and prosecutorial duties. The fact that vast executive powers are usually held by the judges of the Turkish Constitutional Court prior to their appointment to the TCC has the potential of impeding the independence and impartiality of the tribunal.

5. İFÖD is of the opinion that the relevant Section of the TCC which examined the applicant's appeal was not an "impartial tribunal" within the meaning of Article 6 § 1 of the Convention due to the fact that Judge Fidan was the Chief Public Prosecutor of Istanbul at the time the applicant lodged his criminal complaint which raises serious question marks with regards to the standards set by the European Court in terms of the "**institutional requirements**" of Article 6 § 1 of the Convention.

07.06.2023

İfade Özgürlüğü Derneği – İFÖD (Türkiye)

Registration Number: 34-235-076

Address: Hasırcıbaşı Caddesi, No: 24/4 Kadıköy, Istanbul, Türkiye

Web: https://ifade.org.tr Twitter: @ifadeorgtr

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