

Provisional version
23 May 2016

The functioning of democratic institutions in Turkey

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

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Draft resolution¹

1. Turkey has been under post-monitoring dialogue with the Assembly since 2004. In its Resolution 1925 of April 2013, the Assembly encouraged Turkey, a founding member of the Council of Europe and strategic partner for Europe, to pursue its efforts to align its legislation and practices with Council of Europe standards and fulfill the remaining post-monitoring dialogue requirements. Turkey has continued to face a complex and adverse geopolitical situation with the war in Syria and in the surrounding countries and terrorist attacks on its territory. The on-going conflict in Syria has brought further massive flows of refugees to Turkey. The Assembly reiterates its appreciation of the outstanding efforts made by the country since 2011 to host nearly 3 million refugees (among which 262 000 are in refugee camps), who are in need of accommodation, education and access to social and medical care. For over five years, Turkey has been implementing the "open door policy" to the Syrians who fled from the war environment in their country and in compliance with its international obligations, has abided by the principle of "non-refoulement". The Assembly expresses its appreciation of the measures taken by the Turkish authorities to improve the living conditions of Syrian refugees, in particular by allocating work permits since 15 January 2016. The Assembly also values the outstanding financial efforts of the State to address this issue, despite remaining questions, in particular the lack of access to any education for 400 000 Syrian children refugees.

2. In August 2014, the country had the first direct election of the President of the Republic. Parliamentary elections were organised on 7 June 2015, and early parliamentary elections were held on 1 November 2015. While the Justice and Development Party (AK Party) secured a majority in parliament in November 2015, the Peoples' Democratic Party (HDP) – a political party with a pro-Kurdish stance, which had previously entered parliament as independent candidates and subsequently formed a party group - for the first time entered parliament as a political party, despite the 10% electoral threshold, that the Assembly demands to be substantially lowered.

3. EU integration remains a strategic objective for Turkey. In the context of the 2016 EU-Turkey Agreement on the migrant crisis, and the implementation of a roadmap toward liberalisation of the visa regime, the Assembly welcomes the recent ratification of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms; the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No.97); the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198). The Assembly notes that EU integration remains a strategic goal for Turkey. It therefore reiterates its belief that the opening of additional chapters, in particular Chapter 23 (judiciary and fundamental rights) and Chapter 24 (justice, freedom and security), would help consolidate the reform process and reinforce the action undertaken by the Council of Europe for Turkey to align its legislation and practice with Council of Europe standards. Turkey-EU relations, which should be strengthened, will be of great importance not only for the stability and prosperity of the two sides, but for the entire region.

¹ Draft resolution adopted by the committee on 23 May 2016.

4. Recent domestic developments in Turkey pertaining to freedom of the media and of expression, erosion of the rule of law and the alleged human rights violations in relation to anti-terrorism security operations in southeast Turkey have however raised serious questions about the functioning of its democratic institutions. These findings are corroborated by recent reports adopted by several Council of Europe monitoring mechanism, such as the Venice Commission, the Group of States against Corruption (GRECO), and the Commissioner for Human Rights, which highlighted concurring and serious concerns that Turkey should address without further delay.

5. The disclosure of the corruption cases on 17 and 25 December 2013 allegedly involving four ministers and the son of the then Prime Minister Mr Erdoğan, marked the beginning of changes in domestic political processes, in particular the adoption of restrictive legislation (amendments to the criminal code and criminal code of procedure in 2014 and Internal Security Act of March 2015) and enhanced control of the executive over the judiciary (amendments to the Law on the High Council for Judges and Prosecutor in 2014), creation of special courts ("criminal courts of peace") in June 2014 and the adoption of Act No. 5651 on the Internet in March 2015, increasing the Telecommunications Directorate's (TIB) capacity to block websites.

6. The Assembly regrets that the peace talks to address the Kurdish issue collapsed in summer 2015, putting at stake the process of enlarging the cultural and linguistic rights of the Kurdish community, initiated and advanced in the period prior to then, including by its political representation in parliament after the 2015 parliamentary and early parliamentary elections. The breakdown of the peace talks in July 2015 led to increased violence, bomb attacks by the PKK and retaliation measures by the Turkish security forces, including curfews imposed since December 2015 in several districts in southeast Turkey in order to conduct security operations.

7. In this context, the Assembly is very concerned about the decision of 20 May 2016 by the Turkish Grand National Assembly to strip the immunity of a large number of parliamentarians from prosecution by temporarily suspending Article 83 (first sentence) of the Constitution, thus ruling out a case-by-case examination based on merit. Even though MPs from all political groups are concerned, the Assembly notes with concern that this decision disproportionately affects the opposition parties, in particular the People's Democratic Party, some of whose members are facing terrorism-related charges for their statements.

8. The Assembly recalls that parliamentary immunity should first and foremost enable elected representatives to work and express themselves without fear of harassment by the executive, the courts or political opponents. It is thus worried about the potential political consequences of this decision, which could damage parliamentary life and undermine the healthy political environment that Turkey needs to tackle today's challenges, including terrorist threats and the urgent need to solve the Kurdish issue by political and peaceful means. While there are allegations about the lack of independence of the judiciary, the Assembly urges the Turkish authorities to ensure that the cases brought against parliamentarians are handled in due compliance with Council of Europe standards on fair proceedings and trials and respect for freedom of expression, which Turkey has pledged to uphold.

9. In the past years, Turkey has faced massive and repeated terrorist attacks perpetrated by the so-called "Islamic State of Iraq and the Levant" (ISIL/Daesh), the "Kurdistan Workers' Party" (PKK) and PKK-affiliated "Kurdistan Freedom Hawks" (TAK). These attacks caused hundreds of casualties in Ankara, Suruç, Istanbul, Bursa or Diyarbakır. In addition, the border city of Kilis has been targeted by shelling from Syrian territory. The Assembly unequivocally condemns these attacks and all terrorist action and violence perpetrated by the PKK, Daesh or any other organisation, which can by no means be tolerated. The Assembly stresses Turkey's right and duty to fight terrorism and address security issues in order to protect its citizens. It recalls however those security operations must be carried out in line with international law, in accordance with the principle of proportionality and necessity. The right balance between security and individual liberties must be found in Turkey.

10. The Turkish authorities are trying to keep a balance between freedom and security in the counter-terrorism operations in southeast Turkey, so as to protect citizens' right to life, which is the most fundamental right, and to ensure public security. The security operations have dramatically intensified in southeast Turkey since August 2015. The Assembly is very worried about the human consequences of the lengthy, round-the-clock curfews imposed in 22 districts, including Sur, Silvan (province of Diyarbakır), Nusaybin, Dargeait (province of Mardin), Sirmak Center, Cizre, Silopi, Idil (province of Sirmak) and Yüksekova (province of Hakkari). These curfews are affecting 1.6 million people, have resulted in the displacement of 355 000 persons and in restrictions in access to water, electricity, education and health care, including emergency medical care, which has proved fatal for many residents. At least 338 civilians are reported dead by the Human Rights Foundation of Turkey as of 20 April 2016. These operations resulted, since 20 July 2015, in

458 security officers being killed and 3 321 wounded, according to the Ministry of the Interior, as of 13 May 2016.

11. The legal basis for these repeated and lengthy curfews, and their compatibility with Council of Europe standards, have raised doubts. The Assembly expects Turkey to amend its legal framework in line with the Venice Commission opinion on this issue, to be adopted in June 2016.

12. Despite efforts deployed by the Turkish authorities to provide the displaced persons with food and accommodation, temporary jobs in State agencies and social aid, including compensation for lost income, the future of the displaced persons is uncertain. It seems that large parts of the areas under curfew were destroyed during and after the curfews, and during the consequent clearance operations to remove planted explosive devices. The situation is especially regretful in the ancient part of Sur, which was classified as a Unesco world cultural heritage site in 2015.

13. There have been allegations of serious human rights violations, notably in Cizre, which requires due and effective investigation, including the collection of evidence before the areas are cleared. The Assembly believes that access to information through the increased presence of the media and accurate and unbiased media coverage of the situation in southeast Turkey, transparency of the procedures, as well as the prosecution of those who committed crimes or abuses of human rights, would contribute towards restoring confidence. The Assembly notes that Turkey is one of the 116 countries offering an open invitation to the UN Special Procedures since 2001. The Assembly welcomes the recent visit of the UN Working Group on Enforced or Involuntary Disappearances in March 2016, of Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, to southeast Turkey in April 2016 and the announced visit of representatives of the UN High Commissioner for Human Rights. It invites Turkey to consider the setting-up of a fact-finding team, including independent experts and personalities trusted by all sides of Turkish society, to observe the human rights situation in the affected districts and release credible reports. The Assembly further encourages Turkey to strengthen national independent human rights bodies so as to increase citizens' confidence in, and use of, these human rights protection mechanisms.

14. The Assembly notes that administrative investigations have been initiated against 63 security personnel due to their misconduct during the operations in southeast Turkey. It expects the Turkish authorities to carry out effective investigations into all other allegations of misconduct by security personnel during these operations.

15. The adoption by the government of an emergency decree on expropriation on 21 March 2016 related to Sur (Diyarbakır) has raised concern among displaced persons. The lack of information about legal procedures, future urban construction projects and the right of displaced persons to return to live in their neighbourhoods poses many questions. Lack of transparent information fuels fears and insecurity among those concerned. The Assembly expects Turkey to take due care of the needs of the local population and ensure fair compensation for the losses suffered by civilians in case of expropriation procedures, which should be conducted in line with Council of Europe standards and taking account of property rights and their safeguards, as guaranteed by the European Convention of Human Rights.

16. The Assembly is also deeply concerned that the tensions and clashes could spread to other parts of Turkey. It urges the PKK to stop its terrorist attacks and lay down arms. The Assembly also urges all those involved to resort to political means to stop the escalation of violence. The Turkish Parliament, which could provide a political forum for peace resolution, should consider putting in place mechanisms to resume the peace process, including a joint, cross-party parliamentary commission, or a "truth and reconciliation" commission that would allow for a fresh impetus and the healing of past traumas. Political solutions need to be discussed in parliament by all the political forces involved. A due system of parliamentary inviolability – which excludes statements inciting hatred, violence or the destruction of democratic rights and freedoms – is thus necessary to ensure that issues of public interest can be debated by elected representatives without fear from executive or judicial interference.

17. The Assembly is also worried by the lack of political dialogue in the region and the arrests and destitution of democratically elected mayors in southeast Turkey on charges of "aiding and abetting a terrorist organisation". The Assembly calls on political figures to refrain from acts and statements that would be perceived as further fuelling the tensions.

18. The announced preparation of legislation which would empower the Governor to appoint new mayors also raises questions with regard to the respect of the provisions of the European Charter for Local Self-Government, which Turkey ratified in 1992. The Assembly reiterates its call on Turkey, in line with the post-

monitoring dialogue requirement, to further introduce decentralisation in full respect of the territorial integrity of the country and to ratify the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities, which could also contribute restoring confidence among communities.

19. With regard to freedom of expression and of the media, the Assembly shares the concerns of the Council of Europe Commissioner for Human Rights about "the alarming scale of recourse to an overly wide notion of terrorism to punish non-violent statements and criminalisation of any message that merely coincide with the perceived interests of a terrorist organisation". The Assembly urges Turkey to fully comply with its obligations under all the human rights treaties it has ratified. The Assembly remains concerned by the extensive interpretation of the Anti-Terror Law, which contradicts Council of Europe standards and leads to criminalisation and prosecution of human rights defenders and lawyers. It thus reiterates the call it made in 2013 for Turkey to review its definitions of offences related to terrorism and membership of a criminal organisation in line with the case law of the European Court of Human Rights.

20. Recalling its Resolution 2035 (2015) on the protection of the safety of journalists and of media freedom in Europe, the Assembly is concerned about the latest developments in the field of freedom of expression and freedom of the media, which should be understood in the light of the case-law of the European Court of Human Rights with respect to Article 10 of the Convention. There are concerns that changes in ownership of media companies serving business interests over the past years were motivated by, and have resulted in, significant political influence on the media.

21. The Assembly believes that the abusive application of Article 299 (Insulting the President of the Republic) – there were about 2 000 cases in two years against journalists and academicians, but also ordinary citizens - leads to an undue restriction of freedom of expression, considering the case-law of the European Court of Human Rights with respect to Article 10 of the Convention. It recalls in this respect that defamation cases can be handled under civil law procedures or under the general provisions of Article 125 of the penal code on insult.

22. The Assembly is deeply concerned by the prosecution of investigative journalists following their investigations into topics of general interest. Domestic and foreign investigative journalism should be conducted on all topics, and in all regions. The Assembly is appalled by the stiff prison sentences issued against them. It expects the judicial institutions to take future decision in the light of the well-established case-law of the European Court of Human Rights and the authorities to harmonise the legislation and its interpretation by domestic courts with Council of Europe standards. In this respect, the Assembly praises the important role played by the Constitutional Court of Turkey to secure freedom of expression and of the media, and individual applications to the Constitutional Court, which remain an effective mechanism to protect rights covered by the European Convention on Human Rights.

23. The Assembly remains concerned about the large number of websites blocked (110 000) and Twitter takedown requests. Blocking websites appears a highly disproportionate measure, which impedes the public's right to have access to, and to be provided with, information on the internet, and negatively impacts media pluralism and free expression. It urges Turkey to upgrade its legal framework in line with the European Convention on Human Rights, in particular to review Act No. 5651 on the Internet, in line with the recommendations of the Venice Commission (to be adopted in June 2016) on the regulation of publications on the internet and combatting crimes committed by means of such publication.

24. The Assembly recalls that journalists and other media actors make an essential contribution to public debate and the opinion-making processes needed in a democratic society. Council of Europe member States have a positive obligation to ensure freedom of expression, protection of journalists, and access to information and to create the conditions to enable them to act as public or social watchdogs and inform the public on matters of general and public interest. Too many measures currently taken by the authorities, including investigations, prosecutions and the interpretation of the penal code by domestic courts, have a chilling effect. Attacks on journalists and media outlets, seizure of media (which undermines property rights), pressure on journalists and punishment of journalists exercising their job leads to self-censorship. The Assembly therefore urges Turkey to secure a favourable environment for freedom of expression as guaranteed by Article 10 of the Convention and to implement Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.

25. The Assembly believes that further improving of the legal framework would help the country overcome current restrictions to freedom of expression. In the light of the March 2016 opinion of the Venice Commission, the Assembly invites Turkey to:

25.1. Repeal Article 299 of the penal code (Insulting the President of Republic);

25.2. Repeal Article 301 (Degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State) or amend it to ensure that all the notions used in it are clear, specific and predictable, and that its application be limited to statements inciting to violence and hatred and that its interpretation by domestic courts should be in line with the case-law of the ECtHR;

25.3. Limit the use of Article 216 and resort to – proportionate – criminal sanctions only in cases of open incitement to violence, armed resistance, or uprising, and not to punish harsh criticism against government policies. And apply it only in extreme cases of religious insults that intentionally and severely disturb public order, or calls for public violence, and not for mere blasphemy;

25.4. Ensure a strict interpretation of Article 314 (Membership to an Armed Organisation) so as to limit it to cases which do not involve the exercise of the rights to freedom of expression and assembly, in compliance with the established criterion in the case-law of the Court of Cassation that acts attributed to a defendant should show “in their continuity, diversity and intensity” his/her “organic relationship” to an armed organisation or whether his/her acts may be considered as committed knowingly and wilfully within the “hierarchical structure” of the organisation.

26. The Assembly encourages the Turkish authorities to address these proposals in the framework of the working group on freedom of expression created in 2016 by the Ministry of Justice and the Council of Europe, as part of Turkey’s Action Plan to prevent violations of the European Convention on Human Rights. It expects the necessary amendments to the legislation to be prepared and adopted in consultation with the Council of Europe.

27. It urges Turkey to further co-operate with the Council of Europe and implement the recommendations by GRECO when carrying out the Judicial Reform Strategy, which aims at establishing a more reliable justice system, executing judicial services in an independent and impartial way and concluding trials within a reasonable time. It welcomes, as a first step, the adoption of “Action Plan on Enhancing Transparency and Strengthening Fight Against Corruption (2016-2019)” on 30 April 2016 to address these issues.

28. With regard to respect for the rule of law, the Assembly is very concerned about the recent statements made by the President of the Republic and ministers not to respect a decision of the Constitutional Court on the unlawfulness of the pre-trial detention of investigative journalists, which was based on the case-law of the European Convention on Human Rights. The Assembly urges Turkish officials to refrain from unduly interfering in the judiciary and challenging the rule of law. The Assembly however appreciates that all decisions of the Constitutional Court resulting from individual applications have been implemented.

29. Independence of the judiciary is guaranteed by the Constitution. A number of judicial packages have been launched since the constitutional referendum of 2010. They provided for stronger involvement of elected judges and prosecutors in the High Council of Judges and Prosecutors (HCJP), which were positive moves. However, the recent developments and amendments to the HCJP Law in 2014 raised the issue of the lack of independence of the judiciary and undue interference by the executive.

30. The Group of States against Corruption (GRECO) noted in its March 2016 report that the appointment of the elected members of the HCJP in 2014, the use of disciplinary proceedings, including the dismissal of a number of members of the judiciary, and the potential influence by the executive within this body, have further triggered the debate concerning the role and the independence of the HCJP, which seriously undermines the trust of the public in its judicial institutions. The Assembly shares these concerns and calls on Turkey to:

30.1. Implement the GRECO recommendations, in particular to strengthen the security of tenure of judges and to ensure that evaluations of the performances of judges and prosecutors, as well as disciplinary procedures against them, are free from undue influence;

30.2 Further revise the Law on the High Council of Judges and Prosecutors to reduce the influence of the executive within the Council.

31. The Assembly also notes that in 2014 the fight against terrorism was extended to the Gülen movement (the so-called “parallel state structure”), a former ally of the AK Party. The purge to clear the State institutions of allegedly Gülenist followers, raises question in respect of procedural guarantees. This move particularly affected the judicial system, where the large number of transfers, arrest and detention of judges and prosecutors could have a deterrent effect on the members of the judiciary.

32. The Assembly concludes that the latest developments pertaining to freedom of the media and of expression, erosion of the rule of law and the alleged human rights violations in relation to the anti-terrorism security operations in southeast Turkey constitute a threat to the functioning of democratic institutions and the country’s commitments to its obligations towards the Council of Europe. The Assembly will continue to follow closely the issues raised in this report, in particular the situation in southeast Turkey with respect to human rights, on the basis of information provided by its Monitoring Committee. The Assembly recalls that the Turkish authorities are invited to fulfil the remaining requirements pertaining to the post-monitoring dialogue with the Parliamentary Assembly. It reiterates the readiness of the Council of Europe, in particular the Venice Commission, to support the Turkish authorities’ efforts in this respect.