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BUREAU DU CONSEIL CONSULTATIF DE JUGES EUROPEENS (CCJE-BU)

Commentaires du Bureau du CCJE Relatifs aux lettres adressées par différents juges et associations de juges internationales, européennes et nationales

au Conseil de l'Europe et à son Conseil consultatif de juges européens

concernant, *inter alia*, la suspension et l'arrestation

du juge Özçelik et du juge Başer en Turquie

I

Le 27 avril 2015, le Haut Conseil des Juges et des Procureurs de Turquie a décidé de la suspension des juges Başer et Özçelik du tribunal pénal d'Istanbul. Par la suite, les deux juges ont été arrêtés et détenus respectivement le 30 avril et le 1er mai. Ces évènements, dont les détails sont développés au point III ci-dessous, ont donné lieu à un certain nombre de lettres de plainte qui ont été portées à la connaissance du Bureau du CCJE.

Par des courriers électroniques du 13 et 20 mai, deux juges turcs ont allégué notamment qu'ils ont tous deux été détenus en raison de leur décision de libérer des suspects qui avaient fait l'objet d'une enquête pénale. En outre, plus de vingt-cinq plaintes additionnelles ont été adressées aux membres du Bureau du CCJE, certaines provenant de juges, la majorité anonymes, et la plupart étant des plaintes individuelles et non des messages copiés et transférés. Invariablement, ces lettres font présumer que la suspension et l'arrestation des juges Başer et Özçelik étaient injustifiées et illégales.

Par un courrier électronique du 1 mai 2015, adressé au Directeur des droits de l'Homme du Conseil de l'Europe, M. Coşkun Yorulmaz, avocat turc, représentant son client Hidayet Karaca, a donné un compte rendu détaillé des évènements qui ont mené à l'arrestation des deux juges selon son point de vue. Ce compte rendu peut être trouvé en annexe I de ce document. Le Directeur des droits de l'Homme a adressé la lettre de M. Yorulmaz au Bureau du CCJE pour un éventuel examen.

Le Bureau du CCJE a également pris connaissance de la correspondance entre le Président du Réseau Européen des Conseils de la Justice (RECJ), *Lord Justice* Geoffrey Vos, et le Vice-Président du Haut Conseil des Juges et Procureurs de Turquie, le juge Metin Yandirmaz, apparaissant dans les lettres du 18 et 29 mai respectivement. Des correspondances similaires se sont tenues entre le Président du Conseil Supérieur de la Magistrature des Pays-Bas, M. F.C. Bakker, et le Haut Conseil des Juges et Procureurs de Turquie dans des lettres datant respectivement du 11 et 29 mai. L'Association européenne des juges a présenté un "rapport informatif" daté du 16 mai 2015 sur l'arrestation et la détention des deux juges et a adopté une résolution exigeant leur libération immédiate.

Suivant sa politique générale, le Bureau du CCJE a invité le membre CCJE au titre le la Turquie à présenter au Bureau son avis et d'éventuelles informations additionnelles pouvant être utiles à l'examen des plaintes. Dans ce but, le Bureau a communiqué la lettre de M. Yorulmaz et les pièces jointes au membre du CCJE au titre de la Turquie. Par une lettre du 28 mai 2015, un courrier du Haut Conseil des Juges et Procureurs a été transmis par le membre du CCJE au titre de la Turquie au Bureau du CCJE. Dans ce courrier, les faits incontestés sont rapportés tels qu'ils sont décrits au titre III ci-dessous. En outre, le Haut Conseil a déclaré qu'étant donné que M. Karaca n'était ni juge ni procureur, donner de plus amples informations sur son affaire n'était pas de la prérogative du Haut Conseil. Le texte intégral de la réponse peut être trouvé en annexe II de ce document.

II

Le Bureau du CCJE est d'avis que les lettres susmentionnées peuvent être considérées dans le cadre du mandat du CCJE. Selon ce mandat, l'une des missions principales du CCJE est notamment de fournir une coopération ciblée, à la demande des membres du CCJE, des instances judiciaires ou des associations de juges, afin de permettre aux Etats de se conformer aux normes du Conseil de l'Europe. Dans ce contexte, les lettres rédigées par des juges des Etats membres destinées au CCJE, la correspondance entre l'ENCJ et, respectivement, le Conseil de la magistrature des Pays-Bas et le Haut Conseil des Juges et Procureurs de Turquie, et la demande du Directeur des droits de l'Homme du Conseil de

l'Europe d'examiner la lettre de l'avocat Me Yorulmaz, membre du Barreau d'Istanbul, constituent de telles demandes. Ceci s'applique également pour le rapport et la résolution de l'Association européenne des juges portés à la connaissance du CCJE.

III

Bien que M. Yorulmaz ne soit pas juge, le Bureau du CCJE a décidé, avant d'entreprendre une éventuelle coopération ciblée pertinente, de commenter les messages qu'il a reçus sur la base de sa lettre et du commentaire du Haut Conseil des Juges et des Procureurs, tel que transmis au Bureau par une lettre du 28 mai ; les deux peuvent être trouvés en annexes I et II de ce document, car les deux lettres offrent le récit le plus détaillé des évènements en question. Les évènements suivants doivent être pris en compte.

Selon la lettre de M. Yorulmaz et les pièces jointes, M. Yorulmaz représente son client M. Hidayet Karaca. M. Karaca a été arrêté en décembre 2014 et a depuis lors été détenu, selon M. Yorulmaz, au motif d'être suspecté d'être *« un leader d'un réseau terroriste armé»* bien que, une fois encore selon M. Yorulmaz, il avait seulement inclus une scène dans un film télévisé produit en 2009, et bien qu'il n'ait donné aucun motif justifiant l'hypothèse qu'il pourrait prendre la fuite.

Les demandes de libération de M. Karaca n'ont pas abouti et les appels ont été rejetés. Par la suite, M. Yorulmaz, selon son explication incontestée, a renouvelé sa demande qui a alors été présentée au juge Mustafa Başer de la 32ème chambre du tribunal pénal d'Istanbul. Selon cette explication incontestée, le samedi 25 avril 2015, le juge Başer a rédigé un projet de décision demandant la libération d'un certain nombre de prisonniers, parmi lesquels se trouvait le client de M. Yorulmaz. Cette décision et la seconde réaffirmant la première par le juge Başer datée du lundi 27 avril, selon le récit détaillé de M. Yorulmaz, n'ont, dans un premier temps, pas été rédigées par les greffiers du fait de l'intervention de l'inspecteur en chef responsable des greffiers. Dès lors, ces décisions n'ont pas été exécutées par le ministère public.

Suite à la couverture médiatique des décisions de libération qui devaient être rendues par les juges Başer et Özçelik de la 29ème chambre du tribunal pénal d'Istanbul, la commission d'inspection du Haut Conseil des Juges et Procureurs a initié une enquête à l'encontre des deux juges, publié un rapport préliminaire et demandé leur suspension. Par décision de la seconde chambre du Haut conseil du 27 avril 2015, la suspension de leurs fonctions des deux juges était ordonnée selon la loi n° 2802 sur les juges et procureurs, aux motifs suivants :

- avoir agi en lien avec les idées et activités des acteurs soupçonnés initialement,
- avoir intentionnellement et volontairement tenté de détruire la République de Turquie et de l'avoir empêchée, partiellement ou complètement, d'exercer ses devoirs,
- avoir commis une faute et d'autres infractions similaires,
- avoir, par conséquent, violé les dispositions explicites de la loi afin d'assurer la libération des auteurs soupçonnés initialement par le biais d'une méthode illégale.

Conformément aux articles 257/1, 312/1 et 314/2 du Code pénal, sur la suspicion de tentative de destruction de la République de Turquie, étant membre d'une organisation terroriste armée, la faute et la violation du secret, des mandats d'arrêt ont été délivrés à l'encontre des deux juges. Le 30 avril et le 1 mai 2015, respectivement, les 2ème et 5ème chambres de la Cour d'assises de Bakirkoy ont statué sur la détention des deux juges ; un jugement qui s'est ensuite poursuivi en appel par la 2ème Cour d'assises d'Anatolie d'Istanbul.

IV

Dans le traitement de ces demandes, le Bureau du CCJE souhaite souligner qu'il n'est pas en mesure d'examiner et d'enquêter sur les éléments factuels des évènements qui sont présumés avoir eu lieu, comme rapportés dans la lettre de M. Yorulmaz et dans d'autres plaintes et déclarations reçues, dans la mesure où elles sont incontestées comme il en est fait état précédemment.

A cet égard, le CCJE souhaite rappeler que les principes fondamentaux de la séparation des pouvoirs, de l'indépendance de la justice et de l'indépendance personnelle des juges et de leur inamovibilité sont des prérequis nécessaires à l'existence d'une société démocratique dans un Etat de droit. Ces principes ont été exprimés dans de nombreuses constitutions des Etats membres du Conseil de l'Europe ; ils sont les fondements de la Convention Européenne des Droits de l'Homme et ils ont souvent été rappelés ou utilisés comme base dans l'élaboration de nombreux avis du CCJE (cf. a minima Avis 1, para. 63). Selon le paragraphe 13 de la Recommandation CM/Rec(2010)12 du Comité des ministres du Conseil de l'Europe sur l'indépendance, l'efficacité et les responsabilités des juges, toutes les mesures nécessaires devraient être prises afin de respecter, protéger et promouvoir l'indépendance et l'impartialité des juges. Ceci inclut des mesures prises par les institutions directement responsables de l'indépendance du système judiciaire, à savoir, les Conseils supérieurs de la Justice, là où ils existent (cf. Avis 10, para. 14), les ministères de la Justice ainsi que les juges et procureurs eux-mêmes. Selon l'article 1 des Principes fondamentaux des Nations Unies relatifs à l'indépendance de la magistrature, l'indépendance du système judiciaire doit être garanti par l'Etat et inscrit dans la Constitution ou la loi du pays. Il est du devoir de toutes les institutions gouvernementales et des autres institutions de respecter l'indépendance du système judiciaire.

Lorsque l'activité officielle des juges peut donner lieu à des critiques, voire à des enquêtes disciplinaires ou pénales, de telles actions doivent impérativement suivre la procédure fixée par les lois correspondantes, de manière impartiale telle que définie dans de telles lois et mise en œuvre avec les garanties procédurales nécessaires pour toutes les parties impliquées (cf. Avis 10, para. 63). Remplacer ces procédures officielles par des actions visant à sanctionner des juges en raison des jugements qu'ils ont rendus, ou dans le but de les inciter à l'avenir à rendre des jugements spécifiques, est absolument inacceptable. Le CCJE dénoncera fermement de telles actions, quel que soit l'endroit où elles ont lieu.

Le CCJE note que, bien que les enquêtes pénales concernant les juges et les tribunaux ne soient pas illégales et qu'il n'y ait généralement pas d'immunité des juges, les autorités concernées sont dans l'obligation de respecter, de garantir et d'assurer le bon fonctionnement de la justice qui est le troisième pouvoir de l'Etat. Il en découle que le plus grand soin doit être apporté avant que des mesures d'instruction ne soient engagées par une quelconque autorité de poursuite, pouvant donner lieu à l'entrave et l'obstruction du fonctionnement des affaires judiciaires. A cet égard, suspendre un juge, voire procéder à son arrestation au motif qu'il/elle a rendu ou tenté de rendre une décision n'apparaitrait justifié que dans le cadre de circonstances absolument exceptionnelles. De telles suspensions et/ou arrestations n'impliqueront nécessairement que le fait que juge compétent pour des affaires en cours soit empêché d'exercer ses obligations au sein du tribunal ; au contraire, il est de règle que les décisions rendues, même si elles apparaissent mauvaises, ne peuvent être remises en cause que par la voie de l'appel.

Selon le CCJE, cette approche découle également du principe primordial de proportionnalité, qui, comme établi par la Cour Européenne des Droits de l'homme, est un principe fondamental de la Convention Européenne des Droits de l'Homme. Toutes les mesures prises par l'Etat, et en particulier toutes les mesures prises par le pouvoir exécutif de l'Etat, qui portent atteinte aux droits de l'Homme, doivent, dans une société démocratique, être prises conformément à la loi.

Toutes les mesures ne seront justifiables et justifiées que dans la mesure où elles sont justes et nécessaires à la réalisation d'un objectif légitime, qui doit lui-même être basé sur un fondement légal.

V

A la lumière de ces principes, le bureau du CCJE souligne une fois encore qu'il n'est pas en mesure de mesurer ou d'évaluer des allégations contradictoires à propos de faits en lien avec les présentes plaintes. Plus particulièrement, le Bureau ne peut pas juger ou évaluer les faits à partir desquels les enquêtes à l'encontre des deux juges concernés ont été menées. Cela irait clairement au-delà des compétences du CCJE qui ne peut pas remplacer par la propre évaluation du Bureau l'évaluation des faits et des preuves par les autorités turques compétentes. Cela vaut aussi pour l'application du droit procédural, tant dans le cas de procédures concernant la suspension des juges que dans le cadre d'enquêtes pénales en cours.

Comme le rapport incontesté du Haut Conseil des Juges et Procureurs le démontre, dans le cas des deux juges, les autorités compétentes ont agi, les étapes procédurales exigées par la loi ont été respectées et les décisions judiciaires ont été rendues, prétendument en accord avec la droit disciplinaire et pénal applicable. Le Bureau du CCJE peut ne pas commenter et ne commentera pas la bonne application du droit positif et procédural dans le cadre de ces procédures.

Le Bureau du CCJE doit toutefois noter l'existence de plusieurs circonstances qui ont provoqué des doutes et qui ont surtout, en tenant compte du contexte particulier, causé une préoccupation majeure quant à la concordance de ces procédures et de leurs résultats avec les normes européennes et avec l'exigence d'un procès équitable dans une société démocratique :

Le premier aspect qui doit être noté dans ce contexte est l'allégation (incontestée) que le juge Başer a été empêché de faire mettre son projet de décision par écrit, ce qui l'a obligé finalement à le faire lui-même. Empêcher le travail d'un juge en refusant de permettre la rédaction de son projet de décision (ou en ordonnant au greffier de refuser de le faire) serait absolument inacceptable. Il ne doit en aucun cas être fait obstacle au processus décisionnel du juge ; ses décisions, une fois rendues, ne peuvent être remises en cause que par la voie de l'appel.

Il est tout aussi inacceptable, comme il semblerait que cela ait été le cas par le passé, que l'exécution d'une décision soit empêchée par des personnes qui ne sont pas autorisées à agir de la sorte. Dans son Avis n°13, le CCJE a clairement établi que les décisions judiciaires doivent être effectivement exécutées car c'est un élément fondamental de l'Etat de droit (cf., e.g, Avis 13, para. 7). Le refus d'exécuter une ordonnance judiciaire de remise en liberté représenterait, par conséquent, une réelle entrave au cours de la justice, ce qui est absolument inacceptable.

Le fait que, comme il a été indiqué dans les commentaires du Haut Conseil, l'inspection ait commencé ses investigations après l'annonce médiatique des décisions pendantes de libération qui auraient pu avoir lieu au plus tôt lors du week-end entre le 25 et 27 avril, et que l'inspecteur ait établi un rapport prévisionnel dès le 27 avril, avec la décision de la seconde chambre du Haut conseil rendue le même jour, indique que ces procédures ont été conduites rapidement, dans l'urgence. Il est difficile de voir à quel point une telle décision pourrait être fondée sur une évaluation suffisamment approfondie des faits, et d'autant plus après avoir donné une opportunité aux juges d'être entendus, en accord avec toutes les autres garanties

procédurales nécessaires. Il n'est pas expliqué pourquoi une telle rapidité dans la procédure était nécessaire, ni si des raisons suffisantes pour une telle précipitation ont été données.

Prenant en compte l'ensemble de ces aspects, et évaluant de surcroît le nombre de plaintes sans précédent adressées aux membres du Bureau du CCJE, ce dernier a conclu qu'il devait exprimer ses préoccupations graves et sincères concernant ces procédures et les décisions ayant conduit à la suspension et à l'arrestation du juge Özçelik et du juge Başer. Les faits incontestés, tels qu'ils apparaissent au Bureau, ont conduit à la conclusion manifeste que ces juges ont été révoqués uniquement, ou de façon prédominante, en raison de leur prise de décision (ou de leur intention de les prendre). Ceci pourrait jeter de grands doutes quant au fait de savoir si les garanties d'indépendance personnelle et institutionnelle de la justice ont été suffisamment respectées en Turquie. En outre, ces évènements doivent être considérés dans un contexte où des rapports signalent qu'un nombre substantiel de juges en Turquie ont, ces derniers mois, été déplacés contre leur volonté et transférés à d'autres postes. Le nombre de ces transferts entraîne des doutes supplémentaires quant à leur cause. Qu'ils soient ou non justifiés par la nécessité de délivrer un service judiciaire à toutes les régions du pays, ces déplacements, aux yeux de la société et des membres de la magistrature concernés, pourraient conduire à la conclusion que les juges peuvent avoir en réalité subi de tels transferts en raison des décisions qu'ils ont prises. Ceci mettrait en péril et ébranlerait probablement la confiance en l'impartialité et l'indépendance de la justice et dans les principes fondamentaux rappelés sous le titre IV, ci-dessus. Pourtant, pour soutenir et renforcer une telle confiance, ceci doit être l'objectif primordial de toutes les personnes concernées par l'administration de la justice.

VI

Le CCJE est prêt à coopérer plus avant dans ce domaine, à travers des activités de coopération ciblée, conformément à son mandat.

Ce document contient:

- Annexe I: *Note on Hidayet Karaca case* [anglais seulement]

- Annexe II: *Communication of the High Council of Judges and Prosecutors of Turkey* [anglais seulement]

ANNEXE I

A NOTE ON HIDAYET KARACA CASE
28.02.2015

Following the police raids in the December of 2013 Samanyolu Media Group has become an open target for Recep Tayyip Erdogan for not buying into his rhetoric that the duly carried out criminal investigation which resulted in the indictment of 4 cabinet ministers was in fact a coup d'état to bring down his rule.

At a time where large media conglomerates were being hammered into submission by the threat of tax inspections or exclusion from public tenders, the refusal of a relatively small media group to toe the line did not go down well with Mr Erdogan who apparently liked his media with a one or more of his party 'commissars' nicely embedded in.

Dissent makes Mr Erdogan very angry. He tends to give vent to his anger by utilising his power to crush such dissent with little or no regard to the law. He therefore sent forward RTUK, the Turkish regulatory body for media. RTUK has since been very effective in the way it has singled out Samanyolu Media Group and punished it. Samanyolu Haber TV and Samanyolu TV were collectively at the receiving end of 145 separate administrative fines RTUK has issued between December 2013 and February 2015. The total sum of fines Samanyolu Media have so far been hit with is approximately YTL 4m and counting. On the other hand, Samanyolu programmes were suspended in more than 50 different occasions which effectively meant the viewers were left to watch low budget 'documentaries' from the 80s which RTUK conveniently picked for them instead of the suspended show.

In the meantime Mr Erdogan was doing his bit and telling the Turkish public at every opportunity not to watch 'their TV channels'. Public bodies up and down the country were quick to take the hint and start persecuting Samanyolu. Mayors who wanted to keep on the good side of Mr Erdogan used every trick in the book to stop Samanyolu channels filming in their respective towns. As a result film sets had to be removed to different towns at great expense. Some of the cast, clearly influenced by the climate of intimidation, terminated their contracts mid-season fearing loss of future work from state channels. Guests for live shows were appropriately told not to attend.

Government officials were quick to join in by imposing accreditation bans on Samanyolu channels for meetings they were attending. Mr Davutoğlu for instance saw nothing wrong in extending the ban into the UK where he was attending a financial forum and where British ambassador to Turkey was among the guests.

Inspectors from different public bodies but most importantly from the tax office have suddenly become a common sight at Samanyolu premises. Mr Erdogan was determined to stick to what previously worked for him and selectively use tax inspections as stick against a media group which dared to stand up to his authority.

At that point state-owned companies had long confined their advertisement budgets to media outlets which proved themselves as effective mouthpieces for Mr Erdogan regardless of their respective rating figures. Mr Erdogan, however, was not to be happy until and unless media

companies like Samanyolu had no advertisement revenues at all. That would inevitably take 'convincing' of private companies too to take their business elsewhere, which he did. Samanyolu's revenues from advertisement plummeted to record low figures.

As if the above were not enough to finish off a media group with relatively humble means, rowdy demonstrations were organised at the gates of Samanyolu Group premises in İstanbul where AKP supporters were let by the security forces to chant threatening and abusive slogans to the horror and dismay of Samanyolu employees who were left to watch the whole affair unfold from the windows of their offices.

WHAT IS HIDAYET KARACA BEING ACCUSED OF?

In layman's terms Hidayet Karaca is being accused of conveying Fethullah Gülen's directions for the arrest of Tahşiye members to the police officers who took part in the criminal investigation started by a public prosecutor against the same group. According to the public prosecutor who asked for the arrest of Hidayet Karaca it worked like this; Mr Gülen warns his followers of a fundamentalist terrorist group. Hidayet Karaca having heard the talk in question in a website considers that to be an instruction to actually arrest those terrorists. He then instructs the producers and script writers who work for Samanyolu to incorporate that 'instruction' into a TV movie. Subsequently one of the scenes in a movie shows some shady characters making a plan to use fundamentalist terrorists to set up a peaceful group of moderate Muslims. The police officers see the movie. They consider it to be an instruction coming from Mr Gülen to arrest Tahşiye group members. They go and make the arrests.

WHO ARE THE TAHŞİYE?

As far as Mr Erdogan is concerned they are a bunch of good people lead by a poor blind man who went to jail for nothing but not sharing the views of 'Pennsylvania'. In other words, they are yet another victim of 'Pennsylvania' just like himself. Military intelligence and MİT, the national intelligence service, beg to differ.

TAHŞİYE's activities get detected by MİT as early as 2004. After a 4 year surveillance MİT puts together a comprehensive report in 2008 in which it exposes the ideology and objective of the group, which it names TAHŞİYE, as well as its leading figures. MİT, then, shares the same report first with the police and then the military. As of February 2009 all of the intelligence services of the country are aware of the activities of a group called Tahşiye and so are the relevant operational departments of the police and the army.

So, who are the Tahşiye as far as the MİT, the police and the army are concerned? The MİT report in question reads;

- 'M. Doğan [the leader] and other members of the group fully support Usama Bin Laden and Al Qaeda…',

- 'M. Doğan said that his first and foremost objective was to gain control of all religious schools in Turkey and to present them to Al Qaeda's service'

- 'M. Doğan said that Turkey is an 'infidel state' and it would be freed by a war that Al Qaeda would fight as the army of Islam'

- ‘The group is said to have some five thousand members’

-‘M. Doğan is a man of considerable wealth which he obtained from vast parcels of land his family owns in…’

- ‘Amongst the most important sponsors of the group is his son-in-law Saim Aşçı, the owner of ... [a Turkish company] which is the Turkey distributor of ... [one of the biggest motor car manufacturers in the world]’

- The group publish books through publishing companies named Tahşiye, Rahle….’

On the other hand in various video clips posted in the internet Mehmet Doğan can be heard saying;

‘Now Usama Bin Laden is calling [to arms]. It is obligatory for Muslims to comply’

‘ Join the war’

Once furnished with the report the police in May 2009 refer the matter to the public prosecutor, just like any competent police force would do. The public prosecutor immediately orders a criminal investigation to the matter. The police start collecting evidence. Police raids the house of a Tahşiye member in January 2010 where they find, amongst other weapons, 3 hand grenades. Muammer Güler, the then mayor of Istanbul, announces the operation as a success. He then goes on to officially commend the police chief who was in charge of the raids. 4 years later the same group member lodges a complaint against the police officers who took part in the public prosecutor’s criminal investigation of Tahşiye amid rumours that he was ‘encouraged’ by the government to do so. It was that complaint which eventually has led to the unlawful detention of Hidayet Karaca, the CEO of Samanyolu Media Group.

HOW WAS HIDAYET KARACA ARRESTED?

On 23rd of March 2014 Pro-AKP newspaper run a story in which it claimed that Fethullah Gülen pointed the finger in the arrests of Mehmet Doğan, the leader of Tahşiye, and 10 of his friends back in 2010. That story would later turn out to be the blueprint for the public prosecutor’s case against Hidayet Karaca.

Mehmet Nuri Turan, one of the 11 men arrested in 2010, filed a criminal complaint against the police officers who took part in the prosecutor’s criminal investigation of the Tahşiye.

A prominent Pro-AKP journalist in July 2014 wrote; ‘ Is Cemaat [Hizmet Movement] ready for a payback for Tahşiye raids?’

On the 11th of December 2014 a famous twitter account with an astonishing track record of announcing police raids before they actually take place claimed that some 400 people including journalists would be arrested in dawn raids the following day.

On 12th of December 2014 Hidayet Karaca asked the chief public prosecutor whether he was the suspect of an ongoing criminal investigation. The chief public prosecutor replied in writing to say that as of 4:30pm that day he was not.

While Hidayet Karaca was outside the court waiting for the chief public prosecutor's answer, Mr Erdogan gave his presidential assent to a bill which meant when issuing arrest warrants courts would only have to look for 'reasonable doubt' as opposed to the previous requirement 'strong doubt based on concrete evidence'. It was published in the Official Gazette later that day thus have come into effect.

On the 13th of December 2014, the Twitter account above listed the names of 35 people, including Hidayet Karaca, who he claimed would be arrested the following day. He claimed that the public outcry caused by his previous tweets made the government to go back on its plans to arrest hundreds of people.

In the morning of 14th of December 2014 Pro-AKP news channels started announcing that Hidayet Karaca had been arrested at his house when in fact he was at his office. He drove to the Police Headquarters with his lawyer where he was arrested.

THE REASONS WHY HIDAYET KARACA'S ARREST AND SUBSEQUENT DETENTION IS UNLAWFUL

POLITICAL SHADOW CAST OVER MR KARACA'S DETENTION

A day after Mr Erdogan lowered the legal threshold concerning standard of evidence for arrest Mr Karaca was taken into custody. It is noteworthy that the same piece of legislation which lowered the said threshold also made it extremely difficult for lawyers to see their clients' criminal files. As a result Mr Karaca's lawyers were denied the right to have a proper examination of his file. On the other hand, AKP members were allowed to make public statements about the investigation which at times amounted to unlawful instruction and direction of the court.

UNFOUNDED ASSUMPTION OF RISK TO ABSCOND

Despite the fact that Mr Karaca has been to the chief public prosecutor's office to enquire whether there was an ongoing criminal investigation about himself two days before his arrest and the fact that has driven to the police headquarters when he heard in the news that he was being sought by the police the court saw nothing wrong in detaining him on the grounds that he could abscond.

THE JUDGE CONSIDERED INADMISSABLE EVIDENCE TO DETAIN MR KARACA

The same judge, who ignored legally obtained audio recordings of cabinet ministers and refused to detain them, inexplicably used fabricated audio recordings of Mr Karaca to order his detention despite protest from Mr Karaca's lawyers.

MAJOR LOGICAL ERRORS IN THE PROSECUTORS CASE

The public prosecutors claim that a TV movie filmed in 2009 is the result of an imaginary telephone conversation (see above) which is said to have taken place in 2013. This alone should result in the prosecutor's case to collapse, of course, in jurisdictions where the rule of law prevails. Yet, Mr Karaca is still behind bars.

MAKING A TV MOVIE MAY MAKE ONE A TERRORIST!

The particular offence under which Mr Karaca has been detained is 'being a leader of an armed terrorist network'. That particular offence would obviously require arms, terror and violence on the part of the offender. In Mr Karaca's case there is no weapon, no terrorist activity and no violence. The only evidence that the public prosecutor could come up with to back his claim is a scene in a movie. This case should have been thrown out by the very judge who has detained Mr Karaca instead.

AN ACCOUNT OF EVENTS WHICH LED TO UNLAWFUL ARREST

OF TWO SENIOR CRIMINAL JUDGES

This is the account of events which unfolded on the night of Saturday the 25th concerning a criminal court order issued for the release of Hidayet Karaca, the CEO of Samanyolu Media Group.

BACKGROUND

Our client has been detained pending trial for over 4 months now on the ridiculous grounds of instructing police officers, through a scene in a TV movie, to arrest a number of people with alleged links to Al Qaeda. For more information as to the matter please see the attached document.

Since the detention of our client by the Judgeships (which were specifically formed by Erdogan in July 2014 to persecute anybody who he felt a threat to his growing authoritarianism especially those who were officially involved in investigating the corruption allegations against his family and his close circle of politicians, bureaucrats and businessmen) we have applied to them numerous times for the release of our client. All of our pleas were flatly refused by the same criminal judgeships of the peace as they are officially called with no consideration of the facts of the matter or the law. They have also denied us access to the file of our client under a piece of legislation which Erdogan has pushed through the parliament a day before our client was arrested.

There is a common perception that the judges who were appointed to the said 'judgeships' were handpicked from among those who were willing to help Erdogan implement his agenda. We did not care in the beginning whether that was really the case. We believed that their political views were irrelevant as long as they did their duty of upholding the constitution and the rule of law.

When Hidayet Karaca was first arrested the police kept him in custody for 2 whole days without asking him a single question. When they applied for a 3 day extension of time we objected. **Our objection was turned down by the judge who was in charge**. It was only 3 hours from the maximum 4 day custody time limit that the police started questioning our client.

When we applied to the judge to lift the restriction to see our client's file, **he turned down our application.**

When consequently our client was unlawfully detained we have appealed at another judgeship against the detention order. **Our appeal was turned down** with no consideration of the facts or the law.

We have subsequently filed for the release of our client in all of the 10 judgeships which have jurisdiction over the matter. All of which were flatly denied. The courts did not even bother to explain their decisions with a proper reasoning. The attitude of the judgeships towards our client from the start made us to suspect that the public perception that the judgeships are biased might actually be true. In any case, judges must not only be impartial and independent but must be seen to be so.

We then had to file for the removal of the judges at a higher criminal court in February 2015 on the basis of bias and their conduct prior to their appointment. The higher court were reluctant to consider the case as our application was passed around between different courts until it was finally referred to 'Justice Commission' which normally has the final concerning administrative disputes between courts. The Assize Court (Ağır Ceza Mahkemesi), the highest criminal court was in the opinion that *Asliye* Ceza Mahkemesi (Mid degree criminal court) did have jurisdiction in considering removal of judges from a case. The Commission instead of swiftly dealing with the matter chose to sit on their hands. Following a 2 month wait we decided to make another application both for the removal of the judges and the release of our client. This time *Asliye* Ceza accepted the Assize Courts argument, rightly assumed jurisdiction and removed all of the judgeships from our client's file. It then referred our application to another *Asliye* Ceza court to consider the release of our client. That particular *Asliye* Ceza court decided as follows,

> *'It is evident that the suspects were detained well after the 4 day custody time limit had lapsed… The ECHR ruled in* ***Zeynep Avci v Turkey*** *that a detention order issued after a custodial time limit have lapsed would not make lawful the violation of such a limit…*
>
> *A court is under a legal duty to clearly express in its detention order the facts from which it has inferred 'strong suspicion' that a crime has been committed. Upon perusal of the contents of the file* ***no facts or evidence were identified which in accordance with article 170 of the Criminal Procedure [CMK] would arouse even the 'requisite level of suspicion' to suggest that a crime has been committed****, let alone a 'strong suspicion' [without which a suspect may not be detained].*

Once the judge has established 'strong suspicion', before issuing a detention order he must go on to consider whether the conditions in article 100 of the Criminal Procedure [CMK] have been met ...When assessing the risk of absconding character of the suspect, his integrity, address, profession, means…should be taken into account. In the light of the [ECHR's] ***NEUMEISTER [v. AUSTRIA]*** *decision, it is evident that it is very unlikely for the suspects to abscond taking into consideration … that some of them are police officers and Hidayet Karaca is a journalist and that many of them had come forward when informed they were being sought.*

After discussing the points above the court must also discuss why a 'judicial control' order [a criminal measure similar to bail] as defined in article 109 of the Criminal Procedure [CMK] would not be adequate in the circumstances. Upon perusal of the file… it is understood in the light of the above ECHR ruling that even 'judicial control' measures would not be necessary let alone the detention of the suspects.

… with regard to the balance between public security and liberty, in order for an extension of detention new evidence must always be submitted [to the court]. Detention may not be extended solely on the grounds that there has been no change in the circumstances which existed when the first detention order has been made.

…it has not been considered [by the court] why the public prosecutor failed to submit his evidence after such a long time from the detention of the suspects.

Upon perusal of the contents of the file, bundles and CDs, and taking into consideration the laws as well as ECHR and Turkish Constitutional Court rulings, no facts or evidence which would justify detention has been identified.

For the reasons set out above, a conscientious verdict to release the suspects has been reached as requested by their counsel.'

ACCOUNT OF EVENTS FOLLOWING JUDGE'S RELEASE ORDER

At 9pm last Saturday we became aware that 32 '*Asliye*' Criminal Court was about to release our client through a post in Sabah's, a Pro-Erdogan daily, website which said a judge was drafting his decision to release a number of detainees from prison.

We immediately went to the court house where we found a few security guards taking down names of the lawyers who wanted to go in. They said it was with the orders of the chief

public prosecutor. We ignored them and went up to the 2nd floor where 32 'Asliye' Criminal Court was located.

When we arrived at the offices of the court we found Judge Mustafa Başer dictating his decision to his clerk who was uploading it into 'UYAP', nationwide judicial intranet. When he was halfway in to decision the intranet suddenly shut down. Judge Başer then started dictating his decision offline.

We then was alerted to a meeting which was going on at the top floor of the court house where the offices of the most senior public prosecutors were including the chief public prosecutor which the security guards confirmed when we asked them.

At that point the chief inspector who is responsible of the professional conduct of court clerks came to their room and summoned them upstairs to his office. One of the lady clerks passed out on her way to the inspector's office apparently due to stress. She was taken to hospital by an ambulance. We went up to the inspector's office and asked him whether it was the norm in that court house to summon court clerks to emergency one to one meetings when they are in performance of their duties. He said he was reminding them that they had to do their work properly. When we went back to the courtroom we found that one of the lady clerks had left the office without permission as she felt intimidated by the inspector's intervention.

When Judge Başer was busy with getting the release orders ready, the 10th Criminal Judgeship, which is a lower degree court to *Asliye* Criminal Court, went completely out of its jurisdiction and gave a decision in which it said Judge Başer's order to be void.

In the meantime former Minister of Justice Bekir Bozdağ, with total disregard of the Turkish Constitution, attacked Judge Başer over Twitter branding his order 'a decision which defied the law'.

Mr Mustafa Şentop, deputy PM followed suit and tweeted along the same line. What is shocking from a legal point of view is that Mehmet Yılmaz, the head of the HSYK, Supreme Board of Judges and Prosecutors, retweeted his statement.

When individual release orders were ready for the suspects, one of the clerks personally took it to the relevant public prosecutor's office. The office said they would not accept them. Then Judge Başer himself took them there. He was also turned down.

Then we lawyers went to the offices of the duty prosecutor who was supposed to sign and forward the release orders to the prison where the suspects including our client were being held. He was not in his office. We called him at a mobile number which duty prosecutors used. He said he was within the court house but was not available to sign the release orders. When we said he was unlawfully delaying the release of our client he would not come to his office. He said he was told not to accept the orders by the deputy chief prosecutor.

Adv. Ömer Kavili, representative of the İstanbul Bar responsible of lawyers rights was with us at that moment. He asked us to go around and knock all the doors to make sure that the public prosecutor was not in one of the other rooms. He was not. It was unbelievable that a public prosecutor was hiding in order not to do his duty which was administrative in nature.

We then had to wait for the next duty public prosecutor who started at 9:30 Sunday morning. When we went into his office he said he would wait to see the decision of the 10th judgeship. We reminded him that he had no appellate powers which would let him to assess the merits of a court decision. He was apparently under a lot of pressure. He eventually returned the release orders to Judge Başer saying he would not enforce them, a first in Turkish legal history.

On Monday the 27th of April Judge Başer gave another decision to say that his order stood and that he would make a criminal complaint for false imprisonment and contempt of court against those who unlawfully defied it. He sent the release orders to the prosecutors for the 3rd time.

HSYK issued a statement on Monday morning that that they would we convening later that day to discuss the conduct of the two judges. They actually convened at 2pm.

When HSYK was deliberating what to do with the two judges who infuriated Erdogan with their decisions, Erdogan speaking at a press conference said the HSYK has reacted very slowly (Apparently he was expecting them to convene at the weekend) and 'hoped' they would come to an 'ideal conclusion' about the matter.

HSYK, unsurprisingly, suspended the two judges. The head of the HSYK apologised over twitter 'for being late '. Two days later he would apologise once again.

Unfortunately yesterday (30.04.2015) in an investigation started by a complaint from HSYK an arrest order was issued for the two judges, Judge Başer and Judge Özçelik. Judge Özçelik presented himself to the public prosecutor last night who charged him for being 'a member of an armed terrorist organisation'. He was then detained pending trial.

Judge Başer on the other hand tweeted that he was away from Istanbul and would be in the public prosecutor's office today (01.05.2015) at 8am CET.

Adv. Coskun Yorulmaz

ANNEXE II

Communication of the High Council of Judges and Prosecutors of Turkey

According to the information obtained from the 2nd Chamber of the High Council of Judges and Prosecutors and the Chairmanship of the Inspection Board of the High Council of Judges and Prosecutors regarding the course of the suspension and detention of Mr. Metin ÖZÇELİK, Judge at the 29th Chamber of the Istanbul Criminal Court, and Mr. Mustafa BAŞER, Judge at the 32nd Chamber of the Istanbul Criminal Court;

Upon the news coverage of the aforementioned judges on some media organs stating that they had unlawfully rendered a release decision for some suspects, an investigation was initiated by the Inspection Board of the High Council of Judges and Prosecutors, a preliminary report was issued against the judges and their suspension was requested. Subsequently, with the Decision no. 2015/274 dated 27 April 2015 of the Second Chamber of the High Council of Judges and Prosecutors, it was ordered that the judges in question be suspended from their posts, pursuant to the relevant articles of the Law No. 2802 on Judges and Prosecutors, due to the fact that the pursuance of their duty would compromise the reputation of the judiciary on the grounds that they have acted in alliance with ideas and activities of the suspects against whom the Istanbul Chief Public Prosecutor's Office had been carrying out an investigation for the offences of discrediting and putting the Republic and the Government of Turkey in a difficult position before the national and international platforms; intentionally and willingly attempting to destroy the Republic of Turkey and to partly or fully prevent it from performing its duties by creating an image before the international judicial bodies as if it were aiding the Al-Qaeda terrorist organisation, which would incur criminal and civil liabilities on it; misconduct and similar offences; and in this connection, on the grounds that the judges in question have violated the explicit provisions of law in order to make the release of the said suspects possible by an unlawful method.

Arrest warrants were issued against both suspects (judges) respectively, pursuant to Articles 257/1, 312/1 and 314/2 of the Turkish Criminal Code, for the offences of "Attempting to destroy the Republic of Turkey and to partly or fully prevent it from performing its duties; being a member of an armed terrorist organisation; misconduct and violation of secrecy". Relying on the same articles of the arrest warrant, on 30 April 2015, the 2nd Chamber of the Bakirkoy Assize Court, authorized pursuant to Article 85 of the High Council of Judges and Prosecutors, ruled on the detention of Mr. Metin ÖZÇELİK; and on 1 May 2015, the 5th

Chamber of the Bakirkoy Assize Court ruled on the detention of Mr. Mustafa BAŞER. Upon the appeals against the decisions, the 2nd Istanbul Anatolian Assize Court rejected the request for the release of the judges. The examination and investigation into the relevant persons are still in progress.

On the other hand, since Mr. Hidayet Karaca is not a judge or prosecutor, making explanation or giving extra information is not the task of the High Council of Judges and Prosecutors. His case has been dealt with at the Courts and the judicial process has been going on its own way.