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Analysis of Turkey's 4th Judicial Reform Package

A Defining Term for the Legal Reform Package: 'Relative'

PEN Norway Turkey Indictment Project

Kasım Akbaş

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About the Author

Kasım Akbaş graduated from Ankara University's Faculty of Law in 2001 and completed his post-graduate MA and PhD at Anadolu University. He has written book chapters, article and translations in the fields of the sociology and philosophy of law, the theory of the state and the law and on human rights. He continues to work as a freelance lawyer, independent researcher and publisher. He was expelled from his teaching role at university in relation to Emergency Decree number 686, over the Academics for Peace document of which he was one of many signatories and which was drawn up to call for peace in the country in 2016. Akbaş is the recipient of national and international prizes in the fields of human rights and the law.

‘Packaging’ rights and freedoms

Turkey has developed a tradition of introducing “legal packages” containing changes and/or additions to various statutes, which are sometimes completely unrelated to each other. Instead of enacting a new law or changing the old law on a particular matter, and in the process discussing in detail this individual new legal measure or change, packages known as “statutes on amending certain laws" are presented to the public. Turkey has “been managed” with "packages" for a long time.

Problems inherent in the nature of a package

Before looking at the changes presented in the "Fourth Judicial Package", we should firstly address the problematic aspects of delivering strategic and structural programs that affect the country in the form of a “package”.

A package is by its very nature closed, and consequently it gives no opportunity for public debate. The word “closed” has two meanings: one is not knowing what is inside. In this sense, “package” is the opposite of “transparency”. The other meaning is that we cannot tell what the intention of the packager was at first glance. If the outside appearance of the package is somewhat “alluring”, there is no doubt that it has indeed been prepared to be attractive to us. Otherwise, why would it have been presented in “package” form at all...? But could it be that this allure is hiding something? Aren’t there dozens of historical examples of packages being used to facilitate assassinations? By activating the reward centres of the brain, the “package” format may also hinder our ability to think rationally, thus blinding us to the potentially serious threat it may contain.

A package is unilateral. The person who makes it knows what it contains. It is prepared, sealed and “presented” unilaterally. The recipient can but “guess” what’s inside. The only way to do anything with the contents of the package is to open it up. For example, it’s not possible to object to some of the package contents, without accepting it as a whole from the outset. Thinking along similar lines, Austrian physicist Erwin Schrödinger carried out an experiment on the matter of “packages". In this experiment, which represents one of the best-known paradoxes in quantum physics, a cat is left in a sealed box with a vial of poison and a radioactive source. The probability that the radioactive source will radiate within one hour is equal to the probability that it will not. If the sensor inside detects radioactivity, the mechanism that breaks the vial is triggered and the poison kills the cat. According to one interpretation of this experiment, the cat is equally dead and alive all the while the box remains unopened. But if the box is opened and observed, one of these scenarios becomes reality. Contrary to popular belief, Schrodinger did not carry out the experiment to advocate this viewpoint, but rather to show the absurdity of the interpretation that a cat can be both alive and dead at the same time. Therefore, the “reality" can be found by opening up the package.

A package is circumscribed. Once it is sealed, the person who packed it cannot make any modifications. It has now become an independent whole, whose meaning is invested in its existence as an entity embodying both the unilateralism and inaccessibility of the package. What becomes important is the existence of a package, not that it contains this or that. The package symbolises whatever name it is given: democracy package, judicial package, justice package, education package, health package, human rights package, EU harmonisation package… Human rights can be packaged by calling a package containing no human rights "a human rights package".

So, in the light of this brief outline, let me repeat the assertion that Turkey has been "managed" with "packages" for a long time.

Turkey's fourth judicial package

As stated in the Human Rights Action Plan Schedule, a number of laws had to be amended in order to "strengthen the independence of the judiciary and the right to a fair trial, improve legal certainty and transparency, and take essential steps to protect material and moral integrity, and the freedom and security of the individual, and private life". In this context, the legislative proposal "Changes to the Criminal Procedure Code and Other Laws", submitted to the Presidency of the Turkish Grand National Assembly on June 18, 2021, was presented to the public as the "Fourth Judicial Package". The proposal was adopted with Law No. 7331, 8 July 2021, published in Official Gazette No. 31541, dated 14 July 2021. The reason why the package is referred to as the "judicial package" is mainly because it contains "changes" in the field of judicial law. Considering the five statutes and judicial branches related to the provision of justice (Administrative Judicial Procedures Act No. 2577, Turkish penal Code No. 5237, Criminal Procedures Law No. 5271, the Sentencing and Security Measures Law No. 5275, and the Establishment of the Constitutional Court and its Judicial Procedures Law No. 6216. The changes affected three areas of jurisdiction (judicial, administrative and constitutional).

As the package is aimed at "strengthening the indePENdence of the judiciary and the right to a fair trial, improving legal certainty and transparency, taking urgent steps to protect material and moral integrity, and the freedom and security of the individual, and the protection of their private life", the amendments should be evaluated in terms of their fitness for these purposes.

Internship opportunities in constitutional jurisdiction

Considering that the sole regulation concerning constitutional jurisdiction is to allow potential judges and trainee lawyers to do internships in court, it should be said from the outset that the changes in this area are negligible for the context of this analysis.

‘Thrifty’ changes to timing in administrative jurisdiction: from 60 to 30 days

In the field of administrative jurisdiction, there were changes to four clauses of the Administrative Judicial Procedure Act. All relate to reducing the usual time period stipulated for various matters from 60 to 30 days. These time frames are associated with the responses given by administrative officials to members of the public. Before the amendment, a response time of 60 days was stipulated for people applying to administrative officials for a procedure or action that might affect an administrative lawsuit concerning them. If they did not receive a response within 60 days, it was considered as "implied refusal", triggering the start of the litigation period. Now, the litigation period begins if the administration does not respond within 30 days. Therefore, the administration promises to respond to people in a shorter time, and if this does not take place within the period, it is accepted that a lawsuit can be filed.

Certainly, taken at surface value, it’s quite possible to read this regulation, which seems to be a relative improvement on the past, as follows: The administration can remain indifferent to people’s requests for 29 days. In fact, in the past, when the administration had to give a positive answer, but was “playing hard to get" on the issue, they exploited the response period until the last day. For example: You have won an action for an administrative procedure to be revoked, so there is no question that administrative officials can choose “non-implementation” of the court decision. However, in Turkey, this response time tends to be interpreted as a discretionary period in which it can choose “non-implementation” as it pleases. This amendment means that the previous discretionary period of 59 days has now been reduced to 29 days. Considering that we live in a time when almost any document can be accessed with the click of a button and even the most complicated administrative procedures can be carried out in seconds through the e-government interface, REM (registered email address) system and any organisation’s internal email correspondence, this is hardly a “revolution”. The reduction from 60 to 30 days should be seen as a relative rather than an absolute improvement.

Judicial judgments: The lesser of two evils

The Fourth Judicial Package is essentially a judicial package. The amendments made to the Turkish penal Code No. 5237, the Criminal Procedures Law No. 5271 and the Sentencing and Security Measures Law No. 5275 all concern the field of judicial procedures.

The changes to the Turkish penal Code consist of adding “perpetrated against a divorced spouse” to arrangements qualifying the status of various crimes. According to the changes introduced with the package, when the crimes of murder, injury, maltreatment and deprivation of liberty are “perpetrated against a divorced spouse”, they will merit a heavier sentence. It should be emphasized that this *relative* improvement has limited implications. As of 1 July 2021, in

perfect synchronicity with the time of this change, Turkey is no longer a party to the Istanbul Convention, an agreement which is of vital importance for women. Having announced its departure from an international convention of rights that provides much more comprehensive and gender-based protection for all women, the government cannot possibly fill the “gap” in the penal code by aggravating sentences for some crimes committed by the perpetrator against his divorced spouse. The amendment in question requires heavier punishments for crimes committed against a divorced spouse, which was in any case, a significant omission. All the while women are the victims of male violence in Turkey, it is blatantly obvious that such aggression is directed towards divorced spouses. Therefore, this is not a dramatic change, but rather the correction of an omission.

Even though the omission has been corrected it should be emphasized that the change does not foresee one step beyond this. In other words, the reality is that violence against women, even if it was to come to an end, has been correlated with the institution of the family. The amendment is not about protecting women, but “former spouses”.

The main body of the judicial package consists of amendments to the Criminal Procedures Law No. 5271 (CMK). Changes are stipulated in 14 clauses of the CMK, and a new clause has been added. Before we continue, let's set aside any regulations about using new technologies. For example, it allows for witnesses subject to sub subpoena orders to be notified digitally, if contact information such as telephone, telegram, fax, email is included in their file. Likewise, it allows for the indictment to be reported to the accused, and (this is a new one) to the victim and complainant by making use of these technologies, provided that the relevant contact information is included in the file.

Then, let's set aside the regulation including an addition about legal remit: this states that “Courts where the victim resides are also authorised to deal with crimes committed by means of IT systems, banks or credit institutions, and bank or credit cards”. It’s hard to make a firm connection between this amendment and the aim of "strengthening the independence of the judiciary and the right to a fair trial, improving legal certainty and transparency, taking urgent steps to protect material and moral integrity, and the freedom and security of the individual, and the protection of their private life”.

Likewise, we can set aside the regulations regarding serial and simple proceedings, which are judicial procedures. For example, the regulation states that, “simple proceedings cannot be applied after the hearing date has been decided" or when it is found that a material mistake was made in sanctions determined in a summary process; the case must be returned to the Chief Public Prosecutor's Office by the court in order to complete the deficiencies, and the petition letter can be rewritten and sent to the court after the mistakes have been corrected by the public prosecutor. This addition does not constitute an important breaking point in criminal proceedings. Moreover, the summary proceeding is a special procedure that only entered the

law in 2019. The need for a "reorganisation" of this arrangement, which has not even been operational for two years, indicates the haphazard nature of the previous regulation, rather than the success of the new package. Moreover, the notion of bringing special types of judicial processes into criminal proceedings under various names should be discussed separately in its own right. Therefore, it would have been more appropriate if serial and simple proceedings could have simply been removed from complex and special proceedings with the aim of "strengthening the right to a fair trial and providing legal certainty."

We now come to matters associated with liberty and the right to security, where we find measures related to arrest, detention and judicial control.

The following provision has been added to the CMK, clause 94, paragraph 3: "The public prosecutor may order the release of any person arrested outside working hours for the purposes of giving a statement, as long as the person guarantees to be present in front of the judicial authority on the specified date. This provision can only be applied once for each arrest warrant. The public prosecutor of the place where the arrest warrant was issued will issue a fine of 1000 Turkish lira to any person who does not meet their obligation." This regulation is clearly related to personal freedom. The facility to release a suspect who has been arrested in order to give a statement, and whose freedom is restricted until working hours, is a positive development.

Likewise, in CMK clause 109, another positive arrangement in terms of personal freedom, permits judicial control in the form of home confinement to be offset from any potential punishment. Other important steps in terms of personal freedom and legal certainty are: reviewing decisions concerning judicial control in four-month periods, limiting the periods to be spent in judicial control to two or in some cases three years, and halving the lengths of such periods applicable to children. Furthermore, a provision that in the event of an acquittal, the evidence or audio recordings will be destroyed can be associated with the package's aim of the inviolability of private life.

Finally, the package includes amendments made regarding detention, which is one of the long-lasting problems of the criminal justice system in Turkey. However, it should be stated that although these changes bring relative improvements - or appear to do so - they have attracted criticism for being constituted in such a way that they could be used to protect the perpetrator, especially in cases of sexual violence against women and children.

The grounds for arrest are regulated by CMK Clause 100. The formula can be summarized as follows: concrete evidence showing the existence of strong suspicion of crime + reason for arrest Arrest (not "=", " "). The article also lists what can be counted as grounds for arrest, such as the possibility of the accused fleeing, the possibility that they might hide the evidence, or that they might try to influence witnesses. It also states that these grounds for arrest can be

assumed for the crimes specifically listed in the clause. In its old version, this situation was formulated as follows: presence of strong grounds for suspicion that crimes were committed + listed crime type Arrest. In its new version, the formula is as follows: presence of strong grounds for suspicion ***based on concrete evidence*** that crimes have been committed + listed crime type Arrest.

The only change in this amendment appears to be the emphasis on "concrete evidence", which was mentioned earlier in the clause, also being added to "catalogue crimes". Due to judicial practice in Turkey, the condition of "based on concrete evidence" should not be considered otherwise than as a major change. Equally, it should be noted that the weight of "strong suspicion based on concrete evidence" in criminal allegations with a political content and of "strong suspicion based on concrete evidence" in other criminal allegations is not the same. For example, in the trials of Osman Kavala and Selahattin Demirtaş, where the ECtHR ruled there was a violation of rights, in fact a violation of Article 18, judicial organs continued their detention on the grounds of "strong suspicion based on concrete evidence". Yet these same judicial bodies failed to see the charge of sexual abuse of a five-year-old boy, accompanied by concrete evidence in the form of a forensic medicine reports, as reason for arrest .[1] It should be reiterated that the detention of Osman Kavala and Selahattin Demirtaş has continued since these amendments have been in force, including the package's requirement of "based on concrete evidence" Therefore, although the requirement for concrete evidence has come into force, the place where it finds a footing in our legal world might be in cases of sexual violence and abuse against women and children.

When the package was made public, many sections of society, especially women's organisations, insisted that the "strong suspicion based on concrete evidence" provision, would be particularly detrimental to the victim in sexual assault and abuse files. In response, Ministry of Justice spokespersons stated that a child's statement should also be seen as "concrete evidence".[2] However, if a "statement" is to be seen as concrete evidence, it is accepted from the outset that the regulation cannot achieve the protection expected from it. In terms of both the positive obligations of the state for the protection of the right to life and international and national regulations that require taking into account the best interests of the child, it is not difficult to envisage that the regulations introduced by the package may bring inadequate or even counterproductive results, especially in allegations of sexual violence and abuse against women and children. This subject, which would be unlikely to cause so much controversy in any other country, is unfortunately an important issue considering the realities of Turkey. For, example, according to the 2020 report of the We Will Stop Femicide Platform, "In 2020, 300 women were murdered and 171 women were found dead in suspicious circumstances. The reasons behind 182 of the 300 murders could not be identified, 22 of them were killed for

[1] https://www.cumhuriyet.com.tr/haber/5-yasindaki-cocugunu-istismar-eden-akp-eski-selcuk-genclik-kollari-baskani-refik-yakit-tahliye-edildi-1856673
[2] https://m.bianet.org/bianet/hukuk/247045-bakan-sozcusu-cocuklarin-beyanlari-elbette-somut-delildir

economic reasons and 96 were killed when they wanted to make their own life decisions, such as wanting a divorce, rejecting reconciliation, refusing marriage or refusing to have a relationship. The inability to determine the excuses claimed for killing 182 women is down to the fact that violence against women and femicides are rendered invisible. Unless the murderers and reasons behind femicide are determined, unless a fair trial is conducted, and unless deterrent punishments and preventive measures are implemented against suspects, the accused and murderers, the violence rains on with changing dimensions". Against this dire background, and combined with the government's decision to withdraw from the Istanbul Convention, it is no surprise that the package's emphasis on "concrete evidence" is viewed with suspicion by women's organisations, while appearing to be an improvement on personal freedom.

The regulation of "arrest warrants" is also in the CMK, this time in clause 101, which states that the decisions surrounding arrest, the continuation of detention or the rejection of a bail request must be backed up by clear concrete facts showing that there is a strong suspicion of crime, there are reasons for the arrest and that the proportionality of the detention measure is justified. After the changes, these conditions have been supplemented by the requirement to show that "the application of judicial control will be insufficient". As there was already an obligation to evidence that the detention measure was *proportional*, it should be assumed within the principle of *proportionality* that the application of judicial control will be insufficient. However, in the current judicial practice of Turkey, "progress" is made by making further regulations out of something that should already be implied by the very nature of an existing regulation.

CMK clause 268 sets out the process of objecting to decisions made by judges and courts. As known, arrest and judicial control decisions made by Criminal Judgeships of Peace in Turkey have attracted major criticism with respect to personal freedom and security. Worse still was the procedure for filing objections to these decisions, which had to be made to another magistrates court. This *horizontal objection procedure* created a "closed circuit" oversight system among the magistrates courts. With the amendment made with the package objections to decisions made by magistrates courts regarding arrest and judicial control are passed to the judge of the Criminal Court of First Instance in the same legal jurisdiction, thereby introducing a *vertical objection procedure* system, as it should be in any ordinary legal framework. As the practice of horizontal objection has garnered much criticism from human rights defenders, the ECtHR and various national and international civil and public organisations, this should undoubtedly be seen as a win in terms of rights and freedoms. However, this is also a "relative" gain, because the casual observer does not need to be a prophet to predict that the same "state attitude" that, under pressure, turned the previously existing vertical objection procedure into a horizontal objection procedure as a result of pressure, can resort to other means to hinder the emergence of any actual positive outcomes for personal freedom and security.

In 2020, PEN Norway implemented the Indictment Project on the premise that indictments at point zero of trials in Turkey are highly problematic texts. Numerous indictments were examined in their entirety and the report was made public. In her introduction letter for the PEN Norway Turkey Indictment Project Report 2020, Sarah Mehta referred to the indictments as follows:

> "The indictment is only one slice of the trial process, but it is functionally critical, as the indictment sets in motion the narrative of the case, alerting the court and the accused to the charges, and notifying the accused what evidence and legal arguments to defend against. Without that clear statement of the factual allegations with facts specific to the accused, and a concise and lucid explanation of how the alleged actions violate a particular criminal law, defendants face a number of fair trial issues from the outset."

The indictments covered in the report were analysed by national and international experts. Among their conclusions, which are included in the report, the following statements stand out: "some of the unnecessarily included evidence" (Berzan Güneş Indictment Report p13), including legally irrelevant social media posts that lack any reasoning for linking them to the charged crime" (Berzan Güneş Indictment Report p14), "there are a number of rambling and unexplained comments that litter this indictment and appear to be wholly unconnected or relevant to any of the charges" (Gezi Park Indictment Report), "explanations for the inclusion of all this irrelevant material" (Gezi Park Indictment Report), "The fact that there is around 18 pages of content about the organization covering the years between 1977 and 2000 in an indictment against a person born in 1990 cannot be thought to make any kind of contribution to justice" (Nedim Türfent Indictment Report), "there is no attempt in the indictment to connect the allegations to the wording in the articles" (Pelin Ünker Indictment Report), "absolutely no connection is seen to have been established between the suspect and the charges laid against the suspect through the written content of the first page of the indictment." (Deniz Yücel Indictment Report), "it is apparent when the indictment is taken as a whole that these sections have no bearing on the charges laid against either the suspects or the suspects' acts. There was no identifiable legal requirement for the inclusion of this section in the indictment. (MİT News Trial Indictment Report), after having spent 113 days in prison. Taner Kılıç, who was arrested by the police one month prior to the Büyükada workshop on 6 June 2017, was released on 15 August 2018 after 432 days in prison. "it is not clear why Taner Kılıç was added to the indictment. The fact is, at the time the Büyükada workshop took place, he was already in prison, having been detained one month earlier after an unrelated investigation" (Büyükada Indictment Report), "Having been in contact with someone who at some point has been arrested in unrelated incidents is certainly too far-fetched to be used as evidence against any of the defendants." (Büyükada Indictment Report), "The most severe flaw of the indictments appears in the attempt to connect the referred texts to the elements of the alleged crime." (Fincancı, Önderoğlu, Nesin Indictment Report), "there are a number of rambling and unexplained comments" (Kavala-Berkey Indictment Report), "A sequence of, ostensibly, unrelated travel is presented in the lead up to the following conclusion" (Kavala-Berkey Indictment Report), "this indictment has accepted evidence (such as newspaper articles, speeches) that cannot be based on the committing the

crime defined in law, and has accepted additional evidence that is not related, either temporally or to the subject of the allegation, as the basic basis of sufficient suspicion." (Ahmet Altan and others Indictment Report).The reason for such a long reference to the PEN Norway project and its reports is the judicial package's addition to Clause 170 of the CMK. This inserts the following sentence, "there should be no details that are unrelated to the events that constitute the suspected crime and evidence of the crime", into CMK, clause 170, paragraph 4, after the sentence, "The indictment outlines the events that constitute the suspected crime, relating them to the available evidence." The fact that this simple practicality has to be expressed in law and served up as an important change is more of a confession to the past than a hope to the future.

'Your package could not be delivered'

Be it the sender or the recipient, one of the messages that most annoys people today is, "Your package could not be delivered." It brings with it connotations of not being able to do a job that needs to be done and the sent item being in a void or maybe even lost.

Law No. 7331, dated 8 July 2021, otherwise known as the "Fourth Judicial Package", is far from offering a comprehensive solution to Turkey's chronic lack of judicial independence, its problems with fair trials, and its issues with personal freedom and security. The judiciary in Turkey has urgent problems. Clearly, any talk of independent judiciary is null and void as long as the Council of Judges and Prosecutors continues to remain in the hegemony of the executive. Judicial guarantee can only be a principle that remains on paper in a climate where approximately 4,000 judges and prosecutors were dismissed after the attempted coup of 15th July, and committees that ruled to release detained defendants in files of critical social importance were dismissed and appointed to other lower ranking courts. It is not possible to ensure fair trial and legal certainty in a legal regime where the decisions of the ECtHR are not applied and the decisions of the Constitutional Court are ignored. There is no possibility of freedom, security and material and moral integrity being protected by a legal regime in which judges and prosecutors do not act on the basis of rights and freedoms, but according to the political agenda and the protection of their own interests, which are embedded in political sovereignty relations. While it is blatantly obvious that concrete events should underpin legal practice with regards to clauses 216, 220, 299, 301, 314 of the Turkish penal Code and various regulations of the Anti-Terror Law, which have been the subject of dozens of reports, the fact that a judicial package aiming to improve human rights and freedoms chooses not to address these fundamental problems means that the *relative* improvements it contains are in a void.

In summary, it can be said that the Fourth Judicial Package is a *relative* package that could not be delivered. Its contents are caught in a void and will most certainly soon be lost, hence rendering it incapable of doing what needs to be done.