

01 September 2025

Public announcement regarding

Prosecution Reform

A reform is necessary regarding the role and structure, its duties, powers and functioning of the Public Prosecutor's Office in the judiciary

Prosecutors' offices must be removed from the courthouse and the Minister of Justice from jurisdiction!

According to Judicial Registry Statistics; in 2024, there was a total of 6,846 prosecutors, where 5,539 are male (80.9%) and 1,307 female (19.1%). There were 5,830,760 new investigations and together with 5,576,276 case files carried over from the previous year, there was a total of 11,651,519 investigation case files over all prosecutor's offices throughout Türkiye, averaging to 1,701 files per prosecutor.

In 2024, 3,045,610 of these investigations received verdicts of non-prosecution and a total of 2,307,957 new criminal actions were filed in criminal courts. Criminal courts rendered verdicts on 2,370,913 cases out of a total of 3,919,685 cases, including those transferred and revoked, 378,251 cases resulted in acquittals and 1,548,772 case files were carried over to the new year.

Criminal investigations initiated by prosecutor's offices, summonses to testify and arrest warrants, and in some cases arrests and other restrictions on freedom upon the requests of prosecutors even before indictment (i.e. before charges are brought) have an impact on social and political life. The oppositional section of the society raises concerns and has complaints that the judiciary has become a political instrument based on these actions of the prosecutors' offices.¹

¹ According to the OECD's Government at a Glance 2023 - Country Notes report, trust in the judiciary and courts in Türkiye stands at 33%, below the OECD average (55.7%) (OECD, *Government at a Glance 2023 - Country Notes Turkey*, (2023)). According to the results of ASAL Research (Official X account) survey "Do you think there is justice in Turkey?" 74% of the respondents answered "no": (accessed 28 August 2025. <https://x.com/AsalArastirma/status/1836807191002591641>); in its survey dated May 2025, Panorama Research reported that public confidence in the judiciary was 27%: (accessed 28 August 2025. <https://www.gazetepencere.com/gundem/panoramadan-mayis-ayi-anketi>)

However, the public is not sufficiently informed about the role, importance and function of the prosecutor's office. International organisations, of which Türkiye is an official member, have published opinions on prosecution offices from time to time, and the European Court of Human Rights (ECtHR) has also criticised them in its judgments. What captures the attention of the public, and which gains awareness and is criticised, is the fact that prosecutors share the same bench as court judges and work on the same physical case file. The issue has been voiced for a long time but, in our opinion, this requires a different way of thinking and the demand is for the judiciary to be provided a security force (essentially, under the command of prosecutors' offices).

The main issue to be emphasised is the role of the prosecutor's offices within the judiciary, their independence, impartiality, transparency and accountability. The fact that prosecutors, whose financial resources and other means are provided by the State, are dependent on and closely related to or under the influence of the administration renders the judiciary as no longer an independent power but an extension of the execution. This situation may pave the way for the State to lose its republican and democratic character and transform into an oligarchy, and even a tyranny.

For this reason and in consensus of the board of directors and all members of our Association; on the occasion of the new judicial year starting on 01 September 2025, we would like to share with the public our opinions and recommendations that the public prosecutors' offices should be the subject of a comprehensive reform (improvement) in order to raise awareness about the prosecutors and to share innovative suggestions that the Association has developed in remedy of some of the problems we have identified.

I. Judges and prosecutors should be separated.

- ✓ 1. Prosecutors should have their own independent professional organisation.
- ✓ 2. There should be institutional separation of candidate prosecutors and judges.
- ✓ 3. There should be increased social distancing of judges and prosecutors in courthouses and housing facilities.
- ✓ 4. When planning the rotation of judges and prosecutors, care should be taken to ensure that persons do not serve in the same place for long periods of time.

II. Influence of prosecutors in courthouses and judiciary should be prevented.

- ✓ 1. The administration of courthouses should be entrusted to impartial directorates.
- ✓ 2. Chief public prosecutors should be removed from the Justice Commissions.
- ✓ 3. Prosecutor's offices should not be located inside courthouses.

III. The impartiality of prosecutors should be strengthened, and it should be ensured that they are on an equal footing with the defence before judges and that the defence has equal rights with prosecutors.

- ✓ 1. Two prosecutors should be appointed in investigations, one to accuse (thesis) and one to exonerate (anti-thesis) the suspect, so that the suspect can defend themselves without incurring burdens.
- ✓ 2. It must be ensured that the thesis and antithesis for accusation and exoneration of the suspect are, in any case, exactly equal and equivalent.
- ✓ 3. Except in exceptional cases such as terrorism, the investigation should not be issued a confidentiality order and the prosecution and defence should have access to the investigation case file without any restrictions.
- ✓ 4. It should be ensured that prosecutors for the prosecution and defence are at an equal distance and position to the court judge and work on their own physical case files; the position of the prosecution should be lowered from the level of the judge's bench to the level of the position of the defence.
- ✓ 5. In court, the prosecution and those harmed by the crime and interveners should stand in the same place, and the prosecutor for the accused and the defence should stand in the same place; the equality of the prosecution and defence should also be visually ensured. Only during interrogations should they be seated in a special position allocated for this purpose.
- ✓ 6. The prosecutor who drafted the indictment should follow the case from start to end and attend the hearings.

IV. The requirement for the administration to grant permission to the judiciary to investigate the offences of public officials should be abolished.

- ✓ 1. Except for a few exceptions, the preliminary permission to investigate and the conditions imposed by Law No. 4483 and other laws should be abolished in investigating the offences of public officials in all ranks of the hierarchy.
- ✓ 2. Administrative authorities should report crimes they suspect to have been committed and those responsible for the crimes, to the prosecutor's offices.
- ✓ 3. Public prosecutor's offices should conduct the investigation relating to offences by public officials.
- ✓ 4. Administrative authorities should only conduct internal disciplinary investigations.

V. Arrests and similar restrictions of freedoms should be decided by the court judge of the competent court of the alleged offence, and an effective, quick and trusted appeal mechanism should be established against these decisions.

- ✓ 1. Arrest and other restrictions of freedoms should be decided by the court judge (natural judge), competent to hear the offence with which the suspect is charged.
- ✓ 2. Appeals against the decisions of the competent court should be decided by the high criminal courts working as a panel.
- ✓ 3. The appeals against decisions of arrest and other restriction of freedoms of the high criminal courts should be decided by the nearest high criminal court.
- ✓ 4. Appeals against the decisions of the nearest high criminal courts should be decided by a panel of more than 2 chairpersons of high criminal courts at the nearest location.
- ✓ 5. As is the case in civil actions; in criminal cases, there should also be the possibility to appeal against decisions restricting freedoms with a hearing before the courts of appeal.

VI. The capacity of prosecutors to protect the constitutional order should be strengthened and gaps in the current system should be eliminated.

- ✓ 1. A Turkish Chief Public Prosecutor's Office should be established and should be responsible and competent throughout Türkiye to investigate crimes against the constitutional order, nationwide organised crimes such as terrorism and drug related crimes and of high-ranking public officials and privileged groups.
- ✓ 2. The Chief Public Prosecutor's Office of the Court of Cassation should remain responsible for its regular order of business.

VII. The Board of Judges and Prosecutors (HSK) should be transformed into the Supreme Authority of Justice, all legal professions should have their own independent organisations, all decisions regarding the administration of the judiciary should be subject to judicial review, and an expert Supreme Court of Justice should be established.

- ✓ 1. The Supreme Authority of Justice should be established, and the function of the HSK should be transferred to this Supreme Authority of Justice together with the powers vested to the Ministry of Justice.
- ✓ 2. Legal professions (judges, prosecutors, notaries and judicial officials) should have their own independent professional organisations, similar to the bar associations for lawyers. In this context, prosecutors should have their own professional organisations.

- ✓ 3. All decisions and actions regarding the administration of the judiciary should be subject to judicial review, and person wishes to do so should be able to initiate judicial review without incurring any expense or burden, even if they are not a party or of interest.
- ✓ 4. A specialised Supreme Court of Justice should be established, with a specialised and fast-track procedure, specialised in hearing cases related to the administration of justice.
- ✓ 5. Judicial preparation courts should be established; these courts should be responsible for preparing the finalised file, taking statements and obtaining expert reports and preventing abuse by assisting the parties in the process, and the principle of single trial should be implemented, and trials should be reduced to a duration of 3-4 months.

Regards,

Better Justice Association

This study was written by the President of the Association, Att. Mehmet Gün, and the content was developed with the opinions and recommendations of our members.

ChatGPT and GROK were utilised in the research, and all the sources suggested by these two AI applications were checked at the source by Tuğçe Özbilen, Secretary General of the Association, in order not to fall into the mis-imaginings of artificial intelligence.

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For those whose interests are in comparative research on the prosecutor's office, a comprehensive information note on the prosecutor's office in Germany, prepared by our Board Member Att. Ayşegül Andıç, is available on the website of our Association.

01 September 2025

A reform is necessary regarding the role and structure, its duties, powers and functioning of the Public Prosecutor's Office in the judiciary

1. Judicial power and its function as a condition of sovereignty

As Montesquieu's *On the Spirit of the Laws (1748)*, Fukuyama's *Political Order and Political Decay (2014)* and many other similar thinkers recognise, it is indispensable for sovereign political communities (polity), which have the ability to determine their own future, to have a judicial function, for that community to establish a rules and rights-based principles of life, to ensure social peace, reconciliation, cooperation and solidarity, and to maintain both national and international legitimacy.

Sovereignty requires an independent judiciary, and independent judiciary requires that the functions of thesis-antithesis-synthesis, i.e. claim-defence-decision, and the elements that demonstrate these functions must be independent and effective, free from all external influences.

In polities that do not have judicial function, or cannot exercise this function independently or which is not functioning effectively, the sense of trust, investment, enterprise and progress becomes weak. The legal unity and internal order of the community weakens, and the existence of the State as a governing organisation, and thus the maintenance of its sovereignty, is endangered.

2. The nature of the judicial function

Adjudication is an **impartial decision-making** process carried out by **a competent and independent judicial body** to **resolve a legal dispute** by synthesising what is claimed and what is argued against it. Adjudication is a two-stage process: In the first stage, the material fact that is the subject of the judgement is fully, objectively and neutrally revealed; in the second stage, the decision to be reached is determined by determining the rule of law to which the event is related.

Judicial activity, which envisages the resolution of disputes arising between individuals within the community or between the administrators representing the State and individuals, according to pre-agreed rules, is one of the sovereign powers of the state. Its main purpose is to ensure solidarity, coexistence, reconciliation and co-operation in society.

3. The thesis-antithesis-synthesis model is a natural requirement.

Judgement is inherently based on a process of natural necessity (dialectical): The conflict between the “thesis” of the claimant and the “antithesis” of the defence is resolved through an independent judicial process conducted within the framework of the principle of equality, and the material truth is reached, i.e. a “synthesis” is formed. In judgements, the plaintiff/prosecutor produces a thesis; the defendant/defence produces an antithesis; and the judge produces a solution, a synthesis, from the conflict between the two.

According to the science of knowledge (epistemology), every claim to knowledge (thesis) cannot be verified unless it is tested by a counter claim (antithesis). By testing the thesis (claim) with the antithesis (counter claim) and eliminating the contradiction between them, that is, by synthesising the thesis and antithesis, a common truth emerges on which even those with different conflicting views can agree. This structure in judgement is the basis of the adversary system.² Because the way to understand the validity of a claim is to try to refute it and to search for evidence that can refute it.³

This model, which is a natural requirement, ensures that the opposing parties **are heard equally** (adversarial proceedings), **facilitates reaching** the material truth, and **supports a convincing and fair** decision.

The truth sought in the judgement is not a “truth” based on an individual’s personal belief; it is a truth that can be tested by evidence and can be subjected to **objective criteria**. For this reason, material reality is not one’s own inner truth, but an externalised and common form of belief that is revealed by the evidence and that others can be convinced of.⁴ No judgement that is not based on material facts and where the rules to which it relates are not applied independently and impartially can be convincing or fair.

Therefore, in order for this equation, consisting of thesis, antithesis and synthesis, to function properly, all three parties producing thesis, antithesis and synthesis must be free and independent against all means of internal and external influence. The independence of this adjudication model is not only a logical necessity, **but also the cornerstone of the rule of law**.⁵ In fact, in order to speak of the existence of judicial power and function in a society, these three elements must be present, independent and impartial.

The main function of prosecutor’s offices in the judiciary is to produce claims/theses on behalf of the public and by using public power. Acting on behalf of the public and representing the State against the citizens, prosecutors’ offices are the most effective and important pillar of the thesis-antithesis-synthesis trinity. Therefore, the role of prosecutors in the judiciary, their duties and powers, and their relations with other powers

² Adversarial System: It is generally referred to as “adversarial system” in Turkish. This system is primarily applied in countries with Anglo-Saxon legal tradition (England, USA, Canada, Australia, etc.). In essence, it is a judicial model in which the parties put forward their claims and evidence on equal terms, and the judge assumes an arbitral and impartial supervisory role.

³ Karl Popper, *Conjectures and Refutations* (Routledge Classics, 1963).

⁴ Lon L. Fuller, “The Forms and Limits of Adjudication”, *Harvard Law Review* (1978).

⁵ Fuller, “Adjudication” (1978).

of the State and the administration are closely related to the independence of the judiciary and the rule of law.

4. The development of the prosecutor's office

The modern prosecutor's office, which is also the case in Türkiye, has its roots in the Continental European legal system after the French Revolution of 1789 and especially in Napoleon's centralised and authoritarian understanding of the State. In this model, the prosecutor is conceived as the representative of the "state" directly or indirectly harmed by the offence and is subordinated to the executive power within a hierarchical structure. Totalitarian regimes, on the other hand, have used this structure for their own purposes, positioning the prosecutor as a superior power of the State against the individual and deliberately rejecting the principle of "equality of arms". On the other hand, in the common law system, the prosecutor is not regarded as a hierarchical officer of the State, but rather as a party to the case and is positioned on an equal footing with the defence. In this system, the defence lawyer has similar powers as the prosecutor, such as the ability to gather evidence on behalf of his or her client.

Anglo-Saxon legal systems:

Private prosecution was common in England in the Middle Ages. In 1986, the *Crown Prosecution Service (CPS)* was established as an independent and professional prosecutorial body, which decides to prosecute in cases investigated by the police and prosecutes on behalf of the public.⁶

In the United States of America (USA), prosecutors' offices are organised separately at the federal and state levels. Elected or appointed prosecutors (meaning district attorneys) are called *district attorneys (DAs)*. As part of the adversarial system, the prosecutor is an equal party before the court in the case they bring. They are accountable to the public and sometimes to the elected political authorities.⁷

Continental European legal systems:

In France, the prosecutor's office was developed during the Napoleonic era (early 1800s). *The procureur de la république*, which translates as "republican prosecutor" in Turkish, is subordinate to the executive but is part of the judiciary. The French prosecutor's office both supervises (judicial) law enforcement and issues indictments.⁸ The directive power of the Minister of Justice has been criticised. In recent years, the ECtHR has stated that the French prosecutor cannot be considered an independent member of the judiciary (ECtHR, Grand Chamber Judgment, *Medvedyev v France*, 2010).

⁶ Crown Prosecution Service, CPS, www.cps.gov.uk (accessed 21 August 2025)

⁷ Angela Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press, 2007).

⁸ Jacqueline Hodgson, "Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice", in *The French Prosecutor in The Prosecutor in Transnational Perspective* (ed. Luna & Wade, Oxford University Press, 2012).

In Germany, *the Staatsanwaltschaft*, the public prosecutor's office, was institutionalised in Prussia in the 19th century. The prosecutor's office is subordinate to the executive - the Ministry of Justice - but has the same status as the judiciary. Prosecutors are career members of the judiciary with a similar status to judges. The career structure of prosecutors, similar to the system of appointment of judges, requires them to be "impartial like judges". In Germany, the public prosecutor is both the prosecuting authority and the investigator of objective truth.⁹ However, the European Court of Justice has stated that this structure is incompatible with the principle that the indictment should be independent of the executive.¹⁰

In Italy, public prosecutors (Pubblico Ministero) have structurally the same institutional status as judges. Administratively, they do not report to the Ministry of Justice but to the Supreme Judicial Council (Consiglio Superiore della Magistratura-CSM). In this model, the prosecutor's office is completely independent of the executive. However, the impartiality of the prosecutors within this structure is questioned, and in some cases "bias masquerading as impartiality" is criticised. Moreover, although the CSM is fully independent from the executive, it is complained that in Italy there are internal hierarchical interdependencies within the judiciary.

Hybrid or different systems:

In Japan (post-Meiji) the prosecutorial (Kensatsu) model is a synthesis of the French and German models. The public prosecutor's office acts as an independent judicial authority. The Japanese chief prosecutor is subordinate to the Ministry of Justice but has great independence in practice.¹¹ Prosecutors in Japan are very powerful and act almost like judges. There is no alternative internal control mechanism. This is sometimes criticised for excessive control, arbitrariness and a conviction rate of over 99%.

In Brazil, prosecutors (Ministério Público) are completely independent of the executive. They are endowed with constitutional guarantees; they both prosecute offences and have a duty to protect the public interest (environment, human rights, etc.).

In Türkiye, the Ottoman Empire was preceded by a system of the "kadi" and regency. The institution of the prosecutor's office began in the Tanzimat reform era with the Regulation on Criminal Courts of 1840 and took its modern form in 1929 with the Code of Criminal Procedure (CCP). Turkish prosecutors have the status of members of the judiciary but are under the supervision and control of the Ministry of Justice. Article 160(2) of the CCP obliges prosecutors to "gather evidence in favour" of both the prosecution and the defence, in other words, to produce both a thesis and an antithesis.

⁹ Thomas Weigend, "The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure", in *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Damaška* (ed. John Jackson, Maximo Langer, & Peter Tillers, Oxford, 2008)

¹⁰ European Court of Justice, C-508/18 and C-82/19 PPU (2019), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=216758&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1097> (accessed 21 August 2025)

¹¹ Daniel Foote, *Law in Japan: A Turning Point* (University of Washington Press, 2007).

5. Characteristics of the prosecution profession

The personality characteristics of prosecutors and judges are quite different. Occupational role theory in psychology suggests that social roles defined by societal expectations, job demands and interactions shape individuals' behaviours, attitudes and personality traits over time. Roles function as scripts that influence individuals' self-concept and interpersonal styles, leading people with certain characteristics to gravitate towards certain roles, reinforce their educational and environmental characteristics, and adapt to the requirements of the chosen profession.

In legal professions, the roles and performance expectations of prosecutors inherently reinforce traits such as dominance, extraversion and low agreeableness. The roles of prosecutors promote assertiveness and persuasiveness, often referred to in popular psychology as "alpha" traits, which in clinical terms are similar to high dominance and extraversion. Individuals with assertive traits are attracted to the prosecution profession. Highly motivated, responsible types thrive in fast-paced prosecutor's offices where stress and power demand endurance and assertiveness. Psychological factors affecting decision-making, such as the "certainty effect" (overestimating certain outcomes), drive prosecutors to assertively pursue convictions. Over time, positive reinforcements such as successful prosecutions or career advancement reinforce this behaviour. This results in "alpha" profiles that are persuasive (high verbal dominance), assertive (low fear of conflict) and decisive.

The neutral role of judges, which requires the evaluation of evidence and balanced judgement, develops calmness, humility, open-mindedness and persuasiveness. High conscientiousness, diligence and organisation select and develop compatibility, courtesy and cooperation and emotional stability. Calmness prevents rendering emotional judgements; humility counters overconfidence; persuasiveness ensures justice through evidence. Occupational role theory explains this as the opposite of prosecutors.

Group dynamics theories explain that when these different personalities interact in mixed groups, assertive individuals become dominant even when they are a minority. Dominant personalities gain influence by talking more, interrupting and framing discussions. Assertive individuals, even when they are numerically few, use their alpha traits to influence outcomes.

Research shows that alpha traits are perceived as leaders in face-to-face groups, while others submit to confident vocalisations. According to minority theory, minorities can shake up groups if they are consistent and persuasive. According to cohesion experiments, the humble and persuasive (judges) may yield to the assertive in order to avoid conflict and maintain harmony.

Indeed, where prosecutors and judges co-operate in administrative tasks, such as in Justice Committees, assertive/alpha personalities (prosecutors) dominate.

6. Human limitations of prosecutors

It is psychologically impossible for a person - regardless of their intentions - to be completely impartial and to assess all data with equal weight.¹² As an “individual”, prosecutors **have limitations in their capacity to reach the material truth and to apply the applicable rule in the most accurate manner.**

Psychologically, like every human being, prosecutors also have selective perception, is influenced by their own world view, acts with assumptions and cognitive biases, and may be guided by factors such as target pressure and career anxiety.

On the other hand, the prosecutor alone is insufficient to determine the material truth unless they produces an antithesis. This is because a prosecutor cannot create an antithesis - an opposing opinion. More importantly, it is against the nature of a prosecutor to endeavour to refute himself. The prosecutor is subject to human cognitive limitations and it is inevitable that they will fall into the following situations:

a. Confirmation bias

When people believe a conclusion, they tend to look for information that confirms that belief and ignore information that contradicts it.¹³ A prosecutor focuses on the evidence that incriminates a suspect they believes has committed a crime. They show a lower threshold of perception towards evidence that would exonerate him or cast doubt on him. This may cause the prosecutor to unwittingly distort or even ignore evidence.

b. Belief perseverance

When people develop a conviction based on a belief, they tend to maintain this conviction despite contradictory information that comes later.¹⁴ For example: If a prosecutor is convinced that a suspect is guilty, when he sees evidence that exonerates him, he tends to reject it, thinking “there must be another explanation”.

c. Heuristics

The human mind uses shortcuts to make quick decisions, especially in complex situations. This can lead to erroneous generalisations.¹⁵ Prosecutors tend to categorise a case at first glance for reasons such as heavy workload, time pressure and confidence in their experience. They may not bother to consider alternative scenarios.

¹² Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

¹³ Raymond S. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises”, *Review of General Psychology Vol. 2*, (1998), No. 2, 175-220.

¹⁴ Anderson, Lepper & Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, *Journal of Personality and Social Psychology*, 39, (1980), 6, 1037-1049.

¹⁵ Kahneman, *Thinking* (2011).

The prosecutor is a human being. When the above mechanisms come together, it may become inevitable for a prosecutor to behave psychologically as a “person who proves what they believes” rather than as an “impartial truth-seeker”. This may lead to misinterpretation of evidence, biased indictments, and incriminating the innocent.¹⁶

While “truth” is a belief for the individual, the material truth sought in the judgement must be collectively agreeable, verifiable by evidence and convincing to the public conscience. Therefore, at least two views must necessarily conflict in a trial: thesis - antithesis. The prosecutor is epistemologically incompetent in the task of finding the material truth, as he or she alone cannot both assert, refute and verify. In an investigation conducted by the prosecutor alone, it is only possible to reach the material truth on the assumption that their belief is “true” - which is epistemologically and ethically objectionable.

The prosecutor’s power to gather evidence is only valuable as part of a contradictory system. In the discovery of the material truth, the prosecutor conducting the investigation must be opposed by an antithesis generator with equal rights. Only as a result of this can it be said that the material truth is reached. The legal system, taking into account this limitation of the prosecutor, has to put a party producing a compulsory defence (antithesis) and an impartial judiciary (synthesis) against the prosecutor producing a thesis (claim).

With the influence of the media, the accusations of prosecutors’ offices stigmatise persons who are yet to be convicted, in the public opinion as if they were guilty. This means that the accused person is stigmatised through public resources and officials. However, the presumption of innocence requires the prevention of stigmatisation of persons until they are convicted. For those who are acquitted, the stigmatisation is much more severe.

Apart from the psychological and social damages, it is also a fact that those who are stigmatised incur significant financial burdens in order to defend themselves and create an antithesis.

It is also clear that the prosecutors, who use State means and powers, cannot effectively compensate the damages suffered by citizens during the investigation process.

Therefore, it is imperative to provide the suspects under investigation with an impartial defence without financial burden and antithesis opportunity that effectively protects their rights without incurring financial burdens during the investigation phase.

¹⁶ Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, Wisconsin Law Review, Vol.2 (2006).

7. Judge-prosecutor professional association and social relations

At the legislative level, judgeship and prosecution are subject to the same rules to a great extent. Both professions are subject to the same disciplinary regime; they are considered equal in terms of class and rank, and even professional transition between them is possible.

However, despite the fact that these two professions, whose job descriptions, positions and functions within the judiciary are completely different from each other, are regulated within the same framework, and prosecutors are especially more vulnerable to executive influence. This makes it structurally challenging for prosecutors to perform their duties independently and brings them closer to the executive power rather than the judicial power.

There are many reasons to be concerned that prosecutor-judge relations in Türkiye have developed into a de facto intra-professional solidarity and a culture of hierarchical loyalty within the judiciary that jeopardises the principles of independence, impartiality and accountability.

In Türkiye, as in Germany, judicial judges and prosecutors become candidates for judicial office through a written and oral examination after graduating from law school. At the start of their careers, they share the same interview boards, the same training programmes (Deputy Judge and Deputy Prosecutor), the same in-house training (Justice Academy). In addition to the very common “fellow countryman” culture in Türkiye, they also describe each other with adjectives such as “fellow trainee” and “fellow alumni”.

The current rotation system and common provincial experience further reinforces this. Especially in the first 5-10 years of their careers, judges and prosecutors work and live in the same courthouses, in the same social circles and in the same housing facilities. This strengthens the socialisation and solidarity between them. Institutional social events such as the opening of the judicial year deepen the interaction between judges and prosecutors.

The fact that judges and prosecutors have graduated from the same class, have been trained in the same system and have served together in the same environment for a long time may blur the independence-impartiality line that should be inherent to their duties and may de facto increase the influence of prosecutors’ offices. The personal closeness and loyalty of members of the profession to each other may undermine their ability to make impartial judgements. A contradiction between closeness and impartiality may arise. When judges and prosecutors are very close professionally and socially, judges may start not to resist the demands of prosecutors in order not to offend each other and not to damage professional trust, especially in decisions requiring judgement (arrest, evaluation of evidence). Psychologically, thoughts such as “I have worked with this prosecutor for years on the same case, they would not bring incomplete files”, “This is the opinion of the prosecutor, I should not contradict them too much” and similar thoughts

may lead judges to make decisions based on trust relationships.¹⁷ This situation leads to a decision-making structure in which internal professional solidarity comes to the fore, rather than judicial independence.

As a result, the influence of prosecutors, who are both authorised in the administration of courthouses and Justice Committees and in direct relation with the Ministry of Justice, which has a strong influence over the entire judicial system, and who develop alpha personality traits due to their professional role, on judges actually increases. As a result, judges may act as an authority of automatic approvals for actions (especially arrests) proposed by the prosecutor. The judiciary is perceived both externally and internally not as a system that takes independent decisions, but as a system guided by relations of trust. This situation, especially in political cases, creates public perceptions such as “the prosecution and the judiciary are hand in hand”, which leads to erosion of trust.

- ✓ 1. **Prosecutors should have their own independent professional organisation.**
- ✓ 2. **There should be institutional separation of candidate prosecutors and judges.**
- ✓ 3. **There should be increased social distancing of judges and prosecutors in courthouses and housing facilities.**
- ✓ 4. **When planning the rotation of judges and prosecutors, care should be taken to ensure that persons do not serve in the same place for long periods of time.**

8. The institution of prosecution in Türkiye

As mentioned above, prosecution in Türkiye started in the Tanzimat reform era with the Regulation on Criminal Courts dated 1840 and was shaped in a modern sense with the Code of Criminal Procedure in 1929. The duties and powers of public prosecutors in Türkiye are regulated within the framework of the Constitution and especially the Code of Criminal Procedure No. 5271 and the Law on Judges and Prosecutors No. 2802. Turkish public prosecutors have the status of members of the judiciary. Prosecutors’ offices are administratively subject to the supervision of the Ministry of Justice. Pursuant to Article 160(2) of the Code of Criminal Procedure, prosecutors are obliged to both prosecute and “gather evidence in favour”. Pursuant to Article 170 of the Code of Criminal Procedure, prosecutors are those who brings claim on behalf of the State and are therefore a party

¹⁷ Shimon Shetreet, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges”, *Judicial Independence: The Contemporary Debate* (Ed. Shetreet and Deschenes), (Springer, 1985); Kahneman, *Thinking* (2011): The tendency towards group cohesion can replace individual judgement; CCJE, Opinion No. 1 on *Judges’ Independence, Impartiality and Integrity, Strasbourg* (2001): The impartiality of judges should be assessed not only in terms of structure but also in terms of psychological and social interaction.

in the system on behalf of the State. Therefore, as a party, the prosecutor cannot be expected to be objective.

The role, duties and powers of prosecutors under Turkish law are summarised below:

1. The role of the public prosecutor's office

According to Article 140 of the Turkish Constitution, judges and prosecutors are the judges and prosecutors of judicial and administrative jurisdiction. They fulfil these duties independently according to their conscientious convictions in accordance with the Constitution and the law.

Pursuant to Article 160 of the Code of Criminal Procedure No. 5271, as soon as the public prosecutor becomes aware of a situation that gives the impression that an offence has been committed through denunciation or any other means, they immediately start to investigate the truth of the matter in order to decide whether there is a place to file a public case or not. In order to investigate the material truth and to ensure a fair trial, they are obliged to collect and preserve the evidence in favour of and against the suspect and to protect the rights of the suspect by means of the judicial law enforcement officers under his/her command.

2. Duties of prosecutors

- Pursuant to Articles 160-161 of the Code of Criminal Procedure: The prosecutor orders the law enforcement agencies to investigate offences. The law enforcement agency carries out the investigation under the supervision of the prosecutor.
- Pursuant to Article 170 of the Code of Criminal Procedure: The prosecutor files a public case and issues an indictment when sufficient suspicion is established. Pursuant to Article 171 of the Criminal Procedure Code: They may issue a decision of non-prosecution (non-prosecution).
- Pursuant to Article 175 of the Criminal Procedure Code: Upon acceptance of the indictment, the prosecutor represents the prosecution in the proceedings. The prosecutor follows the case in court on behalf of the public and continues their duty of prosecution until the judgement is rendered.
- Pursuant to Article 4 and Article 6 of the Law No. 5275 on the Execution of Sentences and Security Measures: The prosecutor supervises the execution of sentences and security measures. They are authorised to visit prisons and supervise the execution procedures.
- Pursuant to Article 161(3) and Article 92 of the Code of Criminal Procedure: Suspicious deaths, autopsies and crime scene investigations shall be conducted under the supervision of the prosecutor.

3. Powers of prosecutors

- Pursuant to Article 161 of the Code of Criminal Procedure: The prosecutor may give orders to the judicial police and, when deemed necessary, shall personally carry out the investigation procedures.
- Pursuant to Articles 90-91 of the Code of Criminal Procedure: The prosecutor supervises arrest and detention procedures. Pursuant to Article 100 of the Code of Criminal Procedure: The prosecutor submits the request for arrest to the criminal judge of peace.
- Pursuant to Articles 116, 123, 135 of the Code of Criminal Procedure: Prosecutors request injunction measures such as search, seizure and surveillance of communications.
- Pursuant to Article 170(2) of the Code of Criminal Procedure: The public prosecutor is obliged to open the public case; they cannot waive this obligation after the case is opened. Some special procedures, such as conciliation, are excluded.

4. Other duties of public prosecutors

- Article 62 et seq. of the Law No. 2802 on Judges and Prosecutors sets out the job description, appointment and responsibilities of public prosecutors.
- Pursuant to Article 148(5) of the Constitution, the Chief Public Prosecutor of the Court of Cassation may give an opinion in cases of annulment before the Constitutional Court.
- Pursuant to Article 69(1) of the Constitution, the Chief Public Prosecutor of the Court of Cassation is also authorised to file a lawsuit for the dissolution of political parties.

9. Relationship of public prosecutor's offices with the Ministry of Justice

a) Hierarchical position

Pursuant to Article 140/final of the Constitution, public prosecutors are part of the judiciary, not the executive body. Chief public prosecutors make decisions like independent judges; however, they are under the administrative supervision and control of the Ministry of Justice. Article 9 and Article 62 et seq. of the Law No. 2802 on Judges and Prosecutors define the duties of prosecutors, while the role of the Ministry of Justice in “general supervision” and “ensuring administrative functioning” is specified.

b) In terms of criminal investigation

Article 160 of the Code of Criminal Procedure: Prosecutors conduct investigations independently; the Minister of Justice cannot interfere in this process. However, Article 148 of the previous Criminal Procedure Code gave the Minister of Justice limited powers of instruction. This power has been abolished in the new Code of Criminal Procedure. Today, the minister cannot directly intervene in the prosecutor's criminal investigation.

c) In terms of administrative duties

The Ministry of Justice is responsible for the administrative work performed by the chief public prosecutors in the administration of the courts. The chief public prosecutor shall conduct correspondence with the ministry, follow the personal affairs of judicial personnel, and act on behalf of the ministry in maintaining order in the courthouse.

d) In terms of the management of courthouses

Pursuant to Article 18 of the Law No. 5235 on the Establishment of Courts of First Instance and Regional Courts of Appeal: The chief public prosecutor is authorised to manage the courthouses. Security of the courthouse, building organisation, logistical affairs (e.g. cleaning, shift schedules, distribution of duties of staff) are under the responsibility of the chief public prosecutor. The chief public prosecutor exercises his/her authority in these matters through the chief clerks and administrative staff. The chief public prosecutor is the de facto administrative supervisor in matters such as the entrance-exit order of the courthouse, coordination with security personnel, and the use of courtrooms. The chief public prosecutor has an influence on issues such as the allocation of physical space (rooms, courtrooms) in courthouses. Support services such as security, cleaning, physical organisation are often carried out through the chief public prosecutor's office.

10. Duties and powers of Chief Public Prosecutors in Justice Committees

Structure of the Committee

Article 35-36 of Law No. 5235: A Justice Commission shall be established in the centre of each high criminal court. Chief public prosecutors are natural members of the Justice Committees, which have a say in decisions such as temporary assignments, leave and work areas of judges within the courthouse. They are the most senior high criminal court president of that location. The members are two judges and the chief public prosecutor or the deputy chief public prosecutor/prosecutor to be appointed by the chief public prosecutor.

Duties

Justice Commissions have an important administrative function in the judicial organisation as judicial justice commissions: Recruitment of judicial personnel such as court clerks, bailiffs, drivers, auxiliary staff, determination of their positions, local implementation of personnel examinations conducted by the Ministry of Justice, and giving opinions on the performance, discipline and distribution of duties of personnel. Thus, the chief public prosecutor has a direct influence on the selection and supervision of administrative personnel within the Commission.

11. The Chief Public Prosecutor's Office of the Court of Cassation or the Chief Public Prosecutor's Office of Türkiye?

Investigation jurisdictional gap and the need for political support

In a developing Türkiye, terrorism, drug-related and other organised crimes, which exceed the traditional jurisdiction of prosecutors' offices and courts, are committed more and more frequently; in these cases, the jurisdictions of prosecutors' offices overlap and practical solutions are sought. On the other hand, there are gaps in the investigation of offences against the constitutional order independent of politics. The investigation of offences committed by some senior public officials and members of the judiciary depends on the decision of their colleagues to investigate. In order to open an investigation against some senior public officials (e.g. the Banking Regulation and Supervision Agency), there are almost impossible prerequisites, such as a conviction.

The accountability of the State administration is limited

Due to the preliminary authorisation and investigation conditions imposed by the Constitution and other provisions, it is virtually impossible to investigate public officials in the top management of the State and to ensure the rule of law in the administration. This is due not only to the legal and constitutional conditions that hinder the investigation, but also to the fact that the organisation of the prosecutor's office is not suitable to carry out this task effectively.

Turkish Chief Public Prosecutor's Office

A new structure, which can be called the "Turkish Chief Public Prosecutor's Office", should be established for the investigation of offences that are widespread throughout Türkiye or that concern the constitutional order, the framework of its duties should be clearly defined and it should be equipped with appropriate powers. The incidental performance of these duties by the Chief Public Prosecutor's Office of the Court of Cassation in addition to its regular duties should be terminated.

Supreme Court of Justice

In addition to judicial review of the decisions of the administration of justice, a Supreme Court of Justice should be established with the competence to investigate and prosecute high-level executives, including those with immunity, who are subject to privileged conditions of investigation. It should also be considered to try offences for which the Turkish Chief Public Prosecutor's Office has jurisdiction.

- ✓ 1. **A Turkish Chief Public Prosecutor's Office should be established and should be responsible and competent throughout Türkiye to investigate crimes against the constitutional order, nationwide organised crimes such as terrorism and drug related crimes and of high-ranking public officials and privileged groups.**
- ✓ 2. **The Chief Public Prosecutor's Office of the Court of Cassation should remain responsible for its regular order of business.**

12. Why “public prosecutor” and not “prosecutor”?

The origin of the term “public prosecutor” in Türkiye is a reflection of the choices made during the founding period of the Republic. In the Ottoman period, the institution of prosecution was developed under the name of “*müddeiumilik*” with the Tanzimat reform era, and the French model was taken as an example during the modernisation process. The Turkish equivalent of the word “*müdde*”, which derives from the word “*iddia*” meaning “to claim”, is the prosecutor, which derives from the word “*sav*” meaning “claim”, meaning a person whose duty is to “make a claim”. The term *Müddeiumumi* means “public prosecutor”.

In Anglo-Saxon legal systems, prosecutors are often referred to as “public prosecutor” meaning “prosecuting on behalf of the public”, “district attorney” meaning an attorney of a region or “state attorney” meaning an attorney of the state. What they all have in common and emphasise is that they act on behalf of the public. In continental European systems, the term “*procureur de la république*”, meaning “prosecutor of the republic”, is used in France, and the term “*Staatsanwalt*”, meaning “state defender”, is used in Germany. In Germany, the term “*rechtsanwalt*”, meaning defender of rights, is also used for lawyers. There is a strong international consensus that prosecutors “should protect the law and the public interest, not the regime”.

After the proclamation of the Republic in 1923, the idea of protecting the state and the regime was placed at the centre of the judicial organisation. The term “prosecutor of the Republic”, instead of the term *Müddeiumumi*, was transferred into Turkish, especially from the French “procureur de la république”, and identified with the political order of the Republic. In a conversation between Atatürk and the then-Minister of Justice Mahmut Esat Bozkurt, Bozkurt’s suggestion that “since they will protect the Republic, prosecutors should be called prosecutors of the Republic” was accepted, which was a direct symbolic expression of this approach.

The main objective in the establishment of the prosecutor’s office is the protection of the State, i.e. public order, as well as individual rights. For this reason, although the prosecutor may appear to be impartial, they are in fact “a party to the state”. It is their primary duty to maintain social order, protect the public interest and enforce the rule of law. In Türkiye, the emphasis on “republic” directly expresses the identity and political regime of the state. Thus, the prosecutor’s mission is perceived not only as “prosecuting crime” but also as representing and preserving the republican regime. Although the term “public prosecutor” is in line with Türkiye’s history of modernisation and the ideology of the founding of the Republic, it has become an expression identified with the regime, overshadowing the independence and impartiality of prosecutors within the contemporary understanding of democracy and the rule of law.

This approach creates a controversial situation in terms of the impartiality of the prosecutor. This is because defining prosecutors with a politically connotative duty such as “protecting the Republic” positions them as the defender of the State or the regime rather than an independent element of the judiciary. This positioning may constitute an intellectual basis for the powers that be (the executive power), who think that they represent the Republic first hand, to establish dominance or influence over the prosecutors and to try to influence them to perform their duties as the term implies. These days, the ability and capacity of prosecutors’ offices to investigate cases such as non-compliance with Constitutional Court judgements that are incompatible with the fundamental values of the State as laid down in the constitution is being questioned. This may lead to prosecutors taking on a role that prioritises the priorities of the executive, especially in political cases.

Therefore, although the term “public prosecutor” reflects the regime security concerns at the founding of the Republic in the historical context, its accuracy today should be re-examined according to today’s conditions. Because in a state order based on the rule of law, the duty of prosecutors should be to protect the law, not the regime. In this respect, expressions such as “public prosecutor” or “prosecutor on behalf of the public” may reflect the function of the prosecutor more accurately and universally. For these reasons, it may be appropriate to open a discussion and adopt a terminology that emphasises the main function of prosecutors, which is the role of “prosecuting authority on behalf of the public interest”.

13. Hierarchical role and responsibility of the chief public prosecutor

Pursuant to Article 16 of Law No. 5235, the chief public prosecutor is a senior executive in the judicial organisation. This status brings with it not only an administrative jurisdiction but also constitutional and public responsibilities.

The chief public prosecutor is required to act in line with the principles of transparency and accountability, especially in investigations and cases that closely concern the public. Protecting the rights of victims and witnesses, ensuring compliance with national and international norms and leading judicial reforms should be among the primary duties of this office. Adherence to ethical principles is complementary to these duties.

However, the fulfilment of all these duties depends on the institutional and functional independence of the entire prosecution organisation, particularly the chief public prosecutor, from the executive body. Otherwise, the prosecutor's office ceases to be an impartial judicial subject acting on behalf of the public and risks becoming an actor prioritising the priorities and political concerns of the execution.

14. The distinction between assurance and independence

That public prosecutors should be independent is not a matter of discussion. However, the 1982 Constitution creates a dichotomy in this regard. Although Article 139 of the Constitution regulates the "assurance of judgeship and prosecution" together, it should not be inferred from this statement that prosecutors are "independent" like judges.¹⁸ This is because Articles 9 and 138 of the 1982 Constitution only stipulate the "independence of judges and courts". This shows that there is no explicit constitutional assurance that prosecutors are as independent as judges. There is a clear difference between the concept of assurance and independence in this context. While assurance is a status that provides a guarantee against dismissal or relocation, independence means being bound only by law and conscience in making decisions. Civil servants also enjoy this type of assurance but are not independent; likewise, a prosecutorial structure subordinated to the execution cannot properly fulfil the function of an independent judiciary.

¹⁸ Hüseyin Şık, *Türk Adli Yargı Sisteminde Savcılık Kurumu*, (PhD Thesis, Dicle University Institute of Social Sciences, Department of Public Law, Diyarbakır, 2018) p.73 et seq. "The independence of courts is clearly regulated in Article 138 of the Constitution. The independence of judges and courts is mentioned, and any attempt to interfere with the judiciary is prohibited. The institution of the prosecutor's office is not mentioned."

In a democratic State of law, not only the defence but also the prosecution must be independent. The sound execution of judicial activity is possible only if prosecutors (not only judges) are completely independent of the influence of the executive. The prosecutor's office is one of the constituent elements of the judiciary and, as a requirement of this role, should have an organisation completely independent from the executive organ. In this context, it would be one of the fundamental assurances of the right to a fair trial and social justice for prosecutors, like lawyers, to come together under the roof of their own professional organisations, to take professional decisions internally and to act only in accordance with the rule of law and the public interest.

15. The influence of the execution (Minister of Justice) on prosecutors

The president elects almost all of the 13 members of the HSK, which is the decision-making authority and regulator of all occupational processes of judges and prosecutors such as admission to the profession, appointment-transfer, promotion, leave, discipline, dismissal from office and inspector supervision, directly and through the Turkish Grand National Assembly. The Minister of Justice is the natural chairperson and the deputy minister is a natural member of the Board. The Board's inspection board conducts inspections "under the supervision of the chairperson (i.e. the Minister of Justice)".

The fact that the chief public prosecutors, who are administratively under the supervision of the Ministry of Justice, are in charge and authorised in the management of courthouse buildings and judicial staff and administrative services, may increase the administrative/logistical superiority between them and the Ministry of Justice and the superior-subordinate dependency in the institutional environment.

There is an internal hierarchy between chief public prosecutors and prosecutors. The chief public prosecutor is in charge of ensuring the efficient and organised functioning of the public prosecutor's office, dividing the work and personally conducting judicial proceedings when necessary. Although the chief public prosecutor's supervisory authority over prosecutors and the duty to check the legality of prosecutors' decisions terminating investigations are intended as quality assurance, this increases the risk of pressure on the independence of the case.

Indirect influence of the prosecutor's office on the working environment of judges is incompatible with the principles of "equality between the parties" and "independent judgement". Examples such as "red carpeted" corridors and "VIP prosecutor rooms" allocated to the prosecutor's office symbolically but effectively convey the message of a prosecutor-centred courthouse, not a judge-centred courthouse.

The Consultative Council of European Judges (CCJE) Opinion No. 12 (2009) states that judges should be institutionally, managerially and functionally independent from prosecutors and that this independence should be both de facto and publicly visible. The Venice Commission in (CDL-AD(2016)007), the ECtHR in *Delcourt v Belgium* (2689/65) and *Campbell and Fell v the UK* (7819/77 & 7878/77) state that "it is not sufficient for the court to be independent, it must also be perceived to be independent".

In Türkiye, where there are no geographical assurances, all situations lead to judges and prosecutors being under the influence of the prosecutor's office, being legally dependent on the execution, or as having a strong perception in this direction, both among members of the prosecution and in the public. The strong assumed dependence shall cause the independence of the judiciary to be harmed, in practice. In other words, perceived dependence has the risk of creating dependence and influence in practice: Because when internal hierarchy means such as (i) the chairmanship of the HSK by the Minister of Justice and the executive influence in the determination of its members, (ii) the career-discipline-inspection power of the HSK, and (iii) the supervision and decision control of the chief prosecutors over the prosecutors come together, there is a risk that the executive influence at the higher ranks in the hierarchy may be transferred downwards through the institutional hierarchy as "perceived/indirect pressure".

Indeed, these issues have been criticised on an international scale. According to the Venice Commission (2017) recommendation, the new composition of the HSK and the chairmanship of the Minister of Justice jeopardises judicial independence.¹⁹ A significant number of members of the higher judicial boards should be elected by their peers. The EU 2024 Türkiye Report²⁰ also notes the weak independence of the HSK from the execution body and recommends changing the composition and selection process to limit executive influence and introducing safeguards against high-level interference. It also criticises the oversight of candidate selection boards by the Ministry of Justice and the lack of safeguards on evaluation/re-assignment.

Structural improvements and enhancements

Structural control mechanisms should be established to overcome the human and psychological limitations of prosecutors in order to ensure that objective material truth is reached through thesis-antithesis-synthesis in accordance with scientific principles. Procedural rules (e.g. Article 160(2) of the Code of Criminal Procedure) that impose self-contradictory tasks on prosecutors that are humanly impossible for them to fulfil should be abolished.

The thesis and antithesis functions in investigations should be equal and equivalent in all respects, and this equivalence should be maintained throughout the prosecution. In this context, prosecutors should no longer share the same bench and the same physical case file as the judge, and should be on the same level with the defence and at the same distance from the judge.

¹⁹ Venice Commission, CDL-AD(2017)005, Opinion on Türkiye: Accepted by the Grand National Assembly of Türkiye on 21 January 2017 and On the Constitutional Amendment Proposal to be Submitted for Referendum on 16 April 2017 (2017).

²⁰ European Commission, Türkiye 2024 Report (2024).

Except for terrorism and similar crimes of vital importance for society, every aspect of investigations should be fully open to the defence, and no aspect should be kept secret from the suspect and their defence team. In cases where arrest and other restriction of freedoms orders are rendered, if an indictment is not issued, accepted and an action is not filed within a certain and short period of time, the order for restriction of freedoms should be lifted immediately.

In investigations, the functions of the prosecutor's office in producing the claim (thesis) and defence (antithesis) should not be placed upon the same person; these roles should be assigned to separate persons. Suspects should be given the opportunity to defend themselves on an equal footing with the prosecutor who produces the (thesis) without any financial burden and without any restrictions.

In our opinion, the easiest method to implement is the appointment of two prosecutors. Until this is achieved, the provision of free defence services at the expense of public funds or the provision of compulsory defence counsel in all investigations and at all stages of the investigation may be considered. In addition, the suspect should be free to obtain defence assistance at their own expense.²¹

In order to strengthen not only the structural but also the symbolic and administrative independence of the judiciary, prosecutors should cease to play any role in the administration of justice and in decision-making processes concerning the functioning of judges. In this framework, Justice Committees should be composed only of judges and courthouses should be free from the influence of prosecutors. Prosecutors should be physically located outside the courthouses, not within them; they should work in their own separate buildings; and as a requirement of representing the prosecution in trials, and they should come to the courts for hearings, just like lawyers.

Each law enforcement unit should have a 'prosecutor on duty' with authority equivalent to that of the chief-in-charge; the prosecutor should supervise and document all actions of security forces during operations and investigations, and should be able to recommend disciplinary or criminal sanctions when necessary.

²¹ With this proposed model, a public, equal level of competition between thesis and antithesis is ensured and a systematic balance is established against the confirmation bias that prosecutors inevitably fall into. The dual prosecutor model, which proposes a system that is epistemologically and psychologically more robust, fair and trustworthy before the public, strengthens the prosecutorial function against executive influence by structuring it with institutional internal balance. In this case, the suspect will be able place their trust, not only in their lawyer but also the prosecutor in favour, which will increase trust in the judiciary. The proposal offers an alternative to the contradictory (thesis-antithesis) model of the prosecutor's office, similar to the one applied in Japan to balance the mix of prosecutors and judges, and to the problems of the prosecutorial institution, such as the dependence of prosecutors on the executive as seen in Germany, the political influence of prosecutors in France and the dual identity of prosecutors in Italy.

The prosecutor who prepares an indictment should also follow up the action filed on behalf of the public. In fact, *District Attorneys* in the USA take part in the whole process of the case and personally conduct the case. In Italy, the *Pubblico Ministero* is the same, following the investigation until the finalisation of trials. In the UK, the prosecutor of the case also monitors the proceedings, in general but with certain exceptions.

On the other hand, not only the parties to the investigation, but also third parties who hold information and evidence relevant to the investigation should be obliged to contribute to the effectiveness of investigations and the discovery of the material truth. To this end, the suspect's prohibition of self-incrimination and the right to remain silent must be respected to the utmost, while it must be ensured that witnesses, experts and other third parties honestly and fully produce the information and documents in their possession, and honestly, completely and accurately respond to the questions and requests of the prosecution and the defence.

To summarise:

- ✓ 1. **The administration of courthouses should be entrusted to impartial directorates.**
- ✓ 2. **Chief public prosecutors should be removed from the Justice Commissions.**
- ✓ 3. **Prosecutor's offices should not be located inside courthouses.**
- ✓ 4. **Two prosecutors should be appointed in investigations, one to accuse (thesis) and one to exonerate (anti-thesis) the suspect, so that the suspect can defend themselves without incurring burdens.**
- ✓ 5. **It must be ensured that the thesis and antithesis for accusation and exoneration of the suspect are, in any case, exactly equal and equivalent.**
- ✓ 6. **Except in exceptional cases such as terrorism, the investigation should not be issued a confidentiality order and the prosecution and defence should have access to the investigation case file without any restrictions.**
- ✓ 7. **It should be ensured that prosecutors for the prosecution and defence are at an equal distance and position to the court judge and work on their own physical case files; the position of the prosecution should be lowered from the level of the judge's bench to the level of the position of the defence.**

- ✓ 8. In court, the prosecution and those harmed by the crime and interveners should stand in the same place, and the prosecutor for the accused and the defence should stand in the same place; the equality of the prosecution and defence should also be visually ensured. Only during interrogations should they be seated in a special position allocated for this purpose.
- ✓ 9. The prosecutor who drafted the indictment should follow the case from start to end and attend the hearings.
- ✓ 10. The suspect's prohibition of self-incrimination and the right to remain silent must be respected to the utmost, while witnesses, experts and other third parties must be ensured to honestly and fully produce the information and documents in their possession, and to truthfully, completely and fully respond to questions and requests of the prosecution and defence.

16. The oddity of the administration authorising the judiciary: the matter of granting authorisation for investigation

Article 10 of the Constitution and the rule of law dictate that all are equal before the law. Pursuant to Article 138(2) of the Constitution, "No organ, office, authority or person may give orders and instructions to courts and judges in the exercise of judicial power; they may not send circulars; they may not make recommendations or suggestions." However, the requirement for the administration to grant permission to the judiciary for filing criminal investigations against public officials (permissions for investigations) in accordance with Law No. 4483 directly undermines this principle. In the case of crimes committed by public officials, the prosecutors' (judiciary's) ability to perform their ordinary duties depends on the administrative authorities permission to conduct preliminary investigations and granting permission for investigation. The special laws of key institutions such as the Court of Cassation, the Council of State and the Banking Regulation and Supervision Agency also specifically regulate the permission and conditions for investigation.

This situation leads to the following contradiction: While the prosecutor can initiate an investigation directly when citizens commit an offence, the prosecutor cannot take action when a public official commits an offence without the permission of the administration.

Currently, Law No. 4483 on the Prosecution of Civil Servants and Other Public Officials does not provide for a direct prosecutor's investigation in cases where public officials (e.g. governor, director, district governor) are alleged to have committed a crime, but requires the administrative authority to firstly grant permission. Prior to the authorisation process, inspectors investigate the alleged incident, prepare a report, and recommend a decision on whether "an investigation is warranted" or "not warranted".

Inspectors are administrative personnel, not judicial. Inspectors are subordinate to the execution; and hence are not impartial.²² Their authority has transformed into a kind of “preparing an indictment” function. This situation may lead to the protection of persons “close” to the execution and thus to the obstruction of justice. Administrative inspectors, who de facto act as prosecutors, carry out procedures such as “collecting evidence”, “listening to witnesses” and “recommending decisions” for criminal investigations, and in this case, the execution acts as a prosecutor against its own members.

In investigating the offences of public officials, the judiciary is directly dependent on the execution and politicians. By means of the institutional granting of investigations, the executive authorities have the opportunity to accuse innocent officials and ensure the guilty officials evade the clasps of the judiciary, as well as to distort the material truths and to usurp the judicial function of deciding what is or is not a crime, thus creating a privileged oligarchic caste in the public sector, immune from rules and sanction. More importantly, this makes the judiciary fully dependent on the execution in its function of carrying out their ordinary duties.

As a result, the visibility of justice and public trust are damaged; when citizens think that public officials “go unpunished”, trust in the judiciary is lost, which in turn damages the visibility and credibility of the rule of law.

Inspectors should only be able to prepare reports by conducting administrative disciplinary examinations, should not have the authority that should be exercised by a judicial authority such as granting or refusing permission for an investigation, and should not make preliminary assessments within the scope of criminal law. If there is a suspicion of a criminal offence committed by a public official, the should be reported directly to the prosecutor’s office, and in line with the recommendations of the ECtHR and the Venice Commission, the requirement for judicial investigations to be subject to the permission of the administration should be abolished.

The requirement for obtaining authorisation for investigation should be completely abolished. In accordance with Article 140 of the Constitution, prosecutors should be able to initiate direct investigations in cases of suspicion of any offence, as well as in cases of alleged offences committed by public officials. In this way, the constitutional principle of equality before the law will be ensured, the distinction between public officials and citizens shall be lifted, and the administrative tutelage over the ordinary functioning of the judiciary will cease.

Indeed, according to the ECtHR (2009 decision on Kudeshkina v Russia), executive interference in judicial processes, particularly in investigations and decision-making, is a matter of crucial public interest and therefore the freedom of expression of judges wishing to participate in discussions on the activities of judicial institutions is essential for the protection of the independence and impartiality of the judicial power. According to the Venice Commission (CDL-AD(2014)011), special protection mechanisms for public officials should be limited to serious offences and exceptional circumstances,

²² European Court of Human Rights, *Köksal v Türkiye*, Application No. 70478/16 (2020); Venice Commission, CDL-AD(2017)005

transparent, narrow in scope and subject to oversight against abuse and, according to the OECD (Enhancing Integrity in the Public Sector, 2020), independence of criminal oversight mechanisms is a prerequisite for accountability.

Even if the practice of administrative authorities conducting investigations against public officials is not to be abolished, a two-way (for and against) investigation model should be adopted within the prosecutor's office, and the decision of an independent preliminary investigation judge, not the prosecutor, should determine whether charges will be brought as a result.

In this case, the execution will cease to be a party, the legal evaluation of the events will remain within the judiciary, the perception of "politics interfering with the judiciary" will weaken before the public, and public officials will have judicial security against arbitrary and unfounded accusations.

- ✓ 1. **Law No. 4483 and other special laws requiring the granting of permissions to investigate should be abolished.**
- ✓ 2. **Administrative authorities should report suspected offences, and those responsible, to the public prosecutor's office.**
- ✓ 3. **Public prosecutor's offices should investigate offences committed by public officials.**
- ✓ 4. **Administrative authorities should only carry out internal disciplinary investigations.**

17. Interrogation of the suspect by "law enforcement"

Pursuant to the Regulation on Judicial Law Enforcement, in places where there are police, gendarmerie, regional coast guard and customs protection directorates and departments, sufficient judicial law enforcement personnel shall be assigned to the extent of the existing facilities. However, judicial law enforcement is "a part of the law enforcement organisation" to which it is attached. The primary duty of judicial law enforcement is to prevent the committing of offences. Judicial law enforcement is not a part of the judicial organisation. Therefore, their in-service training is not suitable to allow them to perform judicial procedures.

However, pursuant to Article 161(2) of the Code of Criminal Procedure, the prosecutor, while conducting an investigation, may authorise the taking the statement of the suspect by the law enforcement officers with a written instruction; in this case, the law enforcement officers act like the prosecutor and interrogate the suspect. This statement-taking often turns into a de facto delegation of the interrogation function by the prosecutor. However, law enforcement organs, which primarily functions to prevent crime and maintain public order, is not a party to the judicial process. Moreover, although it is said that the prosecutor is the superior of the law enforcement in judicial matters, the law

enforcement agency is not in practice subordinate to the prosecutor, but primarily to the administrative superior. Therefore, the independence and impartiality of suspect interrogation is undermined.

In 31 of the 46 member states of the CEPEJ (2022), prosecutors are authorised to conduct investigations in 31 countries and to request investigative measures from the judge when necessary in 38 countries. In 39 countries prosecutors conduct or supervise police investigations.

In line with ECtHR jurisprudence, law enforcement should be prohibited from taking statements, in addition to public order duties. Law enforcement agencies should only carry out technical tasks such as collecting evidence, taking witness statements and examining crime scenes, and should not interrogate suspects or take statements.

Prosecutors' offices should exercise their control over law enforcement through direct supervision, not through instructions; interrogation should be exclusive to the prosecutor or delegated to the preliminary examination judge, as it is a direct judicial function; and the statements of suspects should only be taken by the prosecutor or judge.

18. Relationship between the prosecutor and the criminal judge of peace

Pursuant to Article 100 et seq. of the Code of Criminal Procedure, basic restrictions of freedom such as arrest, search, seizure, monitoring of communication, extension of detention are subject to the decision of the criminal judges of peace upon the request of public prosecutors. However, as explained above, it is possible for the chief public prosecutors' offices to exert implicit pressure on the criminal judges of peace due to their physical, administrative and de facto influence within the courthouse. The execution, which has influence over both chief public prosecutors and judges as the chairperson of the HSK, can also exert pressure on both the chief public prosecutor's office and the criminal judgeships of peace.

- There are approximately 700 criminal judges of peace in Türkiye. They are appointed by the HSK, chaired by the Minister of Justice, with the overwhelming majority of its members appointed by the President of the Republic. These judges, like other judges, have no geographical assurance, meaning that they can be appointed to a location against their will. There is no possibility of judicial review against the HSK's appointment decisions.
- There is a public perception that the judiciary is used as a tool for politics, especially in political cases.
- The possibility to appeal against the decisions of criminal judges of peace at the criminal court of first instance has been introduced. However, this was not enough to allay concerns. This is because the judges of the law of first instance do not have geographical assurances either.

The Venice Commission (CDL-AD(2017)004) states that criminal judges of peace in Türkiye are perceived as a politicised instrument, rather than providing a guarantee of freedoms, and are at risk of politicisation due to structural problems and lack of independence. In *Kavala v Türkiye* (2022), the ECtHR concluded that the judiciary, particularly the criminal judges of peace, did not act independently and acted in political aims in Osman Kavala's detention decisions. In its report on Türkiye, the UN Special Rapporteur on Freedom of Expression states that criminal judges of peace in Türkiye undermine the rights to a fair trial and defence due to structural problems and the influence of the execution.

The indirect or de facto influence of prosecutors on decisions restricting freedoms is a threat to the essence of the rule of law. Ensuring the full independence of the judiciary from the executive in these processes that limit the most fundamental rights of the individual is vital for democracy and the rule of law. The following measures can be taken to address these concerns:

- ✓ 1. **Arrest and other restrictions of freedoms should be decided by the court judge (natural judge), competent to hear the offence with which the suspect is charged.**
- ✓ 2. **Appeals against the decisions of the competent court should be decided by the high criminal courts working as a panel.**
- ✓ 3. **The appeals against decisions of arrest and other restriction of freedoms of the high criminal courts should be decided by the nearest high criminal court.**
- ✓ 4. **Appeals against the decisions of the nearest high criminal courts should be decided by a panel of more than 2 chairpersons of high criminal courts at the nearest location.**
- ✓ 5. **As is the case in civil actions; in criminal cases, there should also be the possibility to appeal against decisions restricting freedoms with a hearing before the courts of appeal.**

19. There should be a comprehensive reform of the judicial process.

The problems of the Turkish judiciary are not limited to prosecutors' offices or criminal judges of peace. On the contrary, these two segments are also adversely affected by other fundamental structural problems in the judiciary. It is not possible to solve these problems, which prevent society from uncovering and confronting the truth, establishing a rule-based order by applying the rules of law effectively and accurately, and thus developing rapidly by gaining confidence both inside and outside Türkiye, by reforming only the prosecution institution.

Judgement and trial is a mechanism and process initiated by the prosecution by producing a thesis. It is imperative to ensure that the prosecutor's office, after establishing the facts in the most accurate way, puts forward a thesis and proves to an independent and impartial judicial body - not to themselves or to the chief prosecutors - that this should be transformed into a trial, and in this process, it is imperative to ensure that any mistakes, especially in the limitation of freedoms, are resolved by expert judges in the shortest time possible.

It is possible to achieve all this by making the judiciary function more effectively, not by paralysing the judiciary. In other words, the solutions should be innovative and intelligent solutions that do not create new challenges, but also provide solutions to other known problems.

The problem of incomplete case files and the desire for a single trial

The most important problem of the judicial system in Türkiye is that the opening of trials with incomplete case files and not finalising proceedings in a single hearing. If the ideal of single trials is realised, complaints such as the executive's influence and interference in the judiciary or the judiciary becoming a political instrument due to the chief prosecutor's offices dominating others in a variety of ways and rendering of inaccurate judgements will cease or be significantly reduced and become exceptional.

To analyse the current situation only in the context of prosecutors' offices: Cases are filed with incomplete files and insufficient evidence, or arrest and other decisions to restrict freedoms are requested on the basis of suspicion rather than evidence. Decisions such as arrest are rendered in haste and most of the time as suggested by the prosecutor. It is inevitable that judges respect and rely on the work of their colleagues in the same professional group, with whom they have been educated and worked together and with whom they share the same fate, and other personal reasons are also effective. On the other hand, in cases that are not well prepared, judges have to complete the investigation and this causes additional delays.

Moreover, in proceedings where there is no single hearing, case files accumulate and hearings are held at 6-8 month intervals. Instead of the final judgement to be rendered in a trial that lasts for years, justice is attempted to be achieved through arrest and similar decisions to be made during the preparatory phase of the investigation. Because, when the case file and evidence required to sentence the suspect are not fully ready, the decision made at the preparatory stage is in any case a matter of prejudice. For these and similar reasons, the decisions of the criminal judges of peace in the cases brought before them have the quality of "preliminary preparation" of the trial and judges have difficulty in establishing confidence that they are the protectors of freedoms.

Judicial Preparatory Courts should be established.

With the implementation of the proposals for the establishment of **Judicial Preparatory Courts** and the inclusion of lawyers in the case preparation process, which were developed by the “Better Justice Association A to Z” with more than 10 years of experience, it is possible to end the trials that take 4-5 years (48 - 60 months) in the first instance courts in 3-4 months and in a single hearing.

Ninety per cent of the workload in the proceedings is due to incomplete case files and inadequate preparation that are imposed on judges and how are required to handle. With the proposed system of **Judicial Preparatory Courts**, this workload is transferred to lawyers. Judicial Preparatory Courts directly intervene in matters such as obtaining expert reports, hearing witnesses and parties, which should be carried out under the supervision of judges, or ensure that these works are carried out by lawyers. The Judicial Preparatory Courts, which support lawyers to fulfil their duties with confidence and prevent possible abuses, accelerate pre-trial preparations up to 10 times on the one hand, and on the other hand, create a solid infrastructure for trials in a single hearing by ensuring that the cases are opened with complete files. Thus, the duration of the proceedings and, in parallel, the costs are reduced by up to one tenth.

The idea of Judicial Preparatory Courts can be considered as a combination of the functions of evidence gathering and protection measures of the relatively newly established criminal judgeships of peace, and the ideas of the interrogation judgeships (which were abolished in the 1980s). It is envisaged that the Pre-Trial Courts may also take preliminary and provisional measures in matters that do not concern freedoms; however, it is envisaged that every action they take will be closely supervised by the competent court in charge of that matter.

The Preparatory Courts can be compared with the functions of the *Giudice Istruttore* in Italy (Pre-2000) - pre-trial preparation judgeships specialised in the collection of evidence, the *Ermittlungsrichter* in Germany - the authority supervising the procedures requiring the approval of the judge in the preparatory process, and the *Juge d’instruction* in France - the judge assisting in the preparation of the trial in the mixed *system*.

When the Judicial Preparatory Courts are established, the judge in the courts will focus on the proceedings in a single hearing and will only conduct the trial, and will not deal with procedures such as collecting evidence and issuing protective measures, thus strengthening the principle of impartiality and prejudice.

20. The need for comprehensive structural reform and a separate professional organisation for prosecutors

The establishment of a single professional board (HSK) for judges and prosecutors in Türkiye's judicial organisation has been decisive in executive-judiciary relations, especially since the 1970s, and continues to be one of the most fundamental institutional challenges to the independence and impartiality of the judiciary today. The merging of separate boards for prosecutors and judges in the 1970s was a structural mistake that increased the execution's influence over the judiciary after 1980. This mistake was further ingrained in the 2017 reform.

Under the 1961 Constitution, the High Council of Judges and the High Council of Prosecutors were separate. Judges were considered to have a fully independent judicial function, while prosecutors were considered to be closer to the execution as the prosecution authority. With constitutional amendments in 1971, these two structures were merged into the High Council of Judges and Prosecutors (HSYK). The rationale for this change was "unity of the judiciary", but in fact the result was the institutionalisation of prosecutors as judges, thus bringing the execution closer to the judiciary. With the constitutional amendment in 2017, the name HSYK was changed to HSK, and the majority of HSK members were appointed by the Turkish Parliament and the President. In the 1980's, even the secretariat service provided by the Ministry of Justice to the HSYK was criticised, but since 1980 the Minister of Justice and his deputy have been natural members of the HSK.

Judges and prosecutors are considered within the same structure in the HSK. However, whereas prosecutors are the prosecuting authority that produces a thesis on behalf of the public, an institution close to the executive with the authority to prosecute and investigate, judges are impartial and independent decision makers, synthesising individuals with the authority to judge. To evaluate these two institutions, which have different characteristics, personality traits and professional qualifications and which should be independent from each other, in the same board would, on the one hand, lead to ineffective protection of the rights of the members of these professions and, on the other hand, harm the independence and impartiality of the judiciary.

The Venice Commission (CDL-AD(2024)041 and CDL-AD(2014)042) envisages the establishment of two separate boards, a board dedicated to judicial matters and a board dedicated to prosecutors' matters, so that the perspectives of judges and prosecutors are properly represented and managed in their respective fields. It states that the presence of judges and prosecutors in the same institutional structures may increase execution influence and pose a threat to the independence of judges, and therefore professional organisations should be separate. The GRECO Türkiye Phase 4 Report states that the execution-influenced structure of the Council of Judges and Prosecutors poses a serious problem for judicial independence, especially due to the role of the Minister of Justice.

Indeed, in France, the *Conseil Supérieur de la Magistrature* consists of separate sections for judges and prosecutors, while in Italy prosecutors and judges are considered within separate disciplinary bodies within the *Consiglio Superiore della Magistratura*.

In political discussions and recommendations, including those of international organisations, there is complete agreement that the HSK should be divided into a Board of Judges and a Board of Prosecutors. However, these opinions, which are far from providing a radical solution to the issue, propose that the majority of the administrations of these professional boards should be elected by members of the profession and that the members to be elected by politicians should be in the minority; efficiency and effectiveness are neglected in the functions of the members of the profession; accountability is left to their own colleagues and a closed structure is proposed that creates a ground for the formation of hierarchical internal dependencies among members of the profession, privileges members of the profession and does not represent external stakeholders.

These views, which propose the abolition or minimisation of the quotas of the execution and the legislature (the Presidency and the Parliament) in the Board of Judges and the Board of Prosecutors, the direct election of the majority (at least $\frac{2}{3}$) of the members by judges or prosecutors, and the exclusion of the Minister of Justice and his undersecretary (deputy minister), focus on the independence of the judiciary - to the extent of making these professions a privileged group and neglecting their accountability - but exclude democratic legitimacy.

The view that “the members of the HSK should be elected entirely from the judiciary” is unacceptable. This would lead to the formation of a juristocracy, as in the case of the CSM in Italy, i.e. intra-judicial cliquism and the formation of a cartel of influence by senior judges or prosecutors, and the silencing of lower cadres through internal hierarchy pressure.²³ The view that “executive-legislative representatives should predominate” increases the influence of the execution and reinforces the instrumentalisation of the judiciary. This model is the source of the problems experienced in Türkiye.

In order to prevent or minimise these problems, there is a need for an institution that determines the judicial function, institutions, professionals, services and the basic principles and standards governing the judicial function in society. This institution should not only be independent but also have democratic legitimacy and social representation. The HSK is far from meeting these needs and requirements. It must ensure that this institution works for the sovereignty and public interest, not the members of the judiciary or the ruling class. The judiciary should be neither dependent nor unsupervised; it should be accountable and effectively represent all stakeholders. The judiciary should neither be placed under the control of the executive nor left to the initiative of a closed professional elite (juristocracy). The judiciary should be restructured as an institution that maintains social balance and enjoys the trust of all segments of the population.

²³ Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (2002): Explains how intra-judicial selection creates institutional closure in the case of the Italian CSM.

21. Better Justice Association's Proposal for a "Supreme Authority of Justice"

The Better Justice Association proposes to establish a "**Supreme Authority of Justice**" with a completely new perspective, which regulates the production of **quality judicial services** and has a strong democratic legitimacy, representing all stakeholders of the judiciary in a fair and balanced manner, and to transform the HSK into this institution with the powers given to the Ministry of Justice. The Better Justice Association proposes that each of the legal professions should have separate professional bodies and that the professional bodies should only be responsible for (i) defending the independence of the judiciary and the rule of law and (ii) the ethical and other development and solidarity of members of the profession.

The Supreme Authority of Justice is designed as a regulatory body to regulate the production of quality judicial services and sub-departments are established in accordance with the natural functions to prevent the concentration of powers and competences related to the judicial function in one basket. In order to prevent dependency and arbitrariness in the judiciary and its administration, effective judicial supervision and accountability have been introduced through a specialised **Supreme Court of Justice** for all decisions and actions. All legal professions will have their own fully independent professional organisations and will be able to effectively defend the rule of law and judicial independence.

- ✓ 1. **The Supreme Authority of Justice should be established, and the function of the HSK should be transferred to this Supreme Authority of Justice together with the powers vested to the Ministry of Justice.**
- ✓ 2. **Legal professions (judges, prosecutors, notaries and judicial officials) should have their own independent professional organisations, similar to the bar associations for lawyers. In this context, prosecutors should have their own professional organisations.**
- ✓ 3. **All decisions and actions regarding the administration of the judiciary should be subject to judicial review, and person wishes to do so should be able to initiate judicial review without incurring any expense or burden, even if they are not a party or of interest.**
- ✓ 4. **A specialised Supreme Court of Justice should be established, with a specialised and fast-track procedure, specialised in hearing cases related to the administration of justice.**
- ✓ 5. **Judicial preparation courts should be established; these courts should be responsible for preparing the finalised file, taking statements and obtaining expert reports and preventing abuse by assisting the parties in the process, and the principle of single trial should be implemented, and trials should be reduced to a duration of 3-4 months.**

Regards,
Better Justice Association