



THE COLLAPSE OF THE RULE OF LAW AND  
HUMAN RIGHTS IN TURKEY:  
THE INEFFECTIVENESS OF DOMESTIC REMEDIES  
AND THE FAILURE OF THE ECTHR'S RESPONSE

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## Executive Summary

In recent years, Turkey has experienced a massive deterioration of its human rights record, judicial independence, and adherence to the rule of law. This decline began in December 2013, when two major corruption scandals surfaced, incriminating many in the inner circle of President Recep Tayyip Erdoğan. It accelerated following a coup attempt on July 16, 2016, after which the Turkish administration declared a state of emergency that allowed it to pass decrees without the approval of the legislature or judicial oversight.

Since then, nearly 150,000 individuals have been dismissed from government jobs, including, most significantly, almost one-third of the judges and prosecutors in the judiciary. The Turkish government has justified many of these removals by pointing to the individuals' alleged links to the Gülen movement, a transnational Islamic movement led by Turkish cleric Fethullah Gülen. The Erdoğan administration has deemed the Gülen movement a "terrorist organization" (under the name of Fetullahist Terrorist Organization, or FETÖ) and argues that it has created a "parallel structure" within the government, in an attempt to seize control over Turkey. In order to efficiently process these "terrorist" cases, the Erdoğan administration established Criminal Peace Judgeships (CPJs) and Specially Authorized High Criminal Courts, both of which lack judicial independence and fail to provide access to a fair trial. Meanwhile, Turkey's constitution was amended after a rigged national referendum, to allow the executive to exercise greater control over the judiciary, particularly through the appointment of new judges. These changes heralded the complete collapse of judicial independence in Turkey.

More than 33,000 individuals have submitted Turkish human rights cases for consideration by the European Court of Human Rights (ECtHR) since Erdoğan's crackdown. The majority of these applications have been rejected on the ground that applicants have not yet exhausted domestic remedies; however, this ignores the reality

that no viable remedy exists under the current Turkish judicial system, due to a mixture of executive interference and unreasonable court delays.

The two primary avenues for domestic remedies would, in theory, be either the Constitutional Court or the State of Emergency (SoE) Inquiry Commission, yet neither offers true access to justice. The Constitutional Court has held that it cannot assess the constitutionality of decrees made during a state of emergency, has frequently failed to address gross violations of individual rights and freedoms, and has ordered the removal of its members for alleged Gülenist links. Similarly, the SoE Inquiry Commission, created to review applications of measures undertaken through emergency decree laws, lacks independence, does not follow due process, and is unable to offer effective restitution or compensation. It is clear that Turkey does not have a judicial authority that provides access to effective remedies.

By denying Turkish applicants an avenue for justice, the ECtHR has failed in its response to post-coup cases. In addition to maintaining that Turkey offers viable domestic remedies when that is not the case, it has also departed from its well-established mechanism of using the “pilot judgment” procedure to efficiently process repetitive applications of human rights violations by a contracting state. Further, the ECtHR has made a series of controversial decisions relating to arbitrary detention and the dismissal of judges, prosecutors, and civil servants under emergency decree laws. This report recommends that the ECtHR officially recognize that the Turkish judicial system does not offer effective domestic remedies. It also recommends that the ECtHR adopt the “pilot judgment” procedure in order to deal with the flood of cases brought before it, and as a means by which to pressure Turkey to address its systematic human rights abuses and the violation of its obligations under international law.

This Human Rights Foundation (HRF) report provides detailed information on the laws and practices adopted since July 2016 that have contributed to the eradication of judicial independence, rule of law and human rights in Turkey. It also highlights notable cases that illustrate this decline. The aim is to demonstrate with persuasive evidence

that the Turkish judicial system is not capable of providing justice to the victims of the post-coup purges and other rights abuses.

## A. Introduction

Following Turkey's attempted coup in July 2016, the country has witnessed a dramatic erosion of the rule of law and a significant deterioration of its human rights record. Nearly 150,000 individuals have been dismissed from government jobs, while tens of thousands have been arrested and detained on trumped-up terrorism charges. These draconian measures have been employed under the pretext of a declared state of emergency. The Turkish government has shut down, confiscated property from, or appointed state-aligned trustees to more than one-thousand private organizations, including media outlets, private schools, hospitals, unions and companies. Dissatisfied with Turkey's abysmal adherence to the rule of law and the improper functioning of its legal and judicial system, many individuals have turned to the European Court of Human Rights (ECtHR) in search of justice. Since the attempted coup, the ECtHR has received over 33,000 applications from Turkish citizens. Unfortunately, most of these have been rejected on the basis that applicants have yet to exhaust domestic remedies, despite the fact that no effective remedy is available under the Turkish judicial system as it currently functions.

The main focus of this report is to offer an overview of Turkey's recent departure from the rule of law, and to critically assess the ECtHR's response to individual applications from Turkey in the aftermath of the attempted coup. To this end, the report consists of three main sections, accompanied by an introduction and conclusion. The first section provides a detailed account of the deterioration of the rule of law, judicial independence, and human rights in Turkey. This deterioration began in December 2013 after state officials released two corruption investigations that incriminated relatives and allies of President Recep Tayyip Erdoğan (then serving as prime minister), prompting Erdoğan to orchestrate changes to the judicial system. The deterioration accelerated after the 2016 attempted coup, with the pretense of a state of emergency. The second section assesses the effectiveness of Turkish domestic remedies and explains why the

ECtHR should not consider the current legal system to be an effective and viable avenue to justice. Finally, the third section provides an in-depth analysis of the ECtHR's response to cases originating from Turkey, drawing on specific judgments rendered by this court.

A vast array of resources and materials have been consulted in the preparation of this report. Despite an initial lack of awareness surrounding the severity of Turkey's situation, in part due to biased coverage propagated by Turkey's government-controlled media, the extent of suffering and persecution being perpetrated by the regime soon attracted international attention. The reports and opinions of various bodies of the Council of Europe and the United Nations (U.N.) warrant acknowledgment here. Similarly invaluable, have been the opinions of the European Commissioner for Human Rights, the Venice Commission, and various resolutions of the Parliamentary Assembly of the Council of Europe (PACE). The U.N. Human Rights Council's reports, as well those of its special rapporteurs, have shed light on the scale of human right abuses in Turkey. Opinions adopted by various working groups (such as the U.N. Working Group on Arbitrary Detention) on individual applications, have also provided a more complete understanding of the nature of human rights violations in Turkey.

International non-governmental organizations (NGOs) must also be acknowledged for the important role they have played in compiling and analyzing recent developments in Turkey, as well as in condemning the human rights violations perpetrated by the Erdoğan regime. The reports and publications of Amnesty International (Amnesty), Human Rights Watch (HRW), the International Commission of Jurists (ICJ), the Platform for Peace and Justice (PPJ), and the Human Rights Foundation (HRF), have been useful in outlining the many areas of concern in the human rights situation in Turkey, from the torture and ill-treatment of political prisoners, to abductions and purges of opposition supporters from public office.

## B. The Erosion of Rule of Law, Human Rights, and Judicial Independence in Turkey

### a. The Corruption Investigations

On December 17 and 25, 2013, two corruption scandals emerged in Turkey, implicating President Erdoğan's close circle of family and politicians. The investigations involved alleged bribery, and those connected, included the President's son, several cabinet ministers and their offspring, the head of the nation's largest public bank, and numerous prominent businessmen.<sup>1</sup> The most significant scandal involved a money-laundering scheme, wherein gold was exported to Iran through Turkey's government-controlled bank, Halkbank, in exchange for gas and oil, despite U.S. sanctions in place against Iran. Following these revelations, Erdoğan's administration depicted the investigations as an "attempted judicial coup"<sup>2</sup> orchestrated by a "parallel structure"<sup>3</sup> loyal to Turkish cleric Fethullah Gülen.<sup>4</sup> The Gülen movement, or Hizmet, is composed of individuals and institutions in Turkey and worldwide that follow Fethullah Gülen's teachings. On April 30, 2015, the Gülen movement was marked in the National Security Policy Document (the "Red Book") as a group to be repressed.<sup>5</sup> Subsequently, some courts began issuing decisions explicitly based on the Red Book's condemnation of the group.<sup>6</sup> In May 2016,

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<sup>1</sup> Rt. Hon. The Lord Woolf C.H., et al., REPORT ON THE RULE OF LAW AND RESPECT OF HUMAN RIGHTS IN TURKEY SINCE DECEMBER 2013 (July 2015), paras. 52–56, [hereinafter Woolf Report], available at [http://nesemat.com/wp-content/uploads/Books/REPORT\\_ON\\_THE\\_RULE\\_OF\\_LAW.pdf](http://nesemat.com/wp-content/uploads/Books/REPORT_ON_THE_RULE_OF_LAW.pdf).

<sup>2</sup> *Id.* at para. 53.

<sup>3</sup> The term "parallel structure" was invented by Erdoğan and his allies soon after the corruption and bribery investigations of December 2013, and used as a political propaganda tool with a negative connotation, against those in the government who align themselves with Mr. Gülen. The term implies that the alleged Gülenist displays loyalty or allegiance to his own structure, rather than to the political hierarchy of the state.

<sup>4</sup> See Woolf Report, *supra* note 1, at para. 2.

<sup>5</sup> *National Security Council Under Erdoğan Updates Top Secret National Security 'Book,'* HÜRRIYET DAILY NEWS (Apr. 30, 2015), <http://www.hurriyetdailynews.com/national-security-council-under-erdogan-updates-top-secret-national-security-book-81757>.

<sup>6</sup> Criminal Peace Judgeship Decision No. 2015/1291 made references to the 'Red Book' as if it were a binding source of law. "The Istanbul Anadolu 3rd Criminal Peace Court expressed in [its] reasoned verdict (No. 2015/2983) on 8.9.2015 that: "The advisory note [of the 'Red Book'] defines the "parallel state structure" as (PYD/Pro-Gülen Terrorist Organization/FETÖ) in accordance with this advisory note and the decree of the council of ministers that avows these terrorist organizations and their financial supporters...."" *Non-Independence and Non-Impartiality of Turkish Judiciary: A Comprehensive Report on the Abolition of Rule of Law in Turkey*, PLATFORM FOR PEACE AND JUSTICE (2017), para. 59 [hereinafter PPJ Report on Non-

the movement became a designated terrorist organization, under the name Fetullahist Terrorist Organization (FETÖ), and Erdoğan's administration declared its supporters part of the "parallel structure" attempting to 'destroy' his administration.<sup>7</sup>

The Turkish government immediately intervened in the corruption investigations, adopting a series of measures designed to control judicial processes and mechanisms and suppress further inquiries. First, prosecutors leading the investigations, were quickly removed from their positions, and 350 police officers, including many senior officers, were reassigned within days.<sup>8</sup> Almost immediately, the European Commission expressed concern that the government's actions "could undermine the current investigations and capacity of the judiciary and the police to investigate matters in an independent manner."<sup>9</sup> Furthermore, the Parliamentary Assembly of the Council of Europe (PACE) noted:

The disclosure of corruption cases on 17 and 25 December 2013, allegedly involving four ministers and the son of the then-prime minister Mr. Recep Tayyip Erdoğan, marked the beginning of changes in domestic political processes, in particular the adoption of restrictive legislation (amendments to the Criminal Code and the Code of Criminal Procedure in 2014 and the Internal Security Act of March 2015) and the executive's increased control over the judiciary (amendments to the law on the High Council for Judges and Prosecutors in 2014), the creation of special courts ('criminal peace judgeships') in June 2014, and the

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Independence and Non-Impartiality], available at <http://www.platformpj.org/wp-content/uploads/NON-INDEPENDENCE-OF-TURKISH-JUDICIARY.pdf>.

<sup>7</sup> Turkey to Add Gülen Movement to List of Terror Groups: President, HÜRRİYET DAILY NEWS, (May 27, 2016), <http://www.hurriyetdailynews.com/turkey-to-add-gulen-movement-to-list-of-terror-groups-president-99762>.

<sup>8</sup> For a timeline of the graft investigation and the Turkish government's response, see *Turkey's December 17 Process: A Timeline of the Graft Investigation and the Government's Response*, CENTRAL ASIA-CAUCASUS INSTITUTE SILK ROAD STUDIES PROGRAM (2014), available at <http://isdpc.eu/content/uploads/publications/2014-muller-turkeys-december-17-process-a-timeline.pdf>; see also Woolf Report, at para. 54; *Turkish Corruption Probe Row Deepens*, BBC NEWS (Jan. 7, 2014), <http://www.bbc.co.uk/news/world-europe-25637710>.

<sup>9</sup> Daniel Dombey, *European Commission Criticises Police Moves in Turkey*, FINANCIAL TIMES (January 8, 2014), <https://www.ft.com/content/258999bc-7893-11e3-831c-00144feabdc0>; see also Piotr Zalewski, *Corruption Prosecutors Suspended in Turkey*, FINANCIAL TIMES (Dec. 30, 2014), <http://www.ft.com/cms/s/0/3915188c-903c-11e4-b55d-00144feabdc0.html#axzz3ZBQxgQUH>.

adoption of Law No. 5651 on the internet in March 2015, increasing the Turkish Telecommunications Directorate's (TIB) capacity to block websites.<sup>10</sup>

On December 21, 2013, an amendment was made to the Regulation on the Judicial Police<sup>11</sup> requiring judicial law enforcement officers to notify governors—and thus the Ministry of Interior—of any criminal investigation.<sup>12</sup> Further governmental interference occurred in January 2014, with a forced reshuffling of the High Council of Judges and Prosecutors (also referred to as the “Judicial Council” or “HSYK”). Two members of the First Chamber of the Judicial Council—which is responsible for the appointment, transfer, and reassignment of judges and prosecutors—were removed and replaced with government supporters on January 15, 2014.<sup>13</sup>

Next, these interferences were followed by a far-reaching amendment of Law No. 6087, which sought to limit the powers of the Judicial Council's general assembly. This included a provisional article authorizing the Minister of Justice to “reorganize” almost all Judicial Council staff members.<sup>14</sup> The government used this provision to replace administrative staff at the Judicial Council, allowing it greater control over the Council's formation and functioning. Moreover, based on Article 153 of the Turkish Constitution, which provides that the decisions of the Constitutional Court are final, and explicitly states that they cannot be annulled retroactively,<sup>15</sup> the Judicial Council's staff could not

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<sup>10</sup> *The Functioning of Democratic Institutions in Turkey*, PACE, Doc. No. 14078 (June 6, 2016), para. 5, available at

[https://www.ecoi.net/en/file/local/1350862/1226\\_1465286865\\_document.pdf](https://www.ecoi.net/en/file/local/1350862/1226_1465286865_document.pdf).

<sup>11</sup> Ergun Özbudun, *Pending Challenges in Turkey's Judiciary: Policy Brief 20*, GLOBAL TURKEY IN EUROPE (Jan. 2015), available at [http://www.iai.it/sites/default/files/gte\\_pb\\_20.pdf](http://www.iai.it/sites/default/files/gte_pb_20.pdf).

<sup>12</sup> See Woolf Report, at para. 59.

<sup>13</sup> *HSYK'da Görev Değişikliği* [in Turkish], SONDAKİKA (Jan. 15, 2014),

<https://www.sondakika.com/haber/haber-hsyk-da-gorev-degisikligi-5546914/>.

<sup>14</sup> The provisional Article 4 of Law No. 6087, provided that “with the entry into force of the law, the positions of the secretary general, deputy secretaries, the president of the Board of Inspectors, vice presidents, High Council inspectors, rapporteur judges, and all the administrative personnel shall be terminated” [translation], *Hâkimler ve Savcılar Kurulu Kanunu* [in Turkish], MEVZUAT BİLGİ SİSTEMİ (Dec. 11, 2010), available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6087.pdf>.

<sup>15</sup> *Turkey: Unofficial Translation of the Amendments to the Constitution*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 875/ 2017 (Feb. 6, 2017) [hereinafter *Unofficial Translation of the Amendments to the Constitution*], available at

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)005-e).

be reinstated to their previous positions.<sup>16</sup> This would apply even if the law were to be annulled. Opposition parties, jurists, and even then-President Abdullah Gül noted the unconstitutionality of the proposed amendment; however, this did not inhibit its passage into law.<sup>17</sup>

These observations have also been verified by, and highlighted in, the independent reports of various international NGOs. For instance, the International Commission of Jurists (ICJ) stated:

The ICJ is concerned that the government's dominance of the HSYK has effectively co-opted this core constitutional institution to the executive and that this undermines the independence of the judiciary, allowing it to shape the composition of the judiciary, affecting the transfer of judges and the allocation of judges to sensitive cases, and allowing channels for executive pressure on individual judges.<sup>18</sup>

Amnesty also expressed the view that the Minister of Justice's power within the Judicial Council, "will weaken the independence of the judiciary and threaten the actual and perceived independence and impartiality of the judiciary in Turkey and the right to a fair trial."<sup>19</sup>

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<sup>16</sup> The Constitutional Court annulled 19 provisions of the respective Law No. 6524, amending Law No. 6087. For the Constitutional Court Decision 2014/57 E., 2014/81 K (Apr. 10, 2014), see ANAYASA MAHKEMESİ KARARI: GENEL KURUL [in Turkish],

<http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/52c4144a-5923-4ae7-bb7b-1e6ccf296679?excludeGerekce=False&wordsOnly=False>.

<sup>17</sup> *Turkish Main Opposition Takes Judicial Bill to Constitutional Court*, HÜRRİYET DAILY NEWS (Feb. 26, 2014), <http://www.hurriyetdailynews.com/turkish-main-opposition-takes-judicial-bill-to-constitutional-court-62977>.

<sup>18</sup> *Turkey: The Judicial System in Peril—A Briefing Paper*, INTERNATIONAL COMMISSION OF JURISTS (2016), at 13–14 [hereinafter *The Judicial System in Peril*], available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>.

<sup>19</sup> *Amnesty International Public Statement—Turkey: Independence and impartiality of the Judiciary Under Threat* (Feb. 24, 2014), available at <https://www.amnesty.org/en/documents/EUR44/003/2014/en/>.

After “reorganizing” staff to conform with Erdoğan’s will, the newly formed Judicial Council initiated a series of reassignments. According to a report by PPJ,<sup>20</sup> the appointments that most jeopardized judicial independence in 2014 included: the replacement of 21 public prosecutors on January 16, 2014,<sup>21</sup> and the removal of 96 judges and prosecutors on January 22, 2014, including employees conducting critical investigations into the transportation of weapons into Syria, and corruption by businessmen closely associated with the government.<sup>22</sup> This was compounded by the further reshuffling of 166 judges and 271 prosecutors on February 11, 2014 and March 23, 2014, respectively.<sup>23</sup> Finally, June 11, 2014 saw 293 administrative and 2,224 general judiciaries removed or relocated from their roles.<sup>24</sup>

## b. The Introduction of Criminal Peace Judgeships

As outlined above, Erdoğan’s administration succeeded in taking control of the judiciary—mainly through legislative amendments and administrative changes to the Judicial Council—in the first half of 2014. After initially impeding, and ultimately ending, the December 2013 corruption investigations, fighting against what Erdoğan depicted as the “parallel structure,” became the Erdoğan administration’s primary political objective.<sup>25</sup> Within this context, the government established the Criminal Peace Judgeships (CPJ), which became operational on June 28, 2014.<sup>26</sup> Designed to

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<sup>20</sup> *Turkey’s Criminal Peace Judgeships*, PLATFORM FOR PEACE AND JUSTICE (Apr. 21, 2017), para. 9 [hereinafter PPJ Report on Turkey’s Criminal Peace Judgeships], <http://www.platformpj.org/turkeys-criminal-peace-judgeships/>.

<sup>21</sup> *Major Reshuffle in Turkish Judiciary Amid Graft Probe Row*, HÜRRİYET DAILY NEWS (Jan. 16, 2014), <http://www.hurriyetdailynews.com/major-reshuffle-in-turkish-judiciary-amid-graft-probe-row-61162>.

<sup>22</sup> *Up to 96 Judges and Prosecutors in Fresh Purge Within Turkish Judiciary*, HÜRRİYET DAILY NEWS (Jan. 22, 2014), <http://www.hurriyetdailynews.com/up-to-96-judges-and-prosecutors-reassigned-in-fresh-purge-within-turkish-judiciary-61392>.

<sup>23</sup> *More Judges and Prosecutors Reshuffled in Fresh Purge*, HÜRRİYET DAILY NEWS (Feb. 11, 2014), <http://www.hurriyetdailynews.com/more-judges-and-prosecutors-reshuffled-in-fresh-purge-62356>.

<sup>24</sup> *Turkish Gov’t Reshuffles Over 200 Judges and Prosecutors Amid Graft Probe*, HÜRRİYET DAILY NEWS (Mar. 23, 2014), <http://www.hurriyetdailynews.com/turkish-govt-reshuffles-over-200-judges-and-prosecutors-amid-graft-probe-63970>.

<sup>25</sup> When asked by a journalist on June 22, 2014 whether there “will be an operation to the parallel structure,” Erdoğan responded that “the parallel judiciary is thwarting the executive’s steps,” and signaled toward the operations which were to come on July 22, 2014 against the police officers who conducted the December 2013 corruption investigations [translation]. *Paralel Yargı Türkiye’yi Bitirir* [in Turkish], AKŞAM (June 23, 2014), <http://www.aksam.com.tr/siyaset/paralel-yargi-c2turkiyeyi-bitirir/haber-318147>.

<sup>26</sup> See PPJ Report on Turkey’s Criminal Peace Judgeships, *supra* note 20.

standardize the decision-making process, CPJs specialize in procedural matters, to ensure the fast and uniform implementation of protective measures.<sup>27</sup> However, a closer examination of these special courts, reveals a significant overstep of power, thereby prompting serious limitations on others' rights.

The CPJ essentially serves an investigative function, with appointees handling serious procedural matters up until the prosecution reaches the trial stage. CPJ appointees may order wiretaps, arrests, seizures, property searches, and pre-trial detentions.<sup>28</sup> Through the CPJ appointees' powers, the government is able to intimidate those thought to have connections with dissident groups, namely those associated with Turkish cleric Fethullah Gülen, by seizing and taking control of their private property and businesses. After the first assignments to this group, it became clear that Erdoğan's true purpose in establishing the CPJ, was to fight against the supposed "parallel structure."<sup>29</sup> In line with this purpose, the first target of this new mechanism, were the police officers who conducted the December 2013 corruption investigations.<sup>30</sup>

Additionally, closed-circuit appeal mechanism allows decisions of the CPJ to be appealed only by another CPJ.<sup>31</sup> This renders the appeal procedure ineffective, as it offers no way for a superior court to intervene in cases where citizens' rights to liberty

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<sup>27</sup> Turkey: Criminal Judgeships of Peace—Memorandum of the Ministry of Justice, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 852/ 2016 (Feb. 8, 2017), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)004-e).

<sup>28</sup> PPJ Report on Turkey's Criminal Peace Judgeships, *supra* note 20, at para. 20.

<sup>29</sup> Erdoğan stated in Ordu Province on July 20, 2014 that "appointments have been made in order to fight with the parallel structure...the appointments have been made in relation to the criminal peace judgeships...We will see what will happen both in the police and the judiciary" [translation]. *Başbakan Erdoğan: Paralel Yapıyla Mücadele Etmeyen Bedelini Ağır Öder* [in Turkish], STAR (July 22, 2014), <https://www.star.com.tr/politika/basbakan-erdogan-paralel-yapiyla-mucadele-etmeyen-bedelini-agir-oder-haber-915819/>.

<sup>30</sup> The CPJs began their duties on July 21, 2014. On the same day, one of the judges issued search and seizure warrants for 100 police officers allegedly linked to the "parallel state." Ostensibly, this decision was reached after having reviewed 106 folders, seven hard drives, wire-tappings belonging to 238 persons, a CD of 1,292 pages, and umpteen documents. PPJ Report on Non-Independence and Non-Impartiality, *supra* note 6, at para. 37. In addition, when commenting on these operations against police officers, Erdoğan admitted that he and the executive were central to the ongoing judicial process, saying that "now account has been asked for, you will see what else to come about, what else, ... not finished yet, this is just a beginning" [translation]. *Erdoğan'dan operasyon yorumu: Bu daha başlangıç* [in Turkish], STAR (July 23, 2014), <https://www.star.com.tr/guncel/erdogandan-operasyon-yorumu-bu-daha-baslangic-haber-917107/>.

<sup>31</sup> Criminal Procedure Code of the Republic of Turkey (2005), art. 268(3-a).

or security may have been violated. Thus, the closed-circuit appeal system far from satisfies the legal guarantees required under the Article 5(4) of the European Convention on Human Rights (ECHR).<sup>32</sup>

Concerns about the CPJ system have also been raised by various other groups, including the ICJ, which stated that there was “widespread concern within the Turkish legal community about the lack of independence of criminal judges of the peace” who were appointed by the state-aligned First Chamber of the Judicial Council.<sup>33</sup> Furthermore, the Venice Commission has raised numerous concerns over both the jurisdiction and practice of the CPJ.<sup>34</sup>

In cases where an individual has faced accusations of financing “terrorist groups” such as the Gülen movement, the CPJ has been known to appoint trustees to private businesses, allowing them to seize control of their assets. It is reported that, as of September 13, 2017, 1,019 companies, with a collective value of nearly USD12 billion, have been seized and their assets transferred to the Savings Deposit Insurance Fund (SDIF) on such grounds.<sup>35</sup> In particular, this has been used to target large opposition media groups. For instance, in October 2015, the fifth Ankara CPJ appointed a trustee panel to the Koza İpek Group, which has significant media holdings, and in September 2016, a decision by the fourth Ankara CPJ required that all İpek assets, worth USD10 billion, be transferred to the SDIF.<sup>36</sup> Similarly, in March 2016, the sixth Istanbul CPJ also appointed trustees to manage Zaman and Samanyolu, two of the largest opposition news syndicates in the country, which had begun criticizing the Erdoğan government following the 2013 crackdown.<sup>37</sup> In another case, the second Kayseri CPJ designated a

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<sup>32</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE (Nov. 4, 1950), art. 5, available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>33</sup> *The Judicial System in Peril*, *supra* note 18, at 18.

<sup>34</sup> See *Turkey: Opinion on the Duties, Competences, and Functioning of the Criminal Peace Judgeships*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 852/ 2016 (Mar. 13, 2017), available at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e>.

<sup>35</sup> See *The Right to Property Vanished in Turkey*, ARRESTED LAWYERS INITIATIVE (Sept. 13, 2017), <https://arrestedlawyers.org/2017/09/13/the-right-to-property-vanished-in-turkey/>.

<sup>36</sup> *Turkey Seizes 18 Companies of Akın İpek Worth 10 Billion Dollars*, TURKEY PURGE (Sept. 9, 2016), <https://turkeypurge.com/turkey-seizes-18-companies-of-akin-ipek-worth-10-billion-dollars>.

<sup>37</sup> Murat Yetkin, *More Disturbing Moves on the Turkish Media*, HÜRRİYET DAILY NEWS (Mar. 5, 2016),

panel of trustees to Boydak Holding, a major business conglomerate, while its executives were detained due to alleged Gülenist connections.<sup>38</sup>

### c. The Judicial Election of October 12, 2014

The Judicial Council is the cornerstone of Turkey's judicial architecture; as scholar Thomas Giegerich<sup>39</sup> noted in a 2014 report, "when the independence and impartiality of the HSYK [Judicial Council] is jeopardized, so is the independence and impartiality of the Turkish judiciary as a whole."<sup>40</sup> A judicial election for the Judicial Council was held on October 12, 2014. After the Judicial Council reshuffling in January 2014, Turkey experts watched this election with an interest equal to that of a parliamentary election, since the results would be critical in determining the future extent of the Erdoğan administration's interference with judicial independence.<sup>41</sup>

The circumstances of this election and its result, confirmed the end of the separation of powers and judicial independence in Turkey. Candidates from the pro-government group YBP (Platform for Unity in the Judiciary) secured eight of the 10 seats.<sup>42</sup> Together with the ex-officio members and the four members appointed by the president himself, these members joined a pro-Erdoğan faction that clearly dominated the new Judicial Council, hence securing the power necessary for Erdoğan's administration to control the entire judiciary. Notably, on December 8, 2016, the European Network of Councils

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<http://www.hurriyetdailynews.com/opinion/murat-yetkin/more-disturbing-moves-on-the-turkish-media-96073>.

<sup>38</sup> *Trustees Appointed to Boydak Holding Over Gülen Movement Links*, TURKEY PURGE (Aug. 18, 2016), <https://turkeypurge.com/trustees-appointed-to-boydak-holding-over-gulen-movement-links>.

<sup>39</sup> Professor Dr. Thomas Giegerich (Europa-Institut, Jean Monnet Chair for EU Law and European Integration, Professor of EU Law, Public International Law, and Public Law at Saarland University) was an independent expert on a joint mission authorized by the EU commission and the government of Turkey in 2014.

<sup>40</sup> *Report on the Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014*, PEER REVIEW MISSION ON THE HIGH COUNCIL OF JUDGES AND PROSECUTORS (6-8 MAY 2014) (Dec. 18, 2014), at 4, available at [https://www.avrupa.info.tr/fileadmin/Content/Files/File/Docs/Final\\_TG\\_Report18122014.pdf](https://www.avrupa.info.tr/fileadmin/Content/Files/File/Docs/Final_TG_Report18122014.pdf).

<sup>41</sup> See PPJ Report on Non-Independence and Non-Impartiality, *supra* note 6, at 9–14.

<sup>42</sup> *Id.* at paras. 17–27.

for the Judiciary (ENCJ) suspended the Judicial Council's observer status on the basis that it did not maintain independence from the executive and legislature.<sup>43</sup>

On December 2, 2014, shortly following the judicial election, a new law (No. 6572) was adopted with the support of Erdoğan's ruling party (AKP), increasing the number of chambers and members that constituted the Court of Cassation and the Council of State.<sup>44</sup> The new Judicial Council, dominated by pro-government members, swiftly carried out the appointments to avoid a possible stay order by the Constitutional Court. With these new appointments, the government was able to place enough of its supporters in positions of power to firmly establish its control of the supreme courts.

#### d. The Creation of Specialist High Criminal Courts in 2015

On February 17, 2015, the Judicial Council assigned several specialized High Criminal Courts to hear cases on "organized and terror offenses."<sup>45</sup> This allocation occurred despite the fact that these courts had been discontinued by Parliament in 2012, and ultimately abolished in March 2014, for contravening the principles of natural justice, such as providing a fair trial. The newly appointed chief judges and members of judiciary were assigned to these special high criminal courts under the pretext that the work fell within their "area of specialization."<sup>46</sup> These judges and prosecutors were appointed through a selection process similar to that used to select the members of the CPJ. In other words, Erdoğan's administration was able to appoint pro-AKP individuals to hear criminal cases.

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<sup>43</sup> The ENCJ unites the national institutions (judicial councils) of the Member States of the EU, which are independent of the executive and legislature. The ENCJ stated in its suspension decision: "It is a condition of membership, and for the status of observer, that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice. The ENCJ became concerned that the procedures adopted by the High Council for Judges and Prosecutors of Turkey (HSYK) indicated that this condition was no longer satisfied." *ENCJ Votes to Suspend the Turkish High Council for Judges and Prosecutors*, ENCJ (Dec. 8, 2016), <https://www.ency.eu/index.php/node/449>.

<sup>44</sup> See Official Gazette [in Turkish], Law No. 6572 (Dec. 12, 2014), <http://www.resmigazete.gov.tr/eskiler/2014/12/20141212M1-1.htm>.

<sup>45</sup> See, e.g., Official Gazette [in Turkish], Case. No. 224 (Dec. 12, 2015), available at <http://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>.

<sup>46</sup> *Id.*

With the Judicial Council under executive control, it was extremely difficult for judges to rule in favor of the perceived “enemies” of the government, and they feared the consequences of doing so. President Erdoğan proceeded to exert pressure on the judiciary in sensitive cases.<sup>47</sup> These concerns were realized in the instance of Judges Metin Özçelik and Mustafa Başer, who in April 2015, ordered the release of a journalist and 62 police officers allegedly connected to Turkey’s “parallel structure.” Within days of this decision, the Judges found themselves arrested on charges of membership of an armed terrorist organization and attempting to overthrow the government.<sup>48</sup> Shortly thereafter, on September 12, 2015, Judge Süleyman Karaçöl, who had taken part in the December 2013 corruption investigations, was arrested, released, and then re-arrested three days later. An arrest warrant was also issued for Prosecutor Muammer Akkas, who fled the country fearing repercussions for his involvement in the 2013 investigations. Indeed, this pattern of harassment toward judges who retain their judicial independence and refuse to conform to President Erdoğan’s agenda, is further reflected by Erdoğan’s statement on May 12, 2015, following the arrests of four prosecutors and one colonel who had prevented Turkish National Intelligence Service vehicles from smuggling arms to Syria, that “arrest warrants may continue with other [judges and prosecutors].”<sup>49</sup>

## e. The Attempted Coup of July 15, 2016

### i. The Declaration of a State of Emergency

In response to the coup attempt of July 15, 2016, the Turkish government declared a 90-day state of emergency throughout the entire country, starting on July 21, 2016. The state of emergency was later extended seven times, until it was finally lifted on July 18, 2018. It represented a convenient tool for the government to carry out its crackdown

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<sup>47</sup> Erdoğan stated on March 23, 2015, “We are watching the judges who are ruling on the cases related to the parallel structure closely.” PPJ Report on Non-Independence and Non-Impartiality, *supra* note 6, at para. 62.

<sup>48</sup> *J4J [Judges for Judges] Concerned by the Arrest and Ongoing Detention of Two Turkish Judges*, RECHTERS VOOR RECHTERS (Sept. 19, 2015), <https://www.rechtersvoorrechters.nl/judges-for-judges-concerned-by-the-arrest-and-ongoing-detention-of-two-turkish-judges/>.

<sup>49</sup> *Paralel Yargıya Karşı Tutuklamalar Sürecektir* [in Turkish], AKŞAM, (May 12, 2015), <http://www.aksam.com.tr/siyaset/paralel-yargiya-karsi-tutuklamalar-surecek/haber-404841>.

and purge the country of perceived opponents.<sup>50</sup> Statistics from Turkey's post-coup crackdown stand as follows: 500,650 individuals detained; 150,348 dismissed from public service; 85,998 arrested; 6,021 academics fired; 4,463 judges and prosecutors dismissed; 3,003 schools, dormitories, and universities shut down; 319 journalists arrested; and 189 media outlets shut down.<sup>51</sup> The emergency decree laws establishing the legal basis for all these cases were not subject to effective parliamentary scrutiny or judicial review. Ironically, this purge created a real "parallel state" within the country, and undermined the rule of law and long-established democratic institutions.

The Constitutional Court held that examining the constitutionality of the emergency decree laws fell outside of its jurisdiction, clearly contradicting earlier caselaw.<sup>52</sup> Instead, the Court relied on Article 148(1) of the Constitution, which prohibits decrees issued during a state of emergency or in time of war from being brought before the Constitutional Court on the grounds of form or substance.<sup>53</sup> This decision resulted in the emergency decree becoming incontestable, justified by a constitution susceptible to arbitrary amendment by the executive, and therefore amounting to a clear abrogation of the rule of law.

Moreover, the government granted immunity to individuals who contravened the law while purportedly fulfilling their duties under the emergency decree laws. For instance,

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<sup>50</sup> See *Updated Situation Report: 21 July 2016–20 March 2018 State of Emergency in Turkey*, IHOP (Apr. 17, 2018), available at

[http://www.ihop.org.tr/en/wp-content/uploads/2018/04/SoE\\_17042018.pdf](http://www.ihop.org.tr/en/wp-content/uploads/2018/04/SoE_17042018.pdf).

<sup>51</sup> *Turkey's Post-Coup Crackdown Since July 15, 2016*, TURKEY PURGE (Mar. 4, 2019) [hereinafter *Turkey's Post-Coup Crackdown Since July 15, 2016*], <https://turkeypurge.com/>.

<sup>52</sup> See Constitutional Court Decision, Case No. 1990/25, Decision 1991/1, ANAYASA MAHKEMESİ KARARI: GENEL KURUL [in Turkish] (Jan. 10, 1991) [hereinafter Constitutional Court Decision, Case No. 1990/25] <http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/b1077894-6c60-4143-b866-5918178b684e?excludeGerekce=False&wordsOnly=False>; see also Constitutional Court Decision, Case No. 1991/16, Decision No. 1991/20), ANAYASA MAHKEMESİ KARARI: GENEL KURUL [in Turkish] (July 3, 1991) [hereinafter Constitutional Court Decision, Case No. 1991/16],

<http://kararlaryeni.anayasa.gov.tr/Karar/Content/b63623ef-1e8b-45d2-9641-26075a2496f5?excludeGerekce=False&wordsOnly=False>.

<sup>53</sup> See *Turkish Constitutional Court Rejects CHP's Appeal to Annul Decree Laws*, HÜRRİYET DAILY NEWS (Oct. 12, 2016) [hereinafter *Turkish Constitutional Court Rejects CHP's Appeal*], <http://www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889>. For an English translation of the Constitution, see *Unofficial Translation of the Amendments to the Constitution*, *supra* note 15.

Article 9 of Emergency Decree Law No. 667,<sup>54</sup> granted legal, criminal, administrative, and financial immunity to state agents who would otherwise have been subject to criminal investigation and prosecution. Article 37 of Decree Law No. 668,<sup>55</sup> and its subsequent amendment,<sup>56</sup> have also been criticized—including by former President Abdullah Gül—warning that the prolonged state of emergency could encourage vigilante groups.<sup>57</sup> Article 37 effectively grants immunity to government officials who act to isolate alleged Gülenists or other government opponents from Turkish society. The amendment extended this immunity to civilians, thus promoting pro-state vigilantism.<sup>58</sup>

The exploitation, excessive use, and unnecessary extension of Turkey's state of emergency has also been strongly criticized by various international institutions. Council of Europe Commissioner for Human Rights Nils Muižnieks, issued a memorandum on October 7, 2016, addressing the human rights implications of measures adopted by Turkish authorities under the state of emergency. In particular, he noted the

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<sup>54</sup> Article 9 of the Decree Law No. 667 stipulates: "Legal, administrative, financial and criminal liabilities shall not arise in respect of the persons who have adopted decisions and fulfil their duties within the scope of this decree law." Decree Law No. KHK/667 (July 22, 2016), at art. 9; *Turkey: Emergency Decree Laws of July-September 2016, nos. 667-674*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 865/2016 (Nov. 10, 2016), at 6–7, available at

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)061-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)061-e).

<sup>55</sup> "Legal, administrative, financial and criminal liabilities of the persons who have adopted decisions and executed decisions or measures with a view to suppressing the coup attempt and terrorist actions performed on 15/7/2016 and the ensuing actions and the liability for those who have taken office within the scope of all kinds of judicial and administrative measures and who have adopted decisions and fulfilled relevant duties within the scope of the decree laws promulgated during the period of state of emergency shall not arise from such decisions taken, duties and acts performed." *Id.* at 21.

<sup>56</sup> A controversial amendment added to this provision by Article 121 of the Decree Law No. 696, dated December 27, 2017, reads: "provisions of paragraph 1 shall also be applicable to those individuals who acted with the aim of suppressing the coup attempt and the terrorist activities that took place on July 15, 2016 and actions that can be deemed as the continuation of these, without having regard to whether they held an official title or were performing an official duty or not." *Decree-Law on Certain Amendments to be Made within the Scope of the State of Emergency*, COUNCIL OF EUROPE, available at <https://rm.coe.int/cets-005-turkey-decree-no-696-with-force-of-law-on-measures-to-be-take/168077fa14>.

<sup>57</sup> *Critics Say Turkey's New Emergency Decree Could Incite Vigilante Groups*, VOA NEWS (Dec. 25, 2017), <https://www.voanews.com/a/critics-say-turkish-new-emergency-decree-could-incite-vigilante-groups/4178637.html>.

<sup>58</sup> REPORT ON THE IMPACT OF THE STATE OF EMERGENCY ON HUMAN RIGHTS IN TURKEY, INCLUDING AN UPDATE ON THE SOUTH-EAST: JANUARY-DECEMBER 2017, OHCHR, para. 45 (Mar. 2018) [hereinafter REPORT ON THE IMPACT OF THE STATE OF EMERGENCY ON HUMAN RIGHTS IN TURKEY], available at [https://www.ohchr.org/Documents/Countries/TR/2018-03-19\\_Second\\_OHCHR\\_Turkey\\_Report.pdf](https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf); Leighann Spencer, [Opinion] *Nationalist Vigilantes and the Turkish State*, PLATFORM FOR PEACE AND JUSTICE (PPJ), (Jan. 24, 2018), <http://www.platformpj.org/nationalist-vigilantes-turkish-state-2/>.

incompatibility of Turkey's state of emergency measures and judicial practices with the European Convention on Human Rights.<sup>59</sup> The commissioner also observed that the blanket, retroactive criminalization of members of the Gülenist network and their connections from July 15, 2016 onward, violated the core criminal justice principles of "legality" and "non-retroactivity." The Venice Commission's December 2016 opinion on Turkey's emergency decree laws, assessed the overall compatibility of the state of emergency in Turkey with the Council of Europe's standards.<sup>60</sup> The Commission clearly stated that the government had interpreted its extraordinary powers too extensively and had taken measures in violation of the Turkish Constitution and international law.<sup>61</sup> A summary of the commission's main concerns surrounding Turkey's state of emergency are presented in paragraph 227 of its report.<sup>62</sup>

On April 25, 2017, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution No. 2156 (2017),<sup>63</sup> reinitiating monitoring procedures concerning Turkey until "serious concerns" about the country's respect for human rights, democracy, and the rule of law were "addressed in a satisfactory manner." The resolution also stressed that the government had overreached by "ruling through decree laws going far beyond what emergency situations require and overstepping the parliament's legislative competence." PACE, in Resolution No. 2188, dated October 11, 2017,<sup>64</sup> reiterated its significant concern over both the scope of measures employed under the state of emergency and the constitutional amendments approved through a contested national referendum vote on April 16, 2017.<sup>65</sup>

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<sup>59</sup> "Memorandum on the Human Rights Implications of the Measures Taken Under the State of Emergency in Turkey," COMMISSIONER FOR HUMAN RIGHTS-COUNCIL OF EUROPE (Oct. 7, 2016), para. 20, available at <https://rm.coe.int/16806db6f1>.

<sup>60</sup> *Turkey: Unofficial Translation of the Amendments to the Constitution*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 875/ 2017 (Feb. 6, 2017) [hereinafter *Unofficial Translation of the Amendments to the Constitution*], available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e).

<sup>61</sup> *Id.* at para. 226.

<sup>62</sup> *Id.* at para. 227.

<sup>63</sup> *The Functioning of Democratic Institutions in Turkey*, PACE, Resolution No. 2156 (Apr. 25, 2017), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23665&lang=en>.

<sup>64</sup> *New Threats to the Rule of Law in Council of Europe Member States: Selected Examples*, PACE, Resolution No. 2188 (Oct. 11, 2017), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24214>.

<sup>65</sup> *Id.* at para. 12.

The criticisms made by the Council of Europe's institutions on Turkey's misuse of its emergency powers, are manifold.<sup>66</sup> The government's criminalization and dismissal of tens of thousands of people on trumped-up terrorism charges, for their alleged affiliation with the Gülenist movement—despite such associations being completely legal at the time—breaches criminal justice principles of “‘legality’” and “‘non-retroactivity.’”<sup>67</sup> The lack of individualized assessment of, or substantiated evidence supporting, these ostensible Gülenist connections, also violates principles of fairness. Moreover, emergency powers have been misused, far exceeding the exigencies of an emergency, and resulting in these decrees entering permanent legislation, without the required parliamentary or constitutional checks and balances. These changes have resulted in the collapse of judicial independence, the deterioration of natural justice, and, finally, the absence of effective judicial remedies. The Council of Europe's institutions clearly state that, under the state of emergency, Turkey's actions cannot be considered to adhere to the rule of law.

Though the state of emergency was lifted on July 18, 2018, many of the legislative measures adopted during this period have been transformed into permanent legislation. Amendments made under decree laws have remained in force even following the lifting of the state of emergency, unless the regulation was clearly only applicable during the emergency. The government also passed Law No. 7145, dated July 25, 2018,<sup>68</sup> which codifies for a further three years, emergency decree laws that facilitate the arbitrary dismissal of judiciary members, enable detention without charge for up to 12 days without adequate court supervision, and impose restrictions on freedom of assembly.

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<sup>66</sup> See generally *Council of Europe's Perspectives on the Rule of Law and Human Rights in Turkey in the Aftermath of 15 July 2016 Coup Attempt*, PLATFORM FOR PEACE AND JUSTICE (2018) [hereinafter *Council of Europe's Perspectives on the Rule of Law and Human Rights in Turkey*], available at <http://www.platformpj.org/wp-content/uploads/COUNCIL-OF-EUROPE%E2%80%99S-PERSPECTIVES-ON-THE-RULE-OF-LAW-AND-HUMAN-RIGHTS-IN-TURKEY-IN-THE-AFTERMATH-OF-15-JULY-2016-COUP-ATTEMPT.pdf>.

<sup>67</sup> *Id.* at para. 153.

<sup>68</sup> See Official Gazette [in Turkish], Law No. 7145 (July 31, 2018) [hereinafter Law No. 7145], <http://www.resmigazete.gov.tr/eskiler/2018/07/20180731-1.htm>.

## ii. The Purging of the Judiciary

On July 16, 2016, when the identities of the soldiers and service personnel who organized and participated in the failed coup attempt remained unknown, the Judicial Council convened to suspend 2,745 judges and prosecutors, including some of its own members.<sup>69</sup> Arrest warrants were later issued by prosecution offices across the country for these members of the judiciary. It would have been impossible for the prosecuting offices to gather sufficient evidence, or indeed any evidence, of the supposed involvement of 2,745 members of the judiciary within one day. There is no doubt that profiling had already occurred in advance preparation for a planned purge of the judiciary, and that the coup attempt served as an appropriate excuse to execute this plan. It should also be noted that no subsequent prosecutions of the members of the judiciary have sought to establish any link between the accused and the coup attempt; rather, they have merely been based on charges of alleged membership in a terror organization.

The number of judges and prosecutors dismissed reached 4,463,<sup>70</sup> constituting almost one-third of the total number of judges and prosecutors in the judiciary. Of these dismissed judges and prosecutors, 4,290 have been prosecuted, and 2,431 have been arrested.<sup>71</sup> Among the dismissed and arrested judges, are two Constitutional Court judges, five members of the High Judicial Council, 140 Court of Cassation judges, and 48 Council of State judges. It is estimated that more than 1,000 judges and prosecutors are currently incarcerated.<sup>72</sup>

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<sup>69</sup> *Turkey's Top Judicial Board Suspends 2,745 Judges*, ANADOLU AGENCY (July 16, 2016), <https://aa.com.tr/en/anadolu-post/turkey-s-top-judicial-board-suspends-2-745-judges/609091>.

<sup>70</sup> *Turkey's Post-Coup Crackdown Since July 15, 2016*, *supra* note 51.

<sup>71</sup> *Extradition to Turkey: One-Way Ticket to Torture and Unfair Trial*, THE ARRESTED LAWYERS INITIATIVE (Feb. 2018), available at <https://arrestedlawyers.files.wordpress.com/2018/02/one-way-ticket-to-torture-unfair-trial1.pdf>.

<sup>72</sup> Open Letter from Andrew Walker and Kirsty Brimelow to Prime Minister Theresa May (May 15, 2018), available at [https://www.barcouncil.org.uk/media/658843/180515\\_-\\_prime\\_minister.pdf](https://www.barcouncil.org.uk/media/658843/180515_-_prime_minister.pdf).

These dismissals were executed under Article 3 of Emergency Decree Law (EDL) No. 667,<sup>73</sup> enacted on July 23, 2016. The article stipulates that judges and prosecutors of first, second, and third instance courts, as well as the Constitutional Court, who are considered to be associated with a terrorist organization or structure, may be permanently discharged through a unilateral decision without any legal investigation or proceeding. The U.N. High Commissioner for Human Rights declared in March 2018, that such collective dismissals “have been largely arbitrary, and that appropriate procedures were not followed, including respect for the fundamental principle of presumption of innocence, the provisions of specific evidence and individual reasoning of the case, or the ability to present a defense.”<sup>74</sup>

Further, the detention and arrest of the judges and prosecutors overtly violated Article 159(9) of the Constitution and Article 88(1) of Law No. 2802.<sup>75</sup> Under Turkish law, judges and prosecutors may only be arrested if both: (a) there are circumstances that give rise to strong suspicion that they have committed a crime; and (b) they have been caught *in flagrante delicto* (red-handed).<sup>76</sup> It is implausible to accept the coup attempt as evidence of *in flagrante delicto* against the judges and prosecutors given that, firstly, evidence of them being involved in the coup attempt did not exist at the time, and, secondly, those members of the armed forces directly involved in the coup had not yet been detained, nor had a single prosecution commenced against them. The investigatory measures employed—such as arrest, search, and detention—were completely unlawful and a flagrant violation of Article 88/1 of Law No. 2802, as well as constitutional principles protecting the independence and the impartiality of the judiciary.<sup>77</sup>

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<sup>73</sup> See Official Gazette [in Turkish], Resolution KHK/667 Regarding Extraordinary Measures [translation] (July 23, 2016), <http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm>.

<sup>74</sup> REPORT ON THE IMPACT OF THE STATE OF EMERGENCY ON HUMAN RIGHTS IN TURKEY, *supra* note 58, at para. 50.

<sup>75</sup> For an English translation of the Constitution, see *Unofficial Translation of the Amendments to the Constitution*, *supra* note 15; see also Law No. 2802 [in Turkish], MEVZUAT BILGI SISTEMI (Feb. 24, 1983), available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2802.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> Melis Ton, [Opinion] *Arrests of Judges and Prosecutors in Turkey and Violation of the Principle of in Flagrante Delicto?*, PLATFORM FOR PEACE AND JUSTICE (June 23, 2017) [hereinafter *Arrests of Judges and Prosecutors in Turkey*], <http://www.platformpj.org/arrests-judges-prosecutors-turkey-violation-principle-flagrante-delicto/>.

In addition, all the memberships of the Supreme Courts (the Court of Cassation and the Council of State) were terminated with Law No. 6723, dated July 23, 2016.<sup>78</sup> Two-hundred-sixty-seven members of the Court of Cassation and 75 members of the Council of State were re-elected on July 25, 2016, by the Judicial Council, which was already under the political control of the executive.<sup>79</sup> The president to the Council of State also directly appointed 25 members.<sup>80</sup> Within just 10 days of the coup attempt, the two Supreme Courts were completely redesigned and reconstituted through legislative measures, blatantly ignoring the security of tenure and other guarantees supposedly ensured to existing members. This serves as further evidence as to how the independence of the judiciary has been destroyed, and its structure reconstituted, at the convenience of the Erdoğan administration.

These actions by the Turkish executive, have been the subject of intense and widespread criticism by inter-governmental bodies and NGOs. International Commission of Jurists Secretary-General Wilder Tayler stated: "...purging the judiciary now endangers the deepest foundations of the separation of powers and the rule of law. An independent judiciary will be critical to ensure a functioning administration of justice for all people in Turkey as the country emerges from the crisis."<sup>81</sup> Amnesty International's 2017/2018 report noted that the judiciary, itself decimated by the dismissal or detention of up to one-third of Turkey's judges and prosecutors, remained under extreme political pressure.<sup>82</sup> The International Bar Association's Human Rights Institute (IBAHRI) Co-Chair Ambassador (ret.) Hans Corell stated that "this sort of blanket dismissal is in direct conflict with Turkey's Constitutional protection for judges' security of tenure and against unfair dismissal."<sup>83</sup> Referring to the fact that thousands of

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<sup>78</sup> *Official Gazette* [in Turkish], Law No. 6723 (July 23, 2016), available at <http://www.resmigazete.gov.tr/eskiler/2016/07/20160723M2.pdf>.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> *Turkey: ICJ Condemns Purge of Judiciary*, INTERNATIONAL COMMISSION OF JURISTS (July 18, 2016), <https://www.icj.org/turkey-icj-condemns-purge-of-judiciary/>.

<sup>82</sup> *Amnesty International Report 2017/18: The State of the World's Human Rights*, AMNESTY INTERNATIONAL (2018), at 368, available at <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

<sup>83</sup> *IBAHRI Condemns Mass Removal of Judges Following Attempted Coup in Turkey*, INTERNATIONAL BAR ASSOCIATION (July 20, 2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>.

judges and prosecutors had been dismissed, Bernd Fabritius, co-rapporteur of PACE, declared that “this has seriously disrupted the proper functioning of the judicial system, including through the possible “chilling effect” on new and remaining judges of the sudden dismissal of their colleagues with its adverse consequences for judicial independence.”<sup>84</sup>

The current number of judges and prosecutors employed has reached 17,357, with almost 4,500 having been dismissed and 5,889 being recruited as replacements. As a result, as of March 2018, 34 percent of the judiciary with seniority has less than two years of experience.<sup>85</sup> This is extremely alarming in terms of judges and prosecutors’ maturity, since an individual can, in practice, enter this important role as young as 23 years old, just after graduating from law school, following an exam and brief internship period. The minimum pass mark requirement in the written exam has also been lowered, letting poorly scoring candidates reach the interviewing stage to allow favoritism.<sup>86</sup> The entire judicial recruitment process in Turkey is carried out by the Ministry of Justice, under the control of the executive. The main opposition party, the Republican People’s Party (CHP), has claimed that 800 lawyers who held different positions in rank and file cadres of the ruling party (AKP) have become judges under this biased selection process.<sup>87</sup>

## f. The Constitutional Amendments of April 16, 2017

Some of the Constitution’s most important provisions were amended on April 16, 2017 through Law No. 6771.<sup>88</sup> Significant changes were made to the judiciary, as the 22-

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<sup>84</sup> *Joint Statement on the Availability of Domestic Remedies for Allegations of Human Rights Violations in Turkey*, PARLIAMENTARY ASSEMBLY-COUNCIL OF EUROPE (May 24, 2017), <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6660&lang=2&cat=5>.

<sup>85</sup> “Hâkim ve savcılarn yüzde 34’ünün meslekteki kıdemi iki yılın altında” [in Turkish], T24 (Mar. 25, 2018), <http://m.t24.com.tr/amp/haber/hakim-ve-savcilarin-yuzde-34unun-meslekteki-kidemi-iki-yilin-altinda,589828>.

<sup>86</sup> *Id.*

<sup>87</sup> Abdullah Ayasun, *In Turkey, Road to Judicial Posts Passes Through Party Membership*, THE GLOBE POST (Aug. 12, 2017), <https://www.theglobepost.com/2017/04/28/road-to-judicial-posts-in-turkey-passes-through-party-membership/>.

<sup>88</sup> *Official Gazette* [in Turkish], Law Amending the Constitution of the Republic of Turkey, Law No. 6572 [translation] (Feb. 11, 2017) [hereinafter Law No. 6572 Amending the Constitution of the Republic of Turkey], <http://www.resmigazete.gov.tr/eskiler/2017/02/20170211-1.htm>.

member Judicial Council (High Council of Judges and Prosecutors) became the 13-member Council of Judges and Prosecutors (HSK), with the number of its chambers reduced from three to two.<sup>89</sup> Of these 13 members, seven are appointed by parliament, while six are directly selected by the President, including the Minister of Justice and the Under-Secretary.<sup>90</sup> The courts of first and second instance operate under the authority of the HSK. The constitutional amendment terminated the memberships of all existing members whose tenure was due to last until 2018, and new appointments and elections were made in May 2017.<sup>91</sup> Further, in reality, the president essentially oversees the appointment of almost all HSK members as AKP lawmakers comprise the majority of parliament, while the governing party is chaired by the president. Therefore, having the Judicial Council under the direct control of the executive, poses an immediate threat to the independence and impartiality of the judges and prosecutors.

The politically-motivated legislative and administrative changes introduced by the executive, coupled with recent constitutional amendments on the composition of the Judicial Council, have destroyed judicial independence in Turkey. The functioning of the courts under the politically-influenced Judicial Council constitutes a significant bar to the guarantee of a fair trial and access to justice. Various international institutions have raised a number of concerns about the constitutional changes related to the independence of the judiciary and the separation of powers. The Venice Commission<sup>92</sup> and European Commissioner for Human Rights Nils Muižnieks, expressed their concerns prior to the referendum,<sup>93</sup> and the U.N. High Commissioner for Human Rights echoed these sentiments in March 2018.<sup>94</sup>

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<sup>89</sup> CONSTITUTION (1982) (Rep. Turkey), art. 159(2).

<sup>90</sup> *Id.* at art. 159(3).

<sup>91</sup> *Id.* at provisional art. 19.

<sup>92</sup> See generally *Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 875/2017 (Mar. 13, 2017), para. 22, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

<sup>93</sup> Council of Europe Commissioner for Human Rights, FACEBOOK (June 7, 2017), <https://www.facebook.com/CommissionerHR/posts/806253422883903>.

<sup>94</sup> REPORT ON THE IMPACT OF THE STATE OF EMERGENCY ON HUMAN RIGHTS IN TURKEY, *supra* note 58, at para. 34.

## g. Overt Pressure on the Due Process of Law

As described above, there have been many recent instances in which members of the executive have interfered with judicial functioning, exerted pressure on the judiciary, and interfered with legal due process. Further examples of executive involvement are outlined below.

On March 17 and 30, 2017, the Second Antalya High Criminal Court issued decisions ordering the release of 20 police officers and eight civilians.<sup>95</sup> According to a PPJ report, immediately following these decisions, the court's president was removed from his position and reassigned to the province of Manisa as an ordinary judge, while the associate judge was transferred to Siirt, and two other members were transferred to different provinces. After the Chief Prosecuting Office formally objected to the Second Antalya High Criminal Court's decisions, the Third Antalya High Criminal Court ordered the arrest of the formerly released defendants.

On March 31, 2017, the 25<sup>th</sup> Istanbul High Criminal Court issued decisions to release 21 journalists. The prosecutor and judges involved were subsequently suspended on April 3, 2017 and faced disciplinary proceedings.<sup>96</sup> The released 21 journalists were kept in a prison van until a new arrest order was secured from a different court, after which they were returned to prison without ever having been released. This direct link between the release of individuals and the suspension and disciplining of the judges involved, is concerning. Even more alarming, is the public manner in which such events are taking place, which reinforces the view that judicial independence has effectively ceased to exist. Shortly after the release decision, a pro-government journalist, Cem Küçük, made threatening remarks on social media toward the judges involved, saying that they would pay "a heavy price."<sup>97</sup>

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<sup>95</sup> PPJ Report on Non-Independence and Non-Impartiality, *supra* note 6, at para. 90.

<sup>96</sup> *Id.* at para. 80.

<sup>97</sup> *Id.* at para. 81; Cem Küçük shared the following Tweets: "10- If these traitors were not rearrested, some people would pay a heavy price. I am knowingly saying this. Things will get shattered." @cemkucuk55, TWITTER (6:39 PM, Mar. 31 2017); "13- Bekir Bozdog (Minister of Justice) must urgently convene HSYK this evening and actions must be taken concerning some judges. This is the demand of the nation." @cemkucuk55, TWITTER (6:50 PM, Mar. 31, 2017); "Every judge and prosecutor who releases the known

Other cases involve the arrest of independent journalists under politically-motivated charges. Deniz Yücel, the Turkish correspondent for the Turkish-German newspaper *Die Welt*, was arrested in Istanbul on February 27, 2017. President Erdoğan summarized the accusations against Yücel following his arrest, stating that “[h]e is not a journalist, he is a terrorist...<sup>98</sup> who hid in the German embassy as a German agent and PKK [Partiya Karkerên Kurdistanê, or the Kurdistan Workers’ Party, a far-left, militant Kurdish opposition party] member spy.<sup>99</sup> Over the course of the one-year period of Yücel’s detention, no indictment was issued. The day before his official visit to Germany on February 15, 2018, Prime Minister Binali Yıldırım implied that Yücel would be released following discussions between the two governments.<sup>100</sup> On February 16, 2018, Istanbul’s High Criminal Court accepted an indictment seeking up to 18 years’ imprisonment for Yücel for “making propaganda for a terrorist organization.”<sup>101</sup> However, despite accepting this indictment, the court ordered Yücel’s release, and he was able to fly to Germany without a travel ban being imposed.<sup>102</sup> This, combined with Yücel’s statement on his detention,<sup>103</sup> heavily suggests that Yücel was released as a

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persons from FETÖ shall be dismissed. This is the final decision of the STATE. Let everybody know this.” @cemkucuk55, TWITTER (7.08 PM, Mar. 31, 2017).

<sup>98</sup> President Erdoğan: *Die Welt’s Deniz Yücel a Terrorist, Not a Journalist*, TURKEY PURGE (Mar. 6, 2017), <https://turkeypurge.com/president-erdogan-die-welts-deniz-yucel-a-terrorist-not-a-journalist>.

<sup>99</sup> *Erdogan Says German Journalist Held in Turkey Was Agent and PKK Member*, REUTERS (Mar. 3, 2019), <https://www.reuters.com/article/us-turkey-security-germany-journalist-idUSKBN16A2GD>.

<sup>100</sup> Prime Minister Binali Yıldırım stated, “I think that there will be a development soon.” *I Hope German Journalist Deniz Yücel Will Be Released Soon: Turkish PM*, HÜRRİYET DAILY NEWS (Feb. 14, 2018), <http://www.hurriyetdailynews.com/i-hope-german-journalist-deniz-yucel-will-be-released-soon-turkish-pm-127314>. During a joint press conference with German Chancellor Merkel on February 15, 2018 Prime Minister Yıldırım stated, in relation to the Yücel case, that “what is necessary shall be done within the scope of the rule of law; what is required of us is to clear the way for the courts. ... I hope that the trial will take place within a short time and a result will be achieved.” Dr. Ugur Tok, *Turkey’s Judicial System: Under the Government’s Thumb*, INDEX ON CENSORSHIP (Apr. 25, 2018), <https://www.indexoncensorship.org/2018/04/turkeys-judicial-system-under-the-governments-thumb/>.

<sup>101</sup> *Journalist Deniz Yücel Returns to Germany After Release from Turkish Prison*, DEUTSCHE WELLE (Feb. 16, 2018), <https://www.dw.com/en/journalist-deniz-y%C3%BCcel-returns-to-germany-after-release-from-turkish-prison/a-42621077>.

<sup>102</sup> *Id.*

<sup>103</sup> On 16 February 2018, just after his release, Mr. Yücel made the following comment about his detention and release decision: “I was given a document while being freed from prison today. It is a ruling by the 3rd Criminal Peace Judgeship dated February 13, 2018. The Judge had, in fact, ruled for the continuation of my pre-trial detention. I received this decision today when I was released. But I am free despite this (decision). I do not know why I was imprisoned a year ago and why I was released today. Is it not strange? Anyway, it does not matter. After all, I know that neither my jailing, more precisely my being taking as a hostage a year ago, nor my release today is in accordance with the rule of law at all. I know this very well.” [VIDEO] *Deniz Yücel Says Neither Jailing Nor Release in Accordance with Rule of Law*, TURKEY PURGE (Feb. 17, 2018), <https://turkeypurge.com/deniz-yucel-says-neither-jailing-release-accordance-rule-law>.

result of a political agreement between the Turkish and German governments, and that Istanbul's High Criminal Court was merely acting on the instructions of the executive.

On October 12, 2018, a Turkish court ordered the release of U.S. pastor Andrew Brunson, who had been detained on "terrorism" charges for over two years.<sup>104</sup> President Erdoğan expressed his desire to use Brunson as a bargaining chip in discussions with the United States to extradite Fethullah Gülen, who currently lives in exile in Pennsylvania. *The Wall Street Journal* also reported that Turkey asked the U.S. to drop an investigation into one of its largest state-owned banks in exchange for the release of Brunson, a deal that was rejected by the Trump administration.<sup>105</sup> Turkish prosecutors eventually charged Brunson not only with supporting Gülen, but also with secretly helping the outlawed PKK. The Turkish court finally released the U.S. pastor on October 12, 2018, permitting him to return to the U.S.—a decision widely reported as a further example of blatant political interference in Turkey's judicial process.<sup>106</sup>

On November 20, 2018, the ECtHR issued an immediate release ruling, declaring that Turkish courts had violated the rights of Selahattin Demirtaş, former presidential candidate and chairman of the pro-Kurdish opposition party Halkların Demokratik Partisi (HDP), under Articles 5 and 18 of the European Convention on Human Rights, and Article 3 of Protocol 1.<sup>107</sup> Article 5 includes the right to liberty and security; Article 18 regulates abuse of the Convention rights; and Article 3 of Protocol 1 guarantees the right to vote and stand for election. The ECtHR noted that pursuant to Article 46 of the European Convention on Human Rights, judicial authorities lack the competence to deliberate on ECtHR decisions.<sup>108</sup> In response, President Erdoğan stated that the ECtHR's decision was not binding, and that his administration would "make a counter-

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<sup>104</sup> Michael Rubin, *Brunson Release Spotlights the Rot in Turkish Politics and Judiciary*, THE HILL (Oct. 13, 2018), <https://thehill.com/opinion/international/411253-brunson-release-spotlights-the-rot-in-turkish-politics-and-judiciary>.

<sup>105</sup> Fred Imbert, *Trump Administration Reportedly Refuses to Give Turkish Bank Relief in Exchange for Detained Pastor's Release*, CNBC NEWS (Aug. 20, 2018), <https://www.cnbc.com/2018/08/20/us-reportedly-refuses-to-give-turkish-bank-relief-in-exchange-for-detained-pastors-release.html>.

<sup>106</sup> *Andrew Brunson: Trump Meets US Pastor Freed by Turkey*, BBC NEWS (Oct. 13, 2018), <https://www.bbc.co.uk/news/world-europe-45842735>.

<sup>107</sup> *Case of Selahattin Demirtaş v. Turkey (No. 2)*, No. 14305/17, ECtHR (Nov. 20, 2018), available at <https://www.courthousenews.com/wp-content/uploads/2018/11/DEMIRTAS-TURKEY.pdf>.

<sup>108</sup> *Id.*

move and finish the job.”<sup>109</sup> Demirtaş’ plea for his release, which cited the ECtHR decision, was rejected by the 19<sup>th</sup> Assize Court of Ankara on November 30, 2018, on the grounds that there was firm evidence suggesting Demirtaş’ guilt, and that the ECtHR’s decision was not final. This verdict was also upheld by the 20<sup>th</sup> Assize Court of Ankara, on the grounds that “the ECHR decision was not final.”<sup>110</sup> However, under Article 46 of the European Convention on Human Rights, all ECtHR rulings are binding on Member States, including Turkey, and thus decisions do not have to be finalized in order to be implemented.<sup>111</sup>

Before the ECtHR had issued its decision, on September 7, 2018, and in a separate criminal case, the 26<sup>th</sup> Assize Court of Istanbul convicted Demirtaş of disseminating terror propaganda for a speech he gave at a political rally in 2013.<sup>112</sup> Upon appeal, on December 4, 2018, the 2<sup>nd</sup> Criminal Chamber of the Regional Court in Istanbul held an expedited hearing and approved Demirtaş’ conviction, rendering the ECtHR’s decision on his detention inapplicable.<sup>113</sup> This decision altered the Demirtaş’ status from “arrestee” to a “convicted person,” apparently in order to circumvent the ECtHR decision that Demirtaş had been held excessively long in pre-trial detention. On December 4, 2018, within three months of the first instance ruling, the Istanbul Regional Court upheld the first instance judgment, using non-individualized reasoning. As the upheld conviction amounts to less than five years in prison, the decision is final under Turkish law.<sup>114</sup> Due to the fact that Demirtaş had a final conviction in another proceeding, the ECtHR ruling was *de facto* nullified. Thus, the “counter-move”

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<sup>109</sup> *Turkey Must Free Selahattin Demirtaş*, *European Rights Court Says*, BBC NEWS (Nov. 20, 2018), <https://www.bbc.co.uk/news/world-europe-46274330>.

<sup>110</sup> *Turkish Court Dismisses Plea for Release of Demirtaş After ECHR Ruling*, HÜRRİYET DAILY NEWS (Dec. 1, 2018), <http://www.hurriyetdailynews.com/turkish-court-dismisses-plea-for-release-of-demirtas-after-echr-ruling-139359>.

<sup>111</sup> *Turkish Court Keeps Selahattin Demirtaş in Jail Despite ECHR*, AL JAZEERA (Nov. 30, 2018), <https://www.aljazeera.com/news/2018/11/turkish-court-selahattin-demirtas-jail-echr-181130140610828.html>.

<sup>112</sup> *Turkey Upholds Sentencing of Kurdish Politician Demirtaş*, AL JAZEERA (Dec. 4, 2018), <https://www.aljazeera.com/news/2018/12/turkey-upholds-sentencing-kurdish-politician-demirtas-181204161928852.html>.

<sup>113</sup> *Id.*; *Turkish Court Upholds Jail Terms for HDP’s Demirtaş, Önder*, HÜRRİYET DAILY NEWS (Dec. 5, 2018), <http://www.hurriyetdailynews.com/turkish-court-upholds-jail-terms-for-hdps-demirtas-onder-139460>.

<sup>114</sup> The upholding decision of the Regional Court of Appeal for custodial sentences of five years and less are final and cannot be appealed further (Article 286/2-a of the Criminal Procedure Code).

promised by Erdoğan, came in the form of a decision by the Second Instance Court in a separate proceeding, and the job was finished, as promised.<sup>115</sup>

Therefore, as demonstrated, the independence of the Turkish judiciary, as well as the country's respect of the rule of law and human rights, have been in dramatic decline, particularly since the July 2016 coup attempt.

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<sup>115</sup> See, 'Karşı hamle' İstinaf'tan geldi [in Turkish], CUMHURİYET (Nov. 25, 2018), [http://www.cumhuriyet.com.tr/haber/siyaset/1150642/ Karsi\\_hamle\\_istinaf\\_tan\\_geldi.html](http://www.cumhuriyet.com.tr/haber/siyaset/1150642/ Karsi_hamle_istinaf_tan_geldi.html); see also On 29 November 2018, Human Rights Watch Turkey Director shared this tweet: "To avoid complying with ECtHR ruling to release Selahattin Demirtaş, Turkey's Government takes steps to get appeal court to uphold conviction in one of many bogus cases against him so that he becomes a convicted prisoner. Rule of revenge has replaced rule of law." @esinclairwebb, TWITTER (Nov. 29, 2018, 8:11 AM), <https://twitter.com/esinclairwebb/status/1068039771698667520>.

## C. The Ineffectiveness of Domestic Remedies in Turkey

There is currently no internal mechanism or impetus that can allow Turkey's judicial and legal systems to restore themselves. Though the ECtHR could make an impactful intervention to monitor human rights abuses when dealing with individual applications arising from Turkey, such a diligent examination has not taken place in the two-and-a-half years since the coup attempt. This is because the ECtHR has considered the Turkish legal system as capable of providing fair and effective remedies. However, this belief is misplaced. The following section outlines why Turkey's current judicial and legal systems should not be considered sources of effective and viable remedies, particularly with regard to the decisions of the Constitutional Court and the State of Emergency Inquiry Commission.

### a. Can the Constitutional Court Provide an Effective Remedy?

This section seeks to demonstrate that the Constitutional Court, which is the supreme authority for remedying human rights violations under Turkish law, ought not to be considered an effective source of remedies, as defined by the ECtHR.<sup>116</sup>

#### i. The Constitutional Court Declares Emergency Laws as Falling Outside of its Jurisdiction

On October 12, 2016, the Constitutional Court ruled that it had no competence to consider the constitutionality of emergency decree laws. This decision clearly contradicted the court's earlier caselaw, instead relying on the wording of Article 148 of the Constitution.<sup>117</sup> Previously, the Constitutional Court had been liberal in its

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<sup>116</sup> See generally GUIDE TO GOOD PRACTICE IN RESPECT OF DOMESTIC REMEDIES, COUNCIL OF EUROPE (18 Sept. 2013), available at [https://www.echr.coe.int/Documents/Pub\\_coe\\_domestics\\_remedies\\_ENG.pdf](https://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf).

<sup>117</sup> Article 148 of the Constitution stipulates that "the Constitutional Court shall examine the constitutionality in respect to both [the] form and substance of laws, decrees having the force of law, and the Rules of Procedure of the Grand National Assembly of Turkey and decide on individual applications. Constitutional Amendments shall be examined and verified only with regard to their form. However,

interpretation of this article. The Constitutional Court had declared itself competent to review the constitutionality of emergency decree laws to the extent that they went beyond the scope of the state of emergency *ratione temporis* or *ratione loci*.<sup>118</sup> In September 2016, the main opposition party, the Republican People's Party (CHP), challenged Emergency Decree Law No. 667 before the Constitutional Court because, *inter alia*, this decree law introduced permanent measures, as opposed to temporary ones. However, the Constitutional Court rejected the appeal on October 12, 2016, denying the review of the decree law *in abstracto*.<sup>119</sup>

This decision undermined Turkey's democratic institutions.<sup>120</sup> In March 2018, before lifting the state of emergency, Parliament, dominated by members of the ruling party, passed legislation allowing emergency decrees to enter into permanent law.<sup>121</sup> Hence, emergency decrees have become susceptible to constitutional review. The CHP lodged an action with the Constitutional Court, seeking the annulment of these emergency decrees on the grounds of defect in form.<sup>122</sup> The Constitutional Court rejected this application on June 30, 2018.<sup>123</sup> The CHP was expected to initiate another action on

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decrees having the force of law issued during a state of emergency, martial law, or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance." *Unofficial Translation of the Amendments to the Constitution*, *supra* note 15; see *Turkish Constitutional Court Rejects CHP's Appeal to Annul Decree Laws*, HÜRRİYET DAILY NEWS (Oct. 12, 2016), <http://www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889>.

<sup>118</sup> Constitutional Court Decision, Case No. 1990/25; Constitutional Court Decision, Case No. 1991/16, *supra* note 52.

<sup>119</sup> *Turkish Constitutional Court Rejects CHP's Appeal*, *supra* note 53.

<sup>120</sup> See *The Constitution of a Newly-Emerged Authoritarian Regime: Decree Laws Under State of Emergency*, PLATFORM FOR PEACE AND JUSTICE (May 26, 2017), <http://www.platformpj.org/constitution-newly-emerged-authoritarian-regime-decree-laws-state-emergency/>.

<sup>121</sup> Five Emergency Decree Laws were initially made permanent during the state of emergency, while a further 25 Emergency Decree Laws were also promulgated in March 2018, with a view to codifying them as permanent law before ending the state of emergency. See *Yasama Bölümü/Kanunlar* [in Turkish], available at <http://www.resmigazete.gov.tr/eskiler/2018/03/20180308m1.htm>.

<sup>122</sup> As a rule, the right to apply directly to the Constitutional Court for annulment lapses 60 days after the publication of the relevant legislation in the *Official Gazette* (Article 151 of the Turkish Constitution). However, applications for annulment on the grounds of defect in form may not be made more than 10 days after the promulgation of the law (Article 148(2) of the Turkish Constitution). For an English translation of the Constitution, see *Unofficial Translation of the Amendments to the Constitution*, *supra* note 15.

<sup>123</sup> *Turkey's Top Court Says State of Emergency Decrees Are Law*, AHVAL (July 1, 2018), <https://ahvalnews.com/state-emergency/turkeys-top-court-says-state-emergency-decrees-are-law>.

the basis of substance<sup>124</sup> within 60 days of the promulgation of the legal provisions; however, surprisingly, it made no such application. It is still possible under Turkish law for the Constitutional Court to examine a claim of unconstitutionality against these legislative measures by way of reference from general courts upon the request of the parties to the proceedings.<sup>125</sup> Nevertheless, the Constitutional Court's record during the state of emergency, casts a dark shadow on its ostensible independence, and raises questions as to the Court's effectiveness in upholding human rights.

## ii. Failure of the Constitutional Court to Rule in Favor of Applicants

The Constitutional Court has been ineffective in addressing the gross violations of individual rights and freedoms that have occurred in Turkey since the attempted coup of July 2016. After the declaration of a state of emergency, many public officials dismissed under the emergency decree laws, made applications for the annulment of those dismissals to administrative and judicial bodies, the Constitutional Court, and the ECtHR.<sup>126</sup> Administrative courts, along with the Constitutional Court and the Council of State, rejected over 300 of these applications, arguing that they lacked jurisdiction due to the nature of emergency decree laws.<sup>127</sup>

The only evidence suggesting that the Constitutional Court is capable of providing effective remedies, are the cases involving journalists Mehmet Altan and Sahin Alpay, who were both arrested following the July 2016 attempted coup for their alleged links

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<sup>124</sup> The first application was made within a short 10-day period. The CHP would have to apply within 60 days in order to mount a more comprehensive lawsuit on the grounds of substance under Article 151 of the Turkish Constitution.

<sup>125</sup> CONSTITUTION, art. 152; Law No. 6216 on the Establishment of the Constitutional Court and its Rules of Procedure [translation], MEVZUAT BILGI SISTEMI (Mar. 30, 2011), art. 28, available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6216.pdf>.

<sup>126</sup> Kerem Altıparmak, *Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?* HUMAN RIGHTS JOINT PLATFORM (IHOP), at 1 (Feb. 2017), available at <http://www.ihop.org.tr/en/wp-content/uploads/2017/03/IS-THE-STATE-OF-EMERGENCY-INQUIRY-COMMISSION.pdf>.

<sup>127</sup> *Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers Concerning International Law Breaches Concerning the Independence of Legal Profession in Turkey*, THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, ET AL., (Sept. 18, 2018), para. 40, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=deaf1861-f198-4352-b570-7d08e5c0c53a>.

to the Gülenist movement.<sup>128</sup> The Constitutional Court held on January 11, 2018, that Altan's and Alpay's liberty and freedom of expression had been violated.<sup>129</sup> Deputy Prime Minister and Government Spokesperson Bekir Bozdağ, stated that the Constitutional Court had overstepped its jurisdiction as outlined in the Constitution and other legislation.<sup>130</sup> Due to government pressure, the decisions regarding Alpay and Altan were not implemented by the lower courts, which cited almost identical reasoning to that provided by Bozdağ.<sup>131</sup> Despite the fact that the Constitutional Court's decisions are legally binding, the decision was not implemented by these bodies.

Following a separate application filed by Alpay, the Constitutional Court rendered another decision on March 16, 2018, declaring that Alpay's right to personal liberty, security, and a fair trial were all violated under the European Convention on Human Rights.<sup>132</sup> This time, Istanbul's 13<sup>th</sup> Assize Court chose to follow the ruling and ordered Alpay's conditional release. Surprisingly, the executive offered no statement. Many regard this as a tactical move by the government to avoid future rulings by the ECtHR, as this case would stand as proof that the Constitutional Court is able to provide effective remedies.<sup>133</sup>

The ECtHR did find breaches of Altan's and Alpay's rights, specifically because of the lower courts' failure to follow the Constitutional Court's binding decision and release

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<sup>128</sup> *European Court: Altan and Alpay's Rights Violated*, PLATFORM FOR INDEPENDENT JOURNALISM (Mar. 20, 2018) <http://platform24.org/en/articles/604/european-court--altan-and-alpay-s-rights-violated>.

<sup>129</sup> *Id.*

<sup>130</sup> *Penal Court Resists Top Court Ruling, Claims "Usurpation of Authority,"* EXPRESSION INTERRUPTED (last accessed Mar. 25, 2019), <https://expressioninterrupted.com/first-instance-court-resists-top-court-ruling-claims-usurpation-of-authority/>.

<sup>131</sup> *OSCE Calls on Turkey to Release Two Arrested Journalists Over High Court Ruling*, HÜRRİYET DAILY NEWS (Jan. 17, 2018), <http://www.hurriyetaidailynews.com/osce-calls-on-turkey-to-release-two-arrested-journalists-over-high-court-ruling-125910>.

<sup>132</sup> *Constitutional Court Rules Second Time Alpay's Rights Violated*, BIANET (Mar. 16, 2018), <https://m.bianet.org/english/law/195222-constitutional-court-rules-second-time-alpay-s-rights-violated>.

<sup>133</sup> For instance, "Turkish human rights lawyer Kerem Altıparmak tweeted that the Turkish government's move was intended to send a message to the ECtHR that the Constitutional Court is a viable domestic remedy." [Analysis] *Why Should Not the ECHR Accept the Turkish Constitutional Court As An Effective Remedy?*, PLATFORM FOR PEACE AND JUSTICE (Oct. 31, 2018), <http://www.platformpj.org/analysis-why-should-not-the-echr-accept-the-turkish-constitutional-court-as-an-effective-remedy/>.

the journalists.<sup>134</sup> The European Court observed, in particular, that the Istanbul 13<sup>th</sup> Assize Court's refusal to follow the Constitutional Court's application for Altan's and Alpay's release, in and of itself, constituted a breach of their right to liberty and security, under Article 5(1) of the ECtHR.

However, the Constitutional Court has issued negative decisions on many cases, and has been inactive on tens of thousands of individual applications involving unfair dismissal, following the July 2016 crackdown. Even the individual application lodged by one of its own former members, Alpaslan Altan, was found to be inadmissible by the Plenary Session of the Constitutional Court on January 11, 2018.<sup>135</sup> The Constitutional Court refused Altan's individual application, on the grounds that the alleged unlawfulness of his detention was ill-founded. Therefore, the cases of Mehmet Altan and Sahin Alpay clearly represented the exception to the rule.

### iii. The Constitutional Court Dismissed Two Members for Alleged Gülenist Links

In the aftermath of the attempted coup, on August 4, 2016, the Constitutional Court decided to dismiss two of its own members, Professor Erdal Tezcan and Dr. Alparslan Altan, due to their alleged Gülenist links.<sup>136</sup> This judgment was based on the power conferred on the Plenary of the Constitutional Court by Article 3(1) of Emergency Decree Law No. 667, which allowed it to dismiss Constitutional Court judges "who are considered to be a member of, or have relation, connection, or contact with terrorist

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<sup>134</sup> Case of Mehmet Hasan Altan v. Turkey, No. 13237/17, ECtHR (Mar. 20, 2018), available at [http://questionegiustizia.it/doc/case\\_mehmet\\_hasan\\_altan\\_v\\_turkey.pdf](http://questionegiustizia.it/doc/case_mehmet_hasan_altan_v_turkey.pdf); Case of Şahin Alpay v. Turkey, No. 16538/17, ECtHR (Mar. 20, 2018), available at [http://questionegiustizia.it/doc/case\\_sahin\\_alpay\\_v\\_turkey.pdf](http://questionegiustizia.it/doc/case_sahin_alpay_v_turkey.pdf).

<sup>135</sup> *Ayasa Mahkemesi Eski Üyesi Olan Başvurucu Hakkında Uygulanan Tutuklama Tedbirine İlişkin Kararin Basın Duyurusu*, Application No. 2016/15586, (Jan. 11, 2018), T.C. ANAYASA MAHKEMESİ [in Turkish], <http://www.anayasa.gov.tr/icsayfalar/basin/kararlarailiskinbasinduyurulari/bireyselbasvuru/detay/152.html>.

<sup>136</sup> Constitutional Court Decision, Case No. 2016/6 (Miscellaneous), Decision No. 2016/12 (Aug. 4, 2016), ANAYASA MAHKEMESİ KARARI: GENEL KURUL [in Turkish] [hereinafter Constitutional Court Decision, Case No. 2016/6], <http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/717f7c20-b696-4379-84f6-dfb568f8844a?excludeGerekce=False&wordsOnly=False>; see Tarik Olcay, "Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members," EUROPEAN CONSTITUTIONAL L. R. 13(3): 568–581 (2017).

organizations or structures/entities.”<sup>137</sup> The case reveals numerous challenges and problems within the Turkish judicial system, as discussed henceforth.

The Venice Commission highlighted that the Turkish Constitutional Court does not require any particular evidence to dismiss a judge on the basis of extraordinary measures ordered by emergency decree law.<sup>138</sup> In fact, the judgment of the Constitutional Court did not refer to any evidence against the two judges concerned. In order to rule for dismissal, it was considered sufficient for the majority of members to be subjectively persuaded that a link existed between the member concerned and the Gülenists. To find existence of such a link, the Constitutional Court relied on information from “social circles” and the “joint opinion” of the members of the Constitutional Court.<sup>139</sup>

The Venice Commission further highlighted an obvious issue with the Constitutional Court dismissing its own members in connection with its constitutional and judicial review of the emergency measures. The Emergency Decree Law No. 667 served as the legal basis for the dismissal of its members. Other supreme courts and the High Judicial Council for Judges and Prosecutors (HSYK) dismissed thousands of judges using the extraordinary powers given by the same Emergency Decree Law No. 667. The Venice Commission thus concluded that challenging the procedural legitimacy of these mass

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<sup>137</sup> The Constitutional Court stated in particular that: “establishing a link between members of the Constitutional Court and the terrorist organization [...] was not necessarily sought for the application of the measure; it was considered sufficient to establish their link with ‘structures,’ ‘organizations’ or ‘groups’ [...] (para. 84). The link in question does not necessarily have to be in the form of ‘membership of’ or ‘affiliation with’ a structure, organization or group; it is sufficient for it to be in the form of ‘connection’ or ‘contact’ in order for the measure of dismissal from profession to be applied (para. 85). Lastly, establishing the evidentiary link between the members and the structures, organizations or groups [...] is not sought in the Article [of Decree Law No. 667]. ‘Assessment’ of such link by the Plenary Session of the Constitutional Court is deemed sufficient. The assessment in question means a ‘conviction’ formed by the absolute majority of the Plenary Session. Undoubtedly, this conviction is solely an assessment on whether the person concerned is suitable to remain in the profession irrespective of whether there is criminal liability (para 86). Article 3 of the Decree Law prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction. On the basis of which elements this conviction will be formed is a matter left to the discretion of the absolute majority of the Plenary Session....” (para 87). Constitutional Court Decision, Case No. 2016/6, *supra* note 136, at paras. 84–87 [translation].

<sup>138</sup> See *Turkey: Opinion on the Provisions of the Emergency Decree Law No. 674 of 1 September 2016 Which Concern the Exercise of Local Democracy in Turkey*, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 888/2017 (Oct. 9 2017) [hereinafter *Opinion on the Provisions of the Emergency Decree*], available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e).

<sup>139</sup> *Id.* at para. 98.

dismissals of judges and prosecutors before the same courts, is redundant because the highest courts have themselves used, and thereby validated, this law.<sup>140</sup> Challenges to the emergency laws will have little chance of success, as the general legitimacy of the scheme of dismissals *ipso facto* cannot be called into question.<sup>141</sup>

Furthermore, the powers of the Constitutional Court are limited to those granted by Article 148 of the Constitution. Based on this article, the Constitutional Court is not authorized to deal with criminal prosecutions or to decide whether a group qualifies as a terror organization. Notably, when deciding the dismissals, the Constitutional Court delivered its judgment without conducting any adjudicative criminal proceeding or conforming with any *sine qua non* judicial guarantees. The Plenary Session of the Constitutional Court did not have a *res judicata* decision by the criminal courts recognizing the organization as a terrorist one, but it proceeded to use the expression of “Fethullahist Terror Organization/Parallel State Structure” (FETÖ/PDY) several times, implying that the existence of such a “terrorist organisation” is an established fact.

The criminal courts arguably made their first binding ruling concerning the existence of such a “terrorist organization” with the decision of the Assembly of Criminal Chambers of the Court of Cassation on September 26, 2017.<sup>142</sup> Prior to this, the Constitutional Court was unable to characterize a group or organization as a terror organization, nor could it dismiss its members on the basis of a link, contact, or affiliation with such a group. In essence, by making dismissals on such reasoning, all the Constitutional Court’s members have violated the Turkish Constitution and demonstrated impartiality in relation to cases involving alleged Gülenists.

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<sup>140</sup> See *Opinion on the Provisions of the Emergency Decree*, *supra* note 138.

<sup>141</sup> *Id.* at para. 186.

<sup>142</sup> Case No. 2017/16.MD-956; Decision No. 2017/370 (Sept. 26, 2017), see *Yargıtay Ceza Genel Kurulu'nun Bylock ve FETÖ Üyeliğine Dair Kararının Tam Metni* [in Turkish], MEMURLAR (Dec. 5, 2017), <https://www.memurlar.net/haber/712749/yargitay-ceza-genel-kurulu-nun-bylock-ve-feto-uyeligine-dair-kararinin-tam-metni.html>.

#### iv. Members of the Constitutional Court Exposed to Threat of Dismissal and Criminal Prosecution

Article 3(1) of the Emergency Decree Law No. 667<sup>143</sup> provided the authority to dismiss judges, including the Constitutional Court judges, “who are considered to be a member of, or have relation, connection or contact with terrorist organizations or structure/entities.” Under the authority given by this decree, 4,463 judges and prosecutors have been dismissed.<sup>144</sup> Turkey adopted an anti-terrorism law on July 25, 2018, which saw the continuation of some state of emergency powers, following the formal end of the state of emergency period.<sup>145</sup> Consequently, the government was able to continue to exercise a range of powers, originally intended for use only in this interim state of emergency period, for a further three years. In particular, authorities are able to dismiss judges and any other public officials under Article 26A, if they are “found to have been members of or acted in union with or been in contact with terrorist organizations or structures, entities or groups that the National Security Council has decided are engaged in activities against national security.”<sup>146</sup> Such broad and arbitrary grounds of dismissal, threaten judges’ guarantee of tenure, including members of the Constitutional Court.

Since the declaration of the state of emergency, 4,290 judges and prosecutors have been subject to criminal prosecution and 2,431 have been arrested,<sup>147</sup> despite the absence of *flagrante delicto* on the part of the members of the judiciary, as guaranteed by Article 159(9) of the Constitution and Article 88(1) of the Law No. 2802.<sup>148</sup> Two members of the Constitutional Court have also been arrested and subjected to investigatory measures, such as search and seizure, despite the absence of procedural grounds for initiating such an investigation. It is difficult to ensure under the current

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<sup>143</sup> Resolution KHK/667, *supra* note 73.

<sup>144</sup> *Turkey’s Post-Coup Crackdown Since July 15, 2016*, *supra* note 51.

<sup>145</sup> *Official Gazette* [in Turkish], Law No. 7145 Regarding Amendments to Laws and Decrees (July 25, 2018), [www.tbmm.gov.tr/kanunlar/k7145.html](http://www.tbmm.gov.tr/kanunlar/k7145.html).

<sup>146</sup> *Id.*

<sup>147</sup> *Extradition to Turkey: One-Way Ticket to Torture and Unfair Trial*, THE ARRESTED LAWYERS INITIATIVE (Feb. 2018), available at <https://arrestedlawyers.files.wordpress.com/2018/02/one-way-ticket-to-torture-unfair-trial1.pdf>.

<sup>148</sup> See *Arrests of Judges and Prosecutors in Turkey*, *supra* note 77.

political climate that the members of the Constitutional Court will be protected from such an arbitrary criminal prosecution.

### **v. Institutional Independence of the Constitutional Court Cannot Be Guaranteed**

Turkey's 2017 contested constitutional referendum<sup>149</sup> introduced significant changes to the appointment of members of the Constitutional Court.<sup>150</sup> The amended Article 146 provides that members of the Constitutional Court will be selected as follows: five members will be selected by the president from among the candidates nominated by the Court of Cassation and the Council of State; three members of the Constitutional Court will be selected by parliament, which is normally dominated by the president's political party; three members will be selected by the president from candidates designated by the Board of Higher Education (YOK); and the remaining four members will be directly appointed by the president from certain professions listed in the Constitution.<sup>151</sup>

Under the powers granted by this amendment, Erdoğan is able to appoint 12 of the 15 Constitutional Court judges. Even in countries where the rule of law is well-established, it would be highly implausible to expect the Constitutional Court to effectively and impartially revise the constitutionality of the laws adopted by Parliament under these circumstances. The Constitutional Court, with this composition, cannot be perceived as either impartial or independent.

### **b. Is the State of Emergency Inquiry Commission an Ineffective Remedy?**

The Commission on the Examination of the State of Emergency Measures (the "SoE Inquiry Commission" or "SoE") was established by Emergency Decree Law No. 685,

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<sup>149</sup> See Law No. 6572 Amending the Constitution of the Republic of Turkey, *supra* note 88.

<sup>150</sup> See generally *An All-Powerful President without Checks and Balances: An Assessment of the New Constitutional Arrangements in Turkey in View of 24 June 2018 Elections*, PLATFORM FOR PEACE AND JUSTICE (JULY 2018), available at <http://www.platformpj.org/wp-content/uploads/An-All-Powerful-President1.pdf>.

<sup>151</sup> CONSTITUTION, art. 146.

published on January 23, 2017 in the *Official Gazette*.<sup>152</sup> This decree provides for the establishment, jurisdiction, and purpose, as well as the operating principles and procedures, of the SoE Inquiry Commission. Moreover, a July 2017 Prime Ministry Circular published in the *Official Gazette* No. 30122, stipulates detailed rules on the working principles and procedures of the SoE.<sup>153</sup> The Decree Law No. 685 was transformed into permanent law (Law No. 7075) on February 1, 2018.<sup>154</sup> The purpose of the SoE is to examine and determine applications in respect of measures undertaken directly through emergency decree laws. Its powers also cover those removed from public service with lists appended to emergency decree laws, due to their alleged “membership, affiliation, allegiance, connection, or links to either ‘terrorist’ organizations or groups, structures or entities deemed to be a threat to national security by the National Security Council.”<sup>155</sup>

The SoE was created as a result of negotiations between the Secretary General of the Council of Europe and the Turkish government. It was designed to serve as a special body, reviewing the emergency measures directly authorized by the decree laws, and providing judicial oversight, in order to reduce the ECtHR’s workload. When recommending such an *ad hoc* body, the Venice Commission stated:

The essential purpose of that body would be to give individualized treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial, and be given sufficient powers to restore the status quo ante, and/or where

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<sup>152</sup> *Official Gazette* [in Turkish], Decision No. KHK/685 (Jan. 23, 2017), <http://www.resmigazete.gov.tr/eskiler/2017/01/20170123-4.htm>.

<sup>153</sup> “Prime Minister Circular on the Working Principles and Procedures of the Commission on Examination of the State of Emergency Procedures [translation],” *Official Gazette* [in Turkish] (July 12, 2017) [hereinafter Prime Minister Circular], <http://www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm>.

<sup>154</sup> *Official Gazette* [in Turkish], Law No. 7075, OLAĞANÜSTÜ HAL İŞLEMLERİ İNCELEME KOMİSYONU KURULMASI HAKKINDA KANUN HÜKMÜNDE KARARNAMENİN DEĞİŞTİRİLEREK KABUL EDİLMESİNE DAİR KANUN (Feb. 1, 2018) [hereinafter Law No. 7075], available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.7075.pdf>.

<sup>155</sup> *Id.* at art. 1.

appropriate, to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body.....<sup>156</sup>

This report shall now examine the structure and functioning of the SoE, in order to determine whether it satisfies the basic principles proposed by the Venice Commission or otherwise constitutes an effective remedy under Turkey's national and international law obligations.

### **i. SoE Inquiry Commission is Not Independent of the Executive**

The SoE is composed of seven members, three of whom are appointed by the prime minister (now by the president, following the 2017 constitutional amendments), one by the Minister of Justice, one by the Minister of Interior, and two by the Council of Judges and Prosecutors (HSK). The regular term of office for Commission members is two years. However, according to Article 4(e) of the Emergency Decree Law No. 685, any member of the Commission against whom an administrative or judicial investigation is initiated with the suspicion of him having "membership, affiliation, connection or links" to any of the proscribed groups, could be dismissed immediately.

The Venice Commission stated that the special temporary body responsible for reviewing state of emergency measures should be independent and impartial.<sup>157</sup> However, the SoE cannot possibly be independent, given its composition and the fact that its members do not enjoy any security of tenure. Five of its seven members are appointed directly by the executive, while the remaining two are appointed by the Judicial Council (HSK), which operates strongly under government influence. More importantly, grounds for dismissal are sufficed merely by initiating an "administrative" investigation by the president's office on the basis that members of the SoE are

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<sup>156</sup> Turkey: Emergency Decree Laws of July-September 2016, nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, VENICE COMMISSION-COUNCIL OF EUROPE, Opinion No. 865/2016 (Dec. 12, 2016), para. 22 [hereinafter *Failed Coup of 15 July 2016*], available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e).

<sup>157</sup> *Id.*

suspected of “membership, affiliation, allegiance, connection or links to” proscribed groups.<sup>158</sup>

Given these realities, it is clear that the provisions on the appointment and dismissal of the members of the SoE have direct effects on the guarantee of independent and impartial decision-making processes by its members.<sup>159</sup>

## ii. A Protracted Procedure: Justice Delayed, Justice Denied

Under the ordinary administrative appeal procedures in Turkey, if an applicant submits an appeal to an administrative body and does not receive a response within 60 days of the application, the appeal is considered to have been rejected.<sup>160</sup> This rejection grants the applicant the right to appeal to the administrative courts, thus initiating a legal process that can extend up to the Constitutional Court. The SoE is, however, exempt from this 60-day deadline and is not bound by any other deadline within which to make its decisions.<sup>161</sup> Thus, the dismissed public servants who appeal to the SoE do not know how long they may have to wait to receive a response. Amnesty reported that waiting periods ranged from four to 10 months from the date of the application to the SoE. The minimum period an applicant had to wait from the time of dismissal was 7.5 months, while some applicants waited for as long as 21 months.<sup>162</sup>

Individuals whose applications are rejected by the SoE can apply to one of the four authorized first instance administrative courts in Ankara within 60 days of a rejection.<sup>163</sup> If refused, they can then appeal to the Regional Administrative Court, with a further appeal to the Council of State. Once this process is exhausted, the Constitutional Court can hear the case by way of individual application. According to Amnesty, the mandated Ankara courts are likely to be inundated with new applications if the SoE

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<sup>158</sup> Law No. 7075, *supra* note 154, at art. 4(1-e).

<sup>159</sup> *Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers*, AMNESTY INTERNATIONAL, at 5 (2018) [hereinafter *Purged Beyond Return?*], available at <https://www.amnesty.org/download/Documents/EUR4492102018ENGLISH.PDF>.

<sup>160</sup> Code of Administrative Procedure, Law No. 2577 [in Turkish] MEVZUAT BILGI SISTEMI (Jan. 6, 1982), at art. 10, available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2577.pdf>.

<sup>161</sup> Law No. 7075, *supra* note 154, at art. 7(2).

<sup>162</sup> *Purged Beyond Return?*, *supra* note 159, at 13–14.

<sup>163</sup> Law No. 7075, *supra* note 154, at art. 11.

continues to reject the vast majority of appeals. Also, with the current administrative court system, applicants are likely to wait for years before a decision is issued.<sup>164</sup>

### iii. SoE Inquiry Commission's Procedures Fail to Follow Due Process

Applicants to the SoE are not entitled to give oral testimony or call on witnesses, nor to examine allegations or evidence against them either before or even after their appeal.<sup>165</sup> The lodged appeals are decided by the SoE through an assessment of the case files, with no possibility for an actual hearing or the right to respond to allegations.<sup>166</sup>

Persons dismissed by emergency decree laws have to appeal to the SoE without first knowing the specific allegations against them, since the said decrees dismiss the applicants on the basis of general ties to proscribed groups, rather than any individual reasoning. The applicants thus have to carry out what is essentially a guessing exercise as to the grounds on which they were initially dismissed. Amnesty reported that all the applicants it interviewed, were in complete darkness as to the reasoning behind their dismissals and had to speculate when making their applications.<sup>167</sup> Any request for information about the reasons for dismissal within the context of the right to information, are rejected on the grounds that the measures taken during the state of emergency fall outside the scope of the Right to Information Law.<sup>168</sup>

The working principles and procedures of the SoE fall short of respecting the current standards of Turkish due process of the law. For instance, Article 129(2) of the Constitution stipulates that public servants and other public officials shall not be subjected to disciplinary penalties without first being granted the right to defense. Under Article 129 of the Law No. 657 on Public Servants dated July 14, 1965, any public servant who is facing an expulsion from public office, shall be entitled to examine the

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<sup>164</sup> *Purged Beyond Return?*, *supra* note 159, at 15.

<sup>165</sup> Prime Minister Circular, *supra* note 153, at arts. 6–8, 13.

<sup>166</sup> Law No. 7075, *supra* note 154, at art. 9; Prime Minister Circular, *supra* note 153, at art. 14.

<sup>167</sup> *Purged Beyond Return?*, *supra* note 159, at 16.

<sup>168</sup> *Id.*; Law No. 4982 on the Right to Information [in Turkish], MEVZUAT BILGI SISTEMI, (Oct. 9, 2013), available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4982.pdf>.

investigation files and call on witnesses.<sup>169</sup> Further, a public servant cannot face disciplinary sanctions, including dismissal from public service, without having the chance to make a defense under Article 130 of the Law No. 657.<sup>170</sup> The SoE grants none of these rights to public officials.

The working principles and procedures of the SoE bar applicants from understanding the allegations against them in order to prepare an effective appeal. Requiring applicants to file objections without sharing the grounds for their dismissals, *de facto* forces applicants to defend themselves against ambiguous and general accusations.<sup>171</sup> The fact that applicants cannot file an effective appeal not only violates their right to a fair trial, but also means that the SoE cannot have access to all relevant information necessary to reach a fair decision.<sup>172</sup>

The procedures preventing an effective appeal also violate Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of the ECHR, and fail to meet the International Labour Organization (ILO) Convention's 158 requirements on dispute resolution and procedures for appeals against termination, provided by Articles 8–10.<sup>173</sup>

#### iv. SoE Inquiry Commission's Review Powers are Confined and Flawed

In addition to the myriad of ways that the SoE fails to provide a fair and just trial at first instance, its review procedures are equally flawed. For instance, their scope is exceedingly narrow, preventing the SoE from conducting thorough or substantive reviews of the cases brought before them. In particular, Article 14(2) of the Prime Ministry Circular restricts the SOE's mandate in review cases to merely assessing the "membership, affiliation, allegiance, connection or links" of applicants to proscribed

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<sup>169</sup> Law No. 657 on State Officers [in Turkish], MEVZUAT BILGI SISTEMI (July 14, 1965), available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf>.

<sup>170</sup> *Id.*

<sup>171</sup> *Purged Beyond Return?*, *supra* note 159, at 17.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

groups.<sup>174</sup> This prevents the SoE from considering executive actions in light of domestic law or international human rights principles.

The SoE's ability to justly review cases is also impeded by a lack of established criteria by which to assess cases. There is no test as to what constitutes "membership, affiliation, allegiance, connection or links" with proscribed 'armed terrorist' groups, nor are there guidelines outlining how the SoE interprets these terms and concepts. Moreover, the SoE also provides no guidance as to the standard of evidence required to determine an association with these proscribed groups, and there is no requirement of any evidence of unlawful activity or wrongdoing when the relevant activity occurred.<sup>175</sup> Innocuous activities, which were completely legal at the time of their undertaking, have retrospectively been considered evidence of Gülenist connections. These include activities such as: using smartphone application 'ByLock'; employment, enrolment or membership at institutions, schools, or unions alleged to be affiliated with the Gülen movement; and making cash deposits to Asya Bank from December 25, 2013 onward.<sup>176</sup> The SoE regards any interaction with these institutions as a conscious action made with terrorist intent and sufficient to establish links to proscribed terrorist groups.<sup>177</sup> This low threshold for evidence therefore requires that applicants have the burden of proving their innocence.<sup>178</sup> Further, the SoE appears to be issuing reasoned judgments using near identical texts, which do not contain any specific and individualized assessment.

The SoE received a total of 125,600 applications as of December 29, 2018, with 75,300 of these cases still pending. Of the 50,300 cases that have been decided, only 3,700 ruled in favor of the applicant.<sup>179</sup> Therefore, over one-and-a-half years after its inception

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<sup>174</sup> Prime Minister Circular, *supra* note 153, at art. 14.

<sup>175</sup> *Purged Beyond Return?*, *supra* note 159, at 18; Prime Minister Circular, *supra* note 153, at art. 14.

<sup>176</sup> See Nuri Sungur, *The OHAL Commission as a Delaying Tactic*, JUSTICE SQUARE (last accessed Mar. 25, 2019),

<https://www.justicesquare.com/nuri-sungur/the-ohal-commission-as-a-delaying-tactic/>.

<sup>177</sup> See *Purged Beyond Return?*, *supra* note 159.

<sup>178</sup> *Id.* at 5.

<sup>179</sup> Olağanüstü Hal İşlemleri İnceleme Komisyonu: Kararlari Hakkında Duyuru [in Turkish], OHAL İŞLEMLERİ İNCELEME KOMİSYONU (Mar. 15, 2019),

<https://ohalkomisyonu.tccb.gov.tr/duyurular>.

on July 12, 2017, the SoE has issued decisions on only 40% of cases, with only 7% ruling in favor of the applicant. While the SoE was ostensibly established as a remedy for individuals dismissed from public office, it fails to provide an effective remedy to applicants. Rather, by further delaying access to justice, the SoE contributes toward violating victims' rights to effective remedies.

#### v. SoE Inquiry Commission Fails to Ensure Effective Restitution and Compensation

The SoE is far from meeting the criteria established by the Venice Commission: namely, to be independent, impartial and given sufficient powers to restore the *status quo ante* (*restitutio ad integrum*), and, where appropriate, provide adequate compensation.<sup>180</sup> The SoE has no authority that would enable it to restore individuals' state of affairs prior to their dismissal. If a decision of the SoE is challenged, administrative courts are unable to reverse the decision on grounds that it is unlawful. The SoE will have issued its decision based on the file before it, but because the limits of its mandate are clearly established, administrative courts are unable to question the trial's fairness on the grounds that it did not hear witnesses, or even the applicant. Hence, decisions by the SoE will be lawful *stricto sensu*, and the administrative judiciary will be unable to annul the decision.<sup>181</sup>

Further, the Prime Ministry Circular ensured that the SoE would not serve as an effective remedy, capable of restoring the *status quo ante* for applicants.<sup>182</sup> The SoE's powers are expressly confined to examining whether or not the applicant has "membership of, affiliation, link or connection with terrorist organizations or structures." The SoE is not authorized to examine the applications on the criteria set forth by the Venice Commission and the European Commissioner for Human Rights, nor to discuss the compatibility of the victim's relationship with the obligations of loyalty as a public servant. Likewise, the SoE does not have the authority to decide on a sanction less severe than that of permanent dismissal from public service. The SoE is unable to decide

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<sup>180</sup> See Altıparmak, *State of Emergency Inquiry Commission*, *supra* note 126.

<sup>181</sup> *Id.*

<sup>182</sup> See generally Prime Minister Circular, *supra* note 153.

on the reinstatement of public servants believed to have relations with the proscribed groups, even if those relations did not involve any violent behavior or inconsistency with wielding the sovereign power of the state.<sup>183</sup>

Article 10(1) of Emergency Decree Law No. 685 also describes the circumstances under which individuals may be reinstated to the public sector. This provision was amended through the introduction of a new law, No. 7145, adopted by Parliament on July 25, 2018.<sup>184</sup> Under the amended law, if the SoE decides to reinstate an applicant, it must refer them to the last government department the applicant worked for. There are several restrictions on the restitution process set out in Article 10(1). Prior to the amendment of Law No. 7145, these restrictions expressly prevented the applicants from being reinstated to the same institution they had worked for prior to their wrongful dismissal.<sup>185</sup> Reinstatement to one's last-held position is now regarded as a priority under the amended provisions. However, the amended provisions do not provide for public sector employees reinstated prior to these amendments.

The amended provisions continue to provide restrictions similar to those of the original legislation for academics, and those who have previously held managerial positions.<sup>186</sup> Those occupying managerial positions may only be restored to non-management roles, effectively suffering a demotion. Meanwhile, academic personnel cannot be reinstated to the institution where they last worked, and must instead work in higher education institutions outside Ankara, Istanbul, and Izmir that were established after 2006, also limiting their chances of being reinstated to the institution where they had previously worked. Law No. 7145, dated July 25, 2018, also introduces a new procedure for members of the armed/security forces of certain ranks, and diplomatic personnel whose reinstatement has been ordered either by the courts or by the SoE, which essentially limits their employment to some *ad hoc* positions in "research centers."<sup>187</sup>

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<sup>183</sup> Council of Europe's Perspectives on the Rule of Law and Human Rights in Turkey, *supra* note 66, at paras. 126–27.

<sup>184</sup> Art. 22 of Law No. 7145, *supra* note 68 amends Law No. 7075, art. 10(1).

<sup>185</sup> *Purged Beyond Return?*, *supra* note 159, at 22.

<sup>186</sup> *Id.*

<sup>187</sup> Art. 23 of Law No. 7145, *supra* note 68 introduces Law No. 7075, art. 10/A.

Consequently, reinstated public sector employees face being left in a position that is materially worse than the one they enjoyed prior to their wrongful dismissal, thus falling short of restitution of the *status quo ante* (*restitutio ad integrum*).<sup>188</sup> This runs contrary to international human rights standards on reparation, an inherent and necessary part of the right to an effective remedy.<sup>189</sup> Emergency Decree Law No. 685 does not expressly set up an appeals process for individuals dissatisfied with such an incomplete restitution. Instead, unsatisfied public servants must apply to the administrative courts and seek further remedies along the way, up to the Constitutional Court.

The amendments of July 25, 2018 to Emergency Decree Law No. 685, reversed original reinstatement restrictions<sup>190</sup> and introduced the possibility of obtaining compensation for individuals who had been restored to employment in public service by the SoE. The compensation for individuals reinstated by the SoE should be equal to the total of their financial and social benefits for the period during which they were unjustly dismissed.<sup>191</sup> This compensation, nevertheless, does not cover additional financial losses or other harms, including psychological harm, that may have been caused due to the arbitrary dismissal.<sup>192</sup> The new law also expressly bars individuals from pursuing compensation proceedings before the administrative courts.<sup>193</sup> Individuals are thus given no viable or effective remedy, should they find their compensation to be inadequate or unjust.

It is therefore evident that the SoE does not represent an effective remedy to which persecuted Turkish applicants may appeal, as it is overwhelmingly evident that it remains within the control of the executive.

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<sup>188</sup> *Purged Beyond Return?*, *supra* note 159, at 22.

<sup>189</sup> These standards require states to restore the victim of a violation to the victim's situation prior to the violation, through restoration of liberty, enjoyment of human rights, restoration of employment, or return of property, for instance. See Principle 19, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA res. 60/147 (Dec. 16, 2005).

<sup>190</sup> Law No. 7145, *supra* note 68, at arts. 22–24.

<sup>191</sup> Law No. 7075, *supra* note 154, at arts. 10-10A.

<sup>192</sup> *Purged Beyond Return?*, *supra* note 159, at 23.

<sup>193</sup> Law No. 7145, *supra* note 68, at art. 22.

## D. ECtHR's Failure in Post-Coup Attempt Cases

Since the declaration of a state of emergency, and as of March 2019, around 150,000 public servants have been dismissed by emergency decree laws, indefinitely being barred from the public sector.<sup>194</sup> This was achieved based on Articles 3 and 4 of the first Emergency Decree Law No. 667, which provided for dismissal either through an administrative decision, or by directly adding their names to the lists appended to such decrees. Additionally, over 3,000 private institutions including foundations, universities, trade unions, media outlets, health institutions, associations, and schools were directly shut down by the emergency decree laws.<sup>195</sup> Nearly 4,500 judges and prosecutors, including members of higher courts, were discharged by the Judicial Council, with no possibility of working in the public or private sectors.<sup>196</sup> Even after the state of emergency was lifted, the powers of Decree Law No. 667 were extended for a further three years, during which time public officers have continued to be expelled, with the overall figure now approaching 135,000.<sup>197</sup>

While the rule of law and judicial independence in Turkey have been at stake since the corruption probes of December 2013, it is only more recently that the ECtHR has experienced an influx of applications from thousands of state of emergency victims. These applications have been submitted to the ECtHR as a last resort, in addition to applicants bringing lawsuits at a domestic level, and have presented an unparalleled challenge for the Court. The ECtHR has made controversial decisions relating to arbitrary detention, the dismissal of judges and prosecutors by Judicial Council decisions, and the direct dismissal of civil servants under emergency decree laws. Some of these decisions will be examined more thoroughly henceforth.

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<sup>194</sup> *Turkey's Post-Coup Crackdown Since July 15, 2016*, *supra* note 51.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> FAILURE OF STRASBOURG AGAINST TURKISH ENCOUNTER: AN INVESTIGATION ON THE CONTROVERSIAL RULINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE STATE OF EMERGENCY MEASURES IN TURKEY, PLATFORM FOR PEACE AND JUSTICE, para. 2 (Dec. 2018) [hereinafter FAILURE OF STRASBOURG], available at <http://www.platformpj.org/wp-content/uploads/Failure-of-Strasbourg.pdf>.

## a. Mercan Decision on Detention of Judges

The first post-coup decision of the ECtHR involved the detention of dismissed Judge Zeynep Mercan, who lodged an application without first appealing to the Constitutional Court, on the basis that the Constitutional Court had clearly lost its impartiality and independence. The ECtHR found the application inadmissible and rejected it on November 8, 2016, on the ground that the remedy of domestic individual application had not first been exhausted.<sup>198</sup>

However, according to the ECtHR's own caselaw, the security of tenure of judges directly relates to the independence of a court.<sup>199</sup> Immediately after the coup attempt, two members of the Constitutional Court were taken into custody and detained. They were subsequently removed from office on August 4, 2016 by the Plenary of the Constitutional Court, without public hearing and without respecting the essential procedural guarantees of a fair trial.<sup>200</sup> The Venice Commission observed that "the judgment does not refer to any evidence against the two judges concerned."<sup>201</sup> In addition, the Office of the United Nations High Commissioner for Human Rights noted on this matter, that "judges can be suspended or removed only on serious grounds of misconduct or incompetence after fair proceedings."<sup>202</sup>

Hence, the allegation concerning the independence and impartiality of the Constitutional Court was not just a "simple concern," as described by the ECtHR in the

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<sup>198</sup> Zeynep Mercan v. Turkey, Application No. 56511/16 [in French], ECtHR (Nov. 8, 2016), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-169094%22%5D%7D>.

<sup>199</sup> "[T]he irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 [of the ECHR]. However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence, provided that, it is in fact recognized, and that the other necessary guarantees are present." Campbell and Fell v. The United Kingdom, ECtHR (1984), para. 80, available at <http://echr.ketse.com/doc/7819.77-7878.77-en-19840628/view/>; See FAILURE OF STRASBOURG, *supra* note 197, at para. 10.

<sup>200</sup> FAILURE OF STRASBOURG, *supra* note 197, at para. 11.

<sup>201</sup> *Failed Coup of 15 July 2016*, *supra* note 156, at paras. 135–136.

<sup>202</sup> "UN Experts Urge Turkey to Respect the Independence of the Judiciary and Uphold the Rule of Law," OHCHR (July 19, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285>.

Mercan case.<sup>203</sup> Rather, it had a significant “chilling effect,” as recognized by other bodies of the Council of Europe.<sup>204</sup>

## b. Zihni Decision on Direct Dismissals Through an Emergency Decree Law

The largest category of victims of the state of emergency measures were public servants who were dismissed directly through emergency decree laws. The first ruling of the ECtHR regarding such dismissal measures, was the Zihni decision,<sup>205</sup> which was delivered on November 29, 2016. The Court rejected the application of a teacher, Akif Zihni, who was dismissed under emergency decree law No. 672, on the ground of non-exhaustion of domestic remedies, namely that administrative action and individual application to the Constitutional Court were still available and accessible.

However, the Code on the Establishment and Rules of Procedure of the Constitutional Court clearly stipulates that individual applications cannot be made directly against legislative or regulatory administrative acts.<sup>206</sup> Therefore, it was not possible for Zihni to lodge an individual application with the Constitutional Court regarding the human rights violations caused directly through emergency decree laws.<sup>207</sup> Deliberately referring solely to the last condition of Article 45, § 3 of Law No. 6216, the ECtHR ignored the entirety of the competency provision<sup>208</sup> and rejected the application without waiting for the initial decision of the Constitutional Court to assess whether an effective remedy was available.<sup>209</sup>

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<sup>203</sup> Zeynep Mercan v. Turkey, *supra* note 198, at para. 26.

<sup>204</sup> FAILURE OF STRASBOURG, *supra* note 197, at para. 11.

<sup>205</sup> Akif Zihni v. Turkey, Application No. 59061/16 [in French], ECtHR (Nov. 29, 2016), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-169704%22%5D%7D>.

<sup>206</sup> According to Article 45 § 3 of the Law No. 6216, “individual applications cannot be made directly against legislative acts and regulatory administrative acts and similarly, the rulings of the Constitutional Court and acts that have been excluded from judicial review by the Constitution cannot be the subject of individual application.” Code on Establishment and Rules of Procedures of the Constitutional Court, THE CONSTITUTIONAL CT. OF THE REP. TURKEY (Mar. 30, 2011), <http://www.constitutionalcourt.gov.tr/inlinepages/legislation/LawOnConstitutionalCourt.html>.

<sup>207</sup> Council of Europe’s Perspectives on the Rule of Law and Human Rights in Turkey, *supra* note 66, at para. 117.

<sup>208</sup> FAILURE OF STRASBOURG, *supra* note 197, at para. 12 et seq.

<sup>209</sup> *Id.*

Further, as of September 2016, administrative courts and the Council of State have been refusing the dismissal cases on procedural grounds. Given the state of emergency and political pressure placed on the judiciary, it appears reasonable to assume that no judicial body would be willing to deal with such sensitive cases, especially where there is ambiguity as to the jurisdiction of the courts.

Additionally, the Turkish government had already admitted in a memorandum submitted to the Venice Commission, that those dismissed by emergency decree laws would not be given the right to appeal before local courts or to the Constitutional Court.<sup>210</sup> The Commissioner for Human Rights of the Council of Europe also reported in his memorandum, published before the date of the Zihni case, that the Turkish Minister of Justice had made a similar remark.<sup>211</sup>

### c. Köksal Ruling and the Establishment of a New Remedy

The unwillingness of the administrative courts and Constitutional Court to address dismissal claims and the lacunae in the Turkish legal system regarding the emergency measures, were evident and clearly known to the ECtHR. As mentioned earlier in section C.b., the Secretary General of the Council of Europe and the Turkish government negotiated the creation of the SoE, a special body tasked with reviewing the emergency measures directly authorized by the decree laws, making them subject to judicial control in order to alleviate the heavy workload of the ECtHR.<sup>212</sup>

In the Köksal decision, the ECtHR accepted this mechanism as a remedy which ought to be exhausted before lodging an application to the court.<sup>213</sup> Indeed, by accepting this mechanism, which was non-operational at the time of the decision, as an effective remedy, the ECtHR has diverged from its well-established caselaw that a domestic

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<sup>210</sup> The government memorandum stated “[...] As the expulsion transactions performed as attached to the Decree Laws have the characteristic of legislative activity in technical terms, both the lawsuit and the individual application remedy are not available against these transactions.” Turkish Government’s Memorandum, CDL-REF 067 (2016), at 35; see *Failed Coup of 15 July 2016*, *supra* note 156, at para. 201.

<sup>211</sup> “Memorandum on the Human Rights Implications of the Measures Taken Under the State of Emergency in Turkey,” COMMISSIONER FOR HUMAN RIGHTS (Oct. 7, 2016), available at <https://rm.coe.int/16806db6f1>.

<sup>212</sup> See Decision No. KHK/685, *supra* note 152.

<sup>213</sup> *Gökhan Köksal v. Turkey*, Application No. 70478/16, ECtHR (June 2017), para. 29, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-11687%22%5D%7D>.

remedy must be proven to be effective not only in theory, but in practice.<sup>214</sup> The ECtHR opted to approve the mechanism by theoretically examining the provisions of emergency decree law No. 685, without examining whether the SoE would function properly and be effective in practice.

The ECtHR suggested in the Köksal decision that there was nothing to indicate that the SoE would prove to be an ineffective remedy.<sup>215</sup> However, the SoE had not yet started to operate at that point in time. Through this ruling, the ECtHR essentially handed the Turkish government a blank check to continue pursuing its harsh crackdown and illegal purge scheme, acting against its established practice in assessing systemic and structural problems.<sup>216</sup> However, the ECtHR did acknowledge that the effectiveness of this remedy had not been endorsed conclusively, and that the burden of proof regarding the viability of the SoE would fall to the Turkish government in such cases.<sup>217</sup>

Furthermore, the Prime Ministry Circular on the Working Principles and Procedures of the Commission, published on July 12, 2017 following the Köksal decision, is of the utmost concern. According to Article 14 of the Circular, the SoE examines the application “in terms of membership, affiliation and/or connection with terrorist groups or groups and entities that are deemed to be engaged in activities against the national security.”<sup>218</sup> Therefore, the SoE may not take into consideration any other criteria in redressing human rights violations.<sup>219</sup>

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<sup>214</sup> FAILURE OF STRASBOURG, *supra* note 197, at para. 26.

<sup>215</sup> Gökhan Köksal v. Turkey, *supra* note 213.

<sup>216</sup> FAILURE OF STRASBOURG, *supra* note 197, at para. 37.

<sup>217</sup> Council of Europe’s Perspectives on the Rule of Law and Human Rights in Turkey, *supra* note 66, at para. 120.

<sup>218</sup> “The State of Emergency Commission shall review appeals in terms of membership, belonging, affiliation and/or connection with terrorist groups or groups and entities that are deemed to be engaged in activities against the national security by the National Security Council.” Prime Minister Circular, *supra* note 153, at art. 14.

<sup>219</sup> Council of Europe’s Perspectives on the Rule of Law and Human Rights in Turkey, *supra* note 66, at para. 127; FAILURE OF STRASBOURG, *supra* note 197, at para. 29.

## d. ECtHR's Pilot Judgment Mechanism Against Systemic Human Rights Violations

When the ECtHR receives repetitive applications concerning human rights violations deriving from a general dysfunction and structural problems in a contracting state, the Court resorts to a "pilot judgment" procedure, obliging the State to address these problems.<sup>220</sup>

In line with this well-established mechanism, the ECtHR generally adopts a judgment which determines the grounds of violations and usually requests that certain measures be taken to eliminate the systemic problem. After a follow-up procedure to ascertain the effectiveness of the new remedy, the ECtHR may certify this recently developed avenue as an effective remedy to be exhausted in subsequent cases.<sup>221</sup> In other words, an initial proceeding or judgment ruled by the ECtHR which reveals the violation of rights and sets forth the principles and modalities of the new mechanism, is a *sine qua non* of the pilot judgment procedure.

The pilot judgment procedure has already been employed for structural human rights violations in Turkey, namely for cases involving unreasonably long proceedings<sup>222</sup> and forced displacements.<sup>223</sup> In these two examples, the ECtHR relied on initial judgments to demonstrate the human rights violations.<sup>224</sup> After a follow-up period, having been assured of the effectiveness of the recently-created remedies (e.g., Compensation Commissions), the ECtHR endorsed their effectiveness both in theory and in practice, to serve as a basis for the violation in question in later decisions.<sup>225</sup> However, the ECtHR did not pursue this well-established practice in the Köksal decision, for instance. Rather,

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<sup>220</sup> "Factsheet: Pilot Judgments," ECtHR PRESS UNIT, (Jan. 2019), available at [https://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf).

<sup>221</sup> *Id.*; FAILURE OF STRASBOURG, *supra* note 197, at para. 40.

<sup>222</sup> Ummuhan Kaplan v. Turkey, No. 24240/07 (Mar. 20, 2012) and Müdür Turgut and Others v. Turkey, No. 4860/09 (MaR. 26, 2013), FAILURE OF STRASBOURG, *supra* note 197, at para. 42 et seq.

<sup>223</sup> Doğan and Others v. Turkey, Nos. 8803-8811/02, 8813/02 and 8815-8819/02 (June 29, 2004) and İçyer v. Turkey, No. 18888/02 (Jan. 12, 2016), FAILURE OF STRASBOURG, *supra* note 197, at para. 42 et seq.

<sup>224</sup> *Id.*

<sup>225</sup> Müdür Turgut and Others v. Turkey and İçyer v. Turkey, FAILURE OF STRASBOURG, *supra* note 197, at para. 42 et seq.

without examining the merits of the case, the court abstained from analyzing whether the purge scheme conducted in Turkey conformed to European human rights standards.

Taking into account the slow-moving nature of the SoE and the three-instance administrative tribunal system, as well as the time required to process an individual application with the Constitutional Court, purged public servants would have to wait almost 10 years in domestic courts and 15 years before the ECtHR in order to seek redress.<sup>226</sup> Had the ECtHR resorted to the pilot judgment procedure, in conformity with its own precedents, and determined which rights had been violated, it could have forced the Turkish government to align with its own constitutional principles and international obligations.

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<sup>226</sup> *Id.* at para. 48.

## E. Conclusion

The independence and impartiality of the judiciary in Turkey, as well as its adherence to the rule of law and human rights, have been in decline for many years, and especially since the July 2016 coup attempt. Various institutions and advisory bodies comprising the Council of Europe—namely the Venice Commission, the Human Rights Commissioner, and PACE—have clearly underlined that Turkey’s human rights record has been significantly jeopardized by its abuse of its emergency powers, particularly given the collective dismissals, lack of individualized assessments, and retroactive criminalization that has occurred under them.<sup>227</sup> In particular, the government’s establishment of CPJs and specially authorized High Criminal Courts as special judiciary bodies, has helped enable these rights violations. Turkey’s state of emergency was lifted on July 18, 2018, but most of the legislative measures adopted during this period, have been transformed into permanent legislation.

Dissatisfied with Turkey’s observance of the rule of law and the functioning of its legal system, many Turkish individuals whose rights have been violated, have filed applications to the ECtHR in search of an effective remedy. Despite clear evidence, as outlined in this report, that the Turkish legal system currently offers no viable remedy to applicants, most applications to the ECtHR have been rejected on the grounds that domestic remedies have yet to be exhausted. The ECtHR has appeared reluctant to deal with the flood of cases pouring in from Turkey in the aftermath of the July 2016 coup attempt. It must be noted with regret that the ECtHR’s stance provides an

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<sup>227</sup> This criticism of the Council of Europe institutions may be summarized as follows: The state of emergency powers center on the criminalization of thousands of people over terrorism charges as against the core criminal justice principles of legality and non-retroactivity of crimes, overstretching and misuse of the state of emergency powers going well beyond the exigencies of the emergency, giving effect to permanent structural legislative changes without parliamentary and constitutional control, collective dismissals and punishment of the persons and their families affiliated with the Gülen group without any individualized assessment, non-independence of the judiciary, deterioration of defense rights, deprivation of effective judicial remedy. *Council of Europe’s Perspectives on the Rule of Law and Human Rights in Turkey*, *supra* note 66, at paras. 142–158.

uncomfortable and startling contrast to the approaches of the other Council of Europe institutions and advisory bodies.

The high number of dismissals, prosecutions, and detentions of judges and prosecutors in Turkey is, in many respects, unprecedented. The functioning of the courts under the politically-influenced Judicial Council, constitutes a significant bar to the guarantee of a fair trial and access to justice. Further, there have been scores of examples in which the executive has interfered with judicial functioning, exerted pressure on the judiciary, and impeded due process. There appears to be no plausible, immediate means by which Turkey's judicial and legal systems can rescue themselves from the impasse into which they have fallen.

Many have hoped that the ECtHR would move to monitor human rights violations in Turkey, but this has not yet occurred, despite more than two years passing since the coup attempt. Instead, the ECtHR continues to insist that the Turkish legal system provides an effective remedy. This report has demonstrated that the Turkish judicial and legal systems are far from serving as effective domestic remedies, mainly due to the lack of independence of the Constitutional Court and the SoE.

The Constitutional Court, which has declared itself unable to review emergency laws, has not yet delivered any judgment in favor of petitioning applicants (with the exception of the Altan and Alpay cases); it has dismissed two of its members for their alleged Gülenist links without any credible evidence; and it has exposed its members to threats of dismissal and criminal prosecution. As such, its institutional independence has been thrown into serious doubt. For these reasons, the Constitutional Court ought not to be considered as an effective remedy in accordance with the jurisprudence of the ECtHR.

Similarly, the SoE does not satisfy the basic principles that an *ad hoc* body must possess in order for it to constitute an effective remedy, as proposed by the Venice Commission.<sup>228</sup> This report has shown that the SoE is not independent of the executive.

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<sup>228</sup> The Venice Commission stated: "The essential purpose of that body would be to give individualised treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante, and/or where appropriate, to provide adequate

Rather, it involves unnecessarily protracted procedures; fails to follow due process; and fails to ensure effective restitution and compensation, falling short of restitution of the *status quo ante* (*restitutio ad integrum*).

The ECtHR has received thousands of applications from dismissed public servants and on behalf of detainees, and dealing with such a flood of cases has proved an unprecedented challenge for the court. Nevertheless, its response to arbitrary detention, unfair dismissal of judges, prosecutors, and civil servants has not been satisfactory. In the Köksal decision, for instance, the Court accepted as an effective remedy, a mechanism that was non-operational as of the date of judgment; this decision marked a clear divergence from the established caselaw that a domestic remedy should be effective both in theory and in practice. When the ECtHR receives repetitive applications for human rights violations deriving from general dysfunction and structural problems in a Contracting State, the Court typically resorts to the so-called “pilot judgment” procedure, wherein the Court examines a specific case and uses the decision to identify the root causes of the violations, and to obligate the State to address them. However, the ECtHR did not follow this well-established practice in the Köksal decision. By neglecting to examine the merits of the case, the Court denied an important opportunity to analyze whether Turkey’s purges conform with European human rights standards. The ECtHR must therefore urgently reconsider its assessment of the effectiveness of the Turkish domestic remedies for current pending cases.

Had the ECtHR resorted to the pilot judgment procedure in conformity with its above-mentioned precedents and determined which rights had been violated, it would have conveyed to the Turkish government the need to align with its own constitutional principles and obligations under international law. The ECtHR ought to revert back to the pilot judgment procedure for post-coup attempt cases deriving from Turkey. Without adopting such an approach and setting out the criteria for similar cases, the influx of cases will not be handled in a timely and effective manner by the Court.

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compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body... .” *Failed Coup of 15 July 2016, supra* note 156, at para. 222.

While there are some encouraging signs—the ECtHR’s decisions in *Alpay v. Turkey*, *Altan v. Turkey*, and the *Case of Selahattin Demirtaş v. Turkey* represent significant developments—the ECtHR nevertheless appears to be rather slow and selective in its response to other individual applications from Turkey. The ECtHR has not yet reviewed any applications from other professions, such as the judiciary, civil servants, and businessmen.<sup>229</sup> Further, the ECtHR has yet to address any of the applications related to alleged membership in the Gülen movement.<sup>230</sup> As such, it is clear that the ECtHR must use all possible avenues to accelerate the processing of pending applications on a more representative basis, to ensure that persecuted Turkish individuals are provided a means of access to justice.

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<sup>229</sup> For instance, the application of Prof. Alparslan Altan, a former member of the Constitutional Court who was dismissed from the judicial profession and incarcerated, is still pending before the ECtHR. See *Alparslan Altan v. Turkey*, Application No. 12778/17 [in French], ECtHR (Jan. 16 2017), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22alparslan%20altan%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22COMMUNICATEDCASES%22%2C%22itemid%22:%5B%22001-178138%22%5D%7D>.

<sup>230</sup> For instance, the application of Mr. Hidayet Karaca, the head of Samanyolu Broadcasting Group, is still pending, despite his application having been on the Court’s agenda for several years. See *Hidayet Karaca v. Turkey*, Application No. 25285/15 [in French], ECtHR (May 7, 2015), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-162979%22%5D%7D>.





