

**POSITION PAPER:
EUROPEAN COURT OF HUMAN RIGHTS SHOULD RECONSIDER
JUDICIAL INDEPENDENCE IN TURKEY BEFORE REFERRING
CASES TO DOMESTIC AUTHORITIES**



Background

In recent years and in particular in the aftermath of attempted coup of July 15, 2016, the Turkish government has been targeting dissidents belonging to different ideologies. Among the many dissident groups, in particular the Gulen Movement has been the primary target. The members or sympathizers of the movement have been subject to extreme and unlawful measures, including dismissals, detention, arrest, imprisonment, enforced and involuntary disappearance, seizure of their assets and passport cancellation. International organizations, including the United Nations, the Council of Europe and the European Union have repeatedly expressed their grave concern regarding the human rights violations perpetrated on individuals by the government. Repeated calls to Turkey to comply with its obligations under its own legislation and the international human rights law have however had little, if any effect to the improvement of the human rights situation in the country.

The far-reaching, increasingly repressive and almost unlimited discretionary powers exercised by the Turkish authorities during the state of emergency – now in its 15th month - endanger the general principles of rule of law and human rights safeguards, the ones the state of emergency is designed to protect.

The human rights protection system of the Council of Europe thus represented, a glimmer of hope for the people of Turkey as it has been traditionally one of the most successful systems in the world protecting human rights and fundamental freedoms, which decisions are also binding for Turkey.

Regrettably, the European Court of Human Rights (hereinafter “ECtHR”), which monitors the implementation of the European Convention on Human Rights in the Council of Europe member states has been rejecting the applications related to recent events taking place in Turkey on the ground that the applicants have not exhausted domestic remedies. The Court specifically refers to the need to exhaust “available” domestic remedies, i.e. including the complaint procedure presumably offered through the establishment of the State of Emergency Inquiry Commission (hereinafter “the Commission”), as provided for in Emergency Decree 685.

Brief analysis

The brief analysis in this section argues that the establishment of the Commission cannot be an effective remedy for more than 100,000 dismissed individuals.

In absence of any clear procedure to challenge decisions on their abrupt dismissal, public officials dismissed from office and organizations dissolved by emergency decrees launched either individual or concurrent appeals with administrative bodies (administrative remedy), administrative courts, the Constitutional Court and the European Court of Human Rights . The outcome of the appeals has been devastating for hundreds of thousands of families and entire communities across Turkey.

1. Few administrative appeals have been relatively successful in restoring several individuals in their former positions. Administrative appeals however are not guided by any rules or principles and in no respect can these appeals be regarded as an effective remedy.
2. In the aftermath of July 15, 2016, both the Constitutional Court and the ECtHR were flooded with individual applications originating from Turkey. 8,308 applications were lodged with the ECtHR

against Turkey in 2016, compared to only 2,212 in the previous year [2015].¹ If necessary measures were not taken, having into account that most dismissals have not yet been brought before the ECtHR in the post July 15 context, it was obvious that the sheer volume of applications yet to reach the ECtHR, seriously risked bringing down the entire ECtHR system.

3. The Venice Commission noted in the above context that both administrative courts and individual application to the Constitutional Court were not available to public officials who were dismissed by Emergency Decrees.² Having made this determination, the Venice Commission recommended that the government establish an *ad hoc* commission to review the State of Emergency measures.³ The Secretary General of the Council of Europe made a similar recommendation, which was supported by an *ad hoc* sub-committee established by the Parliamentary Assembly of the Council of Europe.⁴

4. With the intention to preempt sharp criticism from the Council of Europe resulting from its relentless crackdown on dissent, the government issued Emergency Decree 685,⁵ which establishes the Commission.⁶

5. To illustrate the immediate effect of its issuance, on the same day the Emergency Decree was published (January 23, 2017), the Parliamentary Assembly of the Council of Europe rejected⁷ the request to hold an urgent debate on Turkey.⁸

6. By mid-November 2017 the Commission has received more than 100,000 cases from different occupational groups such as military personnel, police officers, teachers and academics. Since its establishment the Commission has taken no single decision on any of the hundreds of thousands of applications it has received ever since. As a matter of fact, the government is yet to appoint a president to head the Commission.⁹

Even if the Commission begins its work immediately, there will still be doubts regarding its impartiality, just as the judicial system in general. These concerns have been, *inter alia*, raised by various governmental, intergovernmental and non-governmental organizations as well as legal and human rights experts. Former judge of the ECtHR Riza Turmen, for instance, has argued that possible

¹ European Court of Human Rights (2017), Annual Report, (Strasbourg: CoE), s. 201.

² Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para 201.

³ Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para, para. 220 ff.

⁴ Committee on Political Affairs and Democracy *Ad hoc* Sub-Committee on recent developments in Turkey, Report on the fact-finding visit to Ankara (21-23 November 2016), AS/Pol (2016) 18 rev, para. 62,63.

⁵ The Emergency Decree (KHK) 685 can be found here.

⁶ Article 2(1). The Commission is tasked to carry out an assessment of and render a decision on the following acts established directly through the decree-laws under the state of emergency; a) Dismissal or discharge from the public service, profession or organization being held office; b) Dismissal from studentship; c) Closure of associations, foundations, trade unions, federations, confederations, private medical institutions, private schools, foundation higher education institutions, private radio and television institutions, newspapers and periodicals, news agencies, publishing houses and distribution channels; ç) Annulment of ranks of retired personnel.

⁷ There were 94 votes cast in favor of holding the debate, 68 against and 19 abstaining. The proposal was nevertheless rejected on grounds that the 2/3 majority had not been reached.

⁸ Please see: <https://www.dailysabah.com/eu-affairs/2017/01/23/council-of-europe-rejects-urgent-hearing-demand-on-turkey>.

⁹ Tartanoğlu, Sinan. "OHAL Komisyonu'nda karar da yok başkan da." *Cumhuriyet*, 13 Nov. 2017, available at www.cumhuriyet.com.tr/haber/turkiye/864942/OHAL_Komisyonu_nda_karar_da_yok_baskan_da.html.

non-transparency of the Commission's work and appointment of its members create reasonable questions regarding its independence.¹⁰

The Commission is predetermined to fail in achieving its alleged objectives and serve the interests of justice:

First, the seven members of the Commission are chosen from the same institutions that have decided for the dismissals.¹¹ The principles of independence and impartiality are thus disregarded from its inception.

Second, even based on the most optimistic estimates and presuming that it performs its work in good faith - given the workload, it will take many years for the seven-member Commission to review hundreds of thousands of applications – that is only one of the subsequent domestic remedies to be exhausted.

Third, for cases reversed by the administrative courts, the appeals or the Constitutional Court, the cycle of exhaustion of domestic remedies will take many more years and those cases will probably never be able to reach the ECtHR, or even their day in court.

Fourth, pursuant to Article 9 of KHK 685, “the Commission shall perform its examinations on the basis of the documents in the files,” which are out of reach of those dismissed. In absence of any knowledge on the entities or groups which were presumably designated by the National Security Council as being “terrorist organizations”, this fact alone wipes-out the opportunity of those dismissed to have any defense, let alone effective defense.

Fifth, the Commission is presumed to work and take its decisions on the basis of information and documents provided by the government, which can decide on a case-by-case basis which documents to disclose. Even if the government would be willing to disclose all relevant documents to the Commission - the latter has no authority in reviewing classified documents. Since the dismissals have been argued on basis of terrorist affiliation which undermines, *inter alia*, national security - most of the documents that the government claims to have played a role in the dismissals, as state secrets, will be out of the reach of the Committee.

The Venice Commission, supporting the idea of an *ad hoc* body for the review of the emergency measures envisaged that “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 appropriate, to provide adequate compensation. The law should enable for subsequent *judicial review* of decisions of this *ad hoc* body. Limits and forms of any compensation may be set by Parliament in a special post-emergency legislation, with due regard to the Constitution of Turkey and its international human-rights obligations.”¹²

In conclusion, the State of Emergency Inquiry Commission will certainly not be able to meet the criteria foreseen by the Venice Commission and the standards adopted in the case-law of the ECtHR. The establishment of the Commission will only serve the immediate interests of the ECtHR and the

¹⁰ “Türmen: OHAL Komisyonu'nun bağımsızlığına ilişkin soru işaretleri var.” *Deutsche Welle*, 22 July 2017, available at p.dw.com/p/2h047.

¹¹ The Prime Ministers Office (3), the Justice Ministry (1), The Interior Ministry (1) and the High Council of Judges and Prosecutors (2).

¹² Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para 202.

government of Turkey, not the interests of justice and those hundreds of thousands of individuals. In addition:

- i. The establishment of the Commission is expected to create much more serious consequences. Hundreds of thousands of individuals who have suffered injustice will turn to the ECtHR in several years later as the Commission will not provide any justice. By that time the government would have “acquired” between approximately two to ten years, maybe more. During the same time, hundreds of thousands of people will have suffered tremendously without any available remedy.
- ii. During this long period, the applicants not only will be condemned to a “slow death” - they will also continue to bear the label of ‘terrorist’. They shall not be eligible to work in public service and their social security records will show that they were dismissed by an emergency decree.
- iii. Based on the complicated procedures related to the Commission, it is expected that individuals who are denied the opportunity to challenge the criminal charges against them for an entire year, will wait before an administrative commission for years and then apply for an administrative judicial review, which, as explained above, has no power to remedy the situation. In short, this is undoubtedly a reversal of the presumption of innocence.

Rule of law in the country

Rule of law within the country has started to be weakened by the government’s policies. According to the World Justice Project’s Rule of Law Index,¹³ Turkey was ranked among the worst 15 out of 113 countries, dropping 8 positions compared to the last year and trailing countries such as Iran, Russia, Guatemala and Myanmar.¹⁴ The Index is calculated taking into consideration different crucial components such as “Constraints on Government Power, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice,” and Turkey’s scores are not promising in any of these. Moreover, consecutive reports prepared by the Venice Commission have been pointing out the problems regarding the rule of law. The Venice Commission has published detailed reports and opinions on the situation in Turkey most of which have common points. Especially after the attempted coup in 2016, measures taken in the country failed to meet the requirements of the rule of law such as necessity and proportionality. Additionally, the basic principle of separation of powers is under threat for a long time, risking the independence of judiciary.¹⁵

The three crucial components of what constitutes a fair trial, namely the defense, the prosecution and the courts, have all collapsed in Turkey in recent years, turning the judicial system into merely an extension of the political authority that thwarts an effective defense and appoints (or better employs) partisan and loyalist prosecutors and judges.

Dismissals of judges in particular have had an adverse and devastating effect on the Turkish judiciary, its independence and the effectiveness of the principle of separation of powers. In the current

¹³ The World Justice Project Rule of Law Index provides original, impartial data on how the rule of law is experienced in everyday life in 113 countries around the globe. It is the most comprehensive index of its kind.

¹⁴ WJP Rule of Law Index 2016, World Justice Project, 2016, Washington D.C., U.S.A.

¹⁵ “Documents on Turkey.” *Venice Commission, Council of Europe*, www.venice.coe.int/webforms/documents/?country=31&year=all.

circumstances, when thousands of judges are detained and imprisoned (close to one-third of judges and prosecutors), it is inconceivable that the remaining judges could reverse any measure declared under the emergency decree laws out of fear of becoming subject to such measures themselves.

The U.S. State Department's Human Rights Report in 2016 has explicitly asserted that the government's applications have a "chilling effect on judicial independence" especially as regards the politically sensitive cases.¹⁶ Likewise, the Human Rights Watch and Amnesty International have expressed their concerns that imprisonment and dismissal of officials jeopardize judicial independence, and moreover that new laws tying the judiciary to the executive poses a clear threat to the rule of law.¹⁷ Both organizations are rightfully worried about the newly created appointment system of judges and prosecutors as well as recently established courts with power over politically sensitive investigations.¹⁸

Similarly, the International Commission of Jurists (ICJ) has indicated that the "selection and appointment process as a whole is highly susceptible to executive manipulation, and likely to be weighted against candidates who are not seen as supportive of the government." The ICJ has also drawn attention to the criminal charges against judges and prosecutors and specified that many officials from the judiciary were dismissed because their judgments were conflicting government's interests. According to the ICJ this amount of interference with the judiciary is clearly against internationally accepted standards.¹⁹ The International Commission of Jurists and other international organizations have determined that the independence of the judiciary has now been eroded to its core in Turkey.²⁰

In December 2016, the Board of the European Network of Councils for the Judiciary (ENCJ) concluded that the Turkish High Council for Judges and Prosecutors (HSYK) no longer meets the requirements of the ENCJ, so as to ensure the independence of the Turkish Judiciary. The ENCJ General Assembly accordingly resolved to suspend, with no Council member voting against, the observer status of the Turkish High Council for Judges and Prosecutors (HSYK).²¹

The Parliamentary Assembly of the Council of Europe decided on April 25, 2017 to reopen the monitoring procedure in respect of Turkey until "serious concerns" about respect for human rights, democracy and the rule of law "are addressed in a satisfactory manner."

The above concerns were also voiced by the former chief justice of the Turkish Constitutional Court, Hasim Kilic, who stated that "Everybody knows the political views of judges and prosecutors, even in

¹⁶ United States Department of State, *2016 Country Reports on Human Rights Practices - Turkey*, 3 March 2017, available at: <https://www.state.gov/documents/organization/265694.pdf> [accessed 15 November 2017].

¹⁷ Human Rights Watch, *World Report 2016 - Turkey*, 27 January 2016, available at: <https://www.hrw.org/world-report/2016/country-chapters/turkey> [accessed 15 November 2017]; Human Rights Watch, *World Report 2015 - Turkey*, 29 January 2015, available at: <http://www.refworld.org/docid/54cf83794.html> [accessed 16 November 2017]; Amnesty International, *Amnesty International Report 2015/16 - Turkey*, 24 February 2016, available at: <http://www.refworld.org/docid/56d05b08e.html> [accessed 16 November 2017].

¹⁸ Shaheen, Kareem. "March for Turkey's jailed judges highlights purge on dissidents." *The Guardian*, 7 July 2017, available at www.theguardian.com/world/2017/jul/07/march-for-turkeys-jailed-judges-highlights-purge-on-dissidents.

¹⁹ International Commission of Jurists (ICJ), *Turkey: the Judicial System in Peril*, 2 June 2016, available at: <http://www.refworld.org/docid/57ee8e674.html> [accessed 16 November 2017]

²⁰ "News: Web stories." *International Commission of Jurists*, 13 June 2017, www.icj.org/turkey-judicial-independence-and-freedom-of-expression/.

²¹ "ENCJ votes to suspend the Turkish High Council for Judges and Prosecutors." *European Networks of Councils for the Judiciary (RECJ)*, 8 Dec. 2016, www.encj.eu/index.php?option=com_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en.

the remotest villages of the country. We cannot move forward with such a judiciary,” and he continued “The judiciary is not an instrument of revenge, it is not anyone’s tool to achieve their aims.”²² Ergun Ozbudun, Professor of Political Science and Constitutional Law, also raised similar concerns when he commented on the proposed constitutional amendment (which was adopted through referendum afterwards) and said “What we have here is the weakening of legislation while the president, with full executive powers, forms a parliament under his influence.” Furthermore, Metin Feyzioglu, head of the Turkish Bar Association, stated that “This is a system that will finish judicial integrity and sovereignty,” reminding that half of the judges are to be appointed by the president.²³

Nils Muiznieks, Council of Europe Commissioner for Human Rights as well remarked that independence and impartiality of judiciary have started to be eroded and must be redeveloped as soon as possible. He added that “it is in particular the role of the criminal judges of peace that is the most concerning, because these formations have transformed into an instrument of judicial harassment to stifle opposition and legitimate criticism.”²⁴

The list of similar reports and statements raising above-mentioned concerns grows everyday thanks to the government’s new actions. In the light of all the above, one can conclude that the judicial system in Turkey has been weakened by the government’s actions, therefore; it is highly likely that judges cannot give verdict against the ruling party’s interests not to face different types of punishments including imprisonment.

There have been cases in the past where the European Court examined the cases substantially even though the domestic remedies were not exhausted, when it was believed that they were not available or not going to be effective. For instance, in *Akdivar v. Turkey (1996)* case the Court stated that the Court “must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.”²⁵ Hence, merely having the domestic rules providing remedies to the victims is not seen as satisfactory by the ECtHR. We believe the current situation in Turkey as well falls into this category and warrants immediate action by the Court. Hence, the ECtHR should not reject cases on the ground that the applicants could have gone to the domestic authorities from which, with great deal of certainty they will not receive any effective remedy.

²² France-Presse, Agence. “Turkish courts being turned into 'revenge' instruments says outgoing top judge.” *The Guardian*, 10 Feb. 2015, available at www.theguardian.com/world/2015/feb/11/turkish-courts-being-turned-into-revenge-instruments-says-outgoing-top-judge.

²³ Köylü, Hilal. “Law experts criticize Turkey's proposed constitutional amendment.” *Deutsche Welle*, 14 Dec. 2016, p.dw.com/p/2UG1h.

²⁴ “Urgent measures are needed to restore freedom of expression in Turkey.” *Commissioner for Human Rights*, Council of Europe, 23 Feb. 2017, www.coe.int/en/web/commissioner/-/urgent-measures-are-needed-to-restore-freedom-of-expression-in-turkey?desktop=true.

²⁵ *Akdivar and Others v. Turkey*, Application No. 21893/93, 16 Sept. 1996, para. 69.

ADVOCATES OF SILENCED TURKEY



To address all human rights violations in Turkey regarding civil, political, economic, social and cultural as contained in the basic human rights documents.



To prevent genocide, crime against humanity, arbitrary detention, torture and ill treatment, discrimination and to defend right to life, rule of law, right to privacy, freedom of expression, freedom of thought, conscience and religion, freedom of associations.



To utilize all human rights advocacy tools, mechanisms, and systems that can possibly be used to protect and promote the human rights of those whose voices are being silenced in Turkey and beyond.



To hold accountable the perpetrators of Human Rights in Turkey and beyond together with the opportunity for victims to obtain justice and reparation, in order to do so, it uses the power of the law to fight the impunity of perpetrators, accomplices and instigators of crimes, defends the interests of victims before national and international courts and brings cases before the appropriate international human rights bodies, in close collaboration with its local partners and the victims and lobbies to get authorities to take firm action against violations.