

COUNCIL OF EUROPE'S PERSPECTIVES ON THE
RULE OF LAW AND HUMAN RIGHTS IN TURKEY IN
THE AFTERMATH OF 15 JULY 2016 COUP ATTEMPT



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INTRODUCTION

1. The norms and standards of the Council of Europe have been an authoritative benchmark for Turkey in regulating both its international relations and domestic legal framework. The Council of Europe has hence been an anchor for Turkey's level of democracy, rule of law and human rights.
2. Turkey has nevertheless witnessed a dramatic fall down from its relatively better standard of democracy, rule of law and human rights since the coup attempt of 15 July 2016. This report highlights and discusses the responses of the different institutions of the Council of Europe on the state of emergency measures taken and implemented by the Turkish government in the aftermath of 15 July 2016 coup attempt.
3. The report is prepared with contributions from a number of lawyers, academics and experts focusing on the perspectives and responses of different bodies of the Council of Europe. The findings of the report are mainly based on the official statements, reports, opinions and decisions of different institutions of the Council of Europe.
4. The report consists of five chapters. Chapter 1 deals with the nature and extent of the state of emergency and scale of the purges implemented in Turkey in the aftermath of the coup attempt.
5. The following chapters deal with the perspectives and responses of different bodies of the Council of Europe in connection with the state of emergency measures taken by the Turkish government. Chapter 2 considers the responses of the Parliamentary Assembly of the Council of Europe (PACE); Chapter 3 evaluates the perspectives of Venice Commission; Chapter 4 assesses the viewpoints of the European Commissioner for Human Rights; and Chapter 5 provides an analysis of the ECtHR's responses in respect of cases emanating from Turkey.
6. The concluding part highlights some of the findings of the report and provides some concluding remarks and recommendations.

CHAPTER 1

THE STATE OF EMERGENCY AND SCALE OF THE PURGE IN TURKEY

1. The State of Emergency and Scale of the Purge in Turkey

7. In response to the failed military coup attempt of 15 July 2016, the Turkish government under the chairmanship of the President declared a state of emergency (SoE) throughout the country for a period of ninety days for the entire country beginning from 21 July 2016.¹ The decision of the Turkish government on the announcement of the SoE was published in the Turkish Official Gazette on 21 July 2016 and subsequently approved by the Grand National Assembly of Turkey. The state of emergency has been extended five times since then and is further to be prolonged for the 6th times.² It has thus become a “de facto permanent” emergency regime as a convenient tool for the government to carry on its planned policy of crack down and purge.
8. The presidential directives are being issued as decrees of SoE. Including different articles dealing with managing, administrating, financing public and private sectors’ institutions, these decrees have already taken the place of the National Assembly’s acts.

¹ The decision of the Council of Ministers no: 2016/9064

² <http://www.hurriyetdailynews.com/turkeys-state-of-emergency-to-be-extended-once-again-deputy-pm-125423>

1.1 National Legal Framework for the State of Emergency

9. The legal foundation of the SoE is Articles 119-121 of the Turkish Constitution³ and Law No. 2935 on the State of Emergency (the "SoE Law").⁴ Article 120 of the Constitution and the SoE Law foresee that a SoE may be declared in the event of, among others, serious indications of widespread acts of violence aimed at the destruction of the free democratic order or fundamental rights and freedoms. The maximum term of a state of emergency is limited to six months by law; the parliament may terminate or extend the duration of the state of emergency for periods of four months upon recommendation by the Council of Ministers.
10. The Law on State of Emergency was adopted in 1983. A direct reference to the Law on SoE in the Constitution implies that any measure introduced by an emergency decree law should be in compliance with this law which is defined as setting out a legal framework for any subsequent emergency decree laws. The Venice Commission stresses that the Law on SoE is referred to as a legal framework for the current emergency in the decree laws (see for example preambles to Decree Laws No. 667 and 668) as well as in the derogation letters. It appears therefore that any emergency decree law adopted under Article 121(3) of the Constitution should be compatible with the Law on SoE as amended.
11. Articles 15, 120 and 121 of the Constitution set the following limits to the Government's emergency powers:

³ <https://www.tbmm.gov.tr/anayasa/anayasa82.htm>

⁴ Law dated 25 October 1983 No:2935, published in the Official Gazette dated 17 October 1983 and numbered 18204.

- the Government may declare and use emergency powers only in the event *“of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms;”*
- the Government should follow a particular procedure for declaring a state of emergency and enacting decree laws (including prompt approval by the Grand National Assembly);
- certain basic rights should not be affected;
- limitations to other rights should be necessary and proportionate (*“to the extent required [...]”*) and be temporary in character (*“during the state of emergency”*);
- the international obligations of the State should be respected;
- the Government should act in compliance with the law on the state of emergency.

12. Thus, the Constitution explicitly limits the Government’s power to derogate from fundamental rights and freedoms in times of emergency. In addition, certain implicit limitations on the Government’s emergency powers may be derived from the Constitution, insofar as the system of checks and balances is concerned.⁵

13. The most important impact of the SoE is the power reserved for the government to issue SoE decree laws on matters which relate to the SoE. An emergency decree law is an executive decree promulgated pursuant to a delegation from the Parliament and having all the qualities of law. In a SoE, the Turkish government is granted the power to issue emergency decree laws without being subject to restrictions set forth in the Constitution for the

⁵ [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)

issuance of decree laws. This means that in case of a SoE, fundamental rights, individual rights, and political rights, unlike under normal circumstances, may be regulated by decree laws.

14. The Turkish Constitutional Court, disregarding its own previous case law over the decree laws which it set out in the 1990s, has adopted a new contradicting stance that the decree laws issued during a SoE, martial law or in time of war shall not be brought before the Constitutional Court on the ground of unconstitutionality as to the form or substance.⁶ On 12 October 2016, the Constitutional Court rejected the Turkish main opposition party's (People's Republic Party (CHP)) appeal to annul the decree laws⁷ issued by the government under the SoE. The Constitutional Court decided that it has no competence to examine the SoE decree laws by relying on the wording of Article 148 alone and thus making the Constitution inoperative. By refusing to examine the constitutionality of the new order established by the SoE decree laws, the Constitutional Court has intentionally or unintentionally paved the way for a closed circuit political system under the control and command of the executive.⁸

⁶ <http://www.constitutionalcourt.gov.tr/inlinepages/proceedings/ConstitutionalityReview.html>

⁷ <http://www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889>

⁸ <http://www.platformpi.org/wp-content/uploads/Construction-of-a-New-Regime-By-Decree-Laws-1.pdf>

1.2 International legal framework

15. Derogation from treaty-based human rights obligations is provided by Article 15 of the European Convention on Human Rights (ECHR) and by Article 4 of the International Covenant on Civil and Political Rights (ICCPR). Expressed in very similar terms, they permit derogation in time of public emergency which threatens the life of the nation. Turkey is a party to both treaties.
16. On 21 July 2016, the Secretary General of the Council of Europe was informed by the Turkish authorities in accordance with Article 15 of the ECHR that the post-coup measures may involve derogation from the obligations under the ECHR. In the following weeks, several other such notifications followed, after the enactment of the subsequent emergency decree laws.
17. On 21 July 2016, the Secretary General of the United Nations was also notified by the Turkish authorities under Article 4 of the ICCPR about the derogations from the rights provided under Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the ICCPR.
18. The mechanism of derogation allows the Turkish authorities to temporarily reduce the scope of its obligations under treaty-based human rights instruments. However, there are certain conditions for the exercise of the derogation powers under the ECHR and the ICCPR:
 - the right to derogate can be invoked only in states of emergency (time of war or other public emergency threatening the life of the nation);
 - the State availing itself of this right of derogation has to comply with certain procedural conditions (see Article 15(3) of the ECHR, Article 4(3) of the ICCPR) such as the proclamation and notification requirements as well as those under its national law;
 - the State may take measures derogating from its obligations “*only to the extent strictly required by the exigencies of the situation*” both with respect to the scope and duration, and the necessity and proportionality of those

measures are subject to the supervision by the European Court of Human Rights (ECtHR) and monitoring by the Human Rights Committee (HRC);

- certain rights do not allow any derogation (the right to life, freedom from torture and mistreatment, prohibition of slavery, and prohibition of non-retroactive application of laws are non-derogable under the ECHR);
- the derogation may not be discriminatory or inconsistent with the State's other obligations under international law;
- the predominant objective must be the restoration of a state of normalcy where full respect for human rights can again be secured.

1.3 Ruling with the Emergency Decree Laws

19. The Venice Commission is of the opinion, following the failed military coup attempt, that Turkey was entitled to defend its democratic institutions and population, as they were under violent attacks, killing more than 200 persons and leaving thousands injured. The Venice Commission acknowledges, together with the Commissioner for Human Rights of the Council of Europe, that *“given the seriousness of the crimes committed by those who were behind the coup attempt and the obvious threat to Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary.”* However, the Commission believes and wider international community echoes that it is less clear whether this *“public emergency threatening the life of the nation”* still existed 17 months later when the state of emergency was further extended.

20. The Turkish President and Government enjoy and find it expedient to govern through the emergency decree laws. Since the declaration of the first SoE on 21 July 2016, the Turkish Government enacted 30 decree laws which introduced changes in 369 laws and 1125 articles. Without going through a legal and parliamentary oversight, the government made changes that affected

the ministries, the Turkish Army and law enforcement institutions, public servants, non-governmental organisations, journalists and media, academia, private companies and local governments.

21. 15 out of 30 decree laws were about dismissing public servants without due process and any administrative and judicial investigations, which ruined the lives of millions of Turks living in and outside of Turkey. They provide for a comprehensive purging from the State apparatus of the persons allegedly linked to the conspiracy. The decree laws also relax the individual guarantees against arbitrary practices in the rules of criminal investigation for terrorist-related activities. During the state of emergency, over 150,000 civil servants, military officers, judges (4,463), teachers and academics (5,822) have been dismissed from their jobs. Over 130,000 have been detained and 63,000 arrested. 3,003 schools, dormitories and universities and 187 media outlets were shut down and 308 journalists were put behind the bars. Private institutions allegedly linked to the conspiracy have been closed down and their property confiscated.
22. The other half of decree laws introduced permanent changes on laws and/or introduced completely new rules and regulations.⁹ Only 5 decree laws out of 30 were brought forward to the Turkish Parliament and became full-fledged laws. The Office of Prime Ministry sent the rest of the 25 decree laws together with the preamble laws to the Parliament. However, these decree laws did not go through a review process at the relevant parliamentary commissions and waiting for the parliamentary proceedings.
23. 30 decree laws covered wide spectrum of subject matters, not all of them related to the purpose of the SoE. Such emergency decree laws should concern

⁹ <http://www.platformpi.org/wp-content/uploads/Construction-of-a-New-Regime-By-Decree-Laws-1.pdf>

“matters necessitated by the state of emergency” and are to be submitted by the Government to the Parliament for prompt ex post approval (*“shall be submitted to the Turkish Grand National Assembly on the same day for approval”*); the time-limits and procedure for their approval are indicated in the Rules of Procedure of the Parliament.

24. The limits to the Government’s emergency powers are set out in Article 15 of the Constitution. It allows for *“partial or total”* suspension *“during the state of emergency”* of the exercise of fundamental rights and freedoms but only *“to the extent required by the exigencies of the situation”* and provided that *“obligations under international law are not violated.”* Article 15 also contains a list of non-derogable rights such as the right to life or physical integrity.¹⁰ Venice Commission has provided its opinions on the overall compatibility of the implementation of the state of emergency in Turkey particularly of all the subsequent decree laws with the Council of Europe standards.

1.4 Crackdown on the Judiciary

25. The Turkish government continues its purge of the judiciary after sacking 4,463 judges and public prosecutors suspected of having links to the Gulen community. Of 4,463, 2,431 have been arrested and 680 have been held in solitary confinement¹¹. Two members of the Constitutional Court, several of the members of the High Council of the Judges and Prosecutors (HSYK) and hundreds of the judges of the Court of Cassation and the Council of State are still in prison. Dismissals equate more than one in four of the judges and public

¹⁰ [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)

¹¹ <http://www.platformpj.org/opinion-thousands-judges-still-jail-680-kept-solitaryconfinement/>

prosecutors, and are part of the sweeping crackdown that has seen more than 150,000 people sacked from the military, law enforcement, civil service and academia. The Turkish Justice Minister in May 2017 informed the media that *“there is no judge or prosecutor left that we have not screened.”*

26. The scale of crackdown on the judiciary has astonished Turkish observers and alarmed European leaders. Turkish researcher based at the University of Amsterdam’s law school Kerem Gulay was quoted by Financial Times when he described the situation as saying that *“I see it as the suicide of the Turkish judicial system. There is no other way to describe it.”*¹²
27. The judiciary, along with the armed forces and law enforcement, has been one of the worst hit institutions that brought chaos and confusion to the whole judicial system, and destroyed the confidence and trust in the judiciary. Legal experts, lawyers and independent observers are of the opinion that the government waived some prerequisites previously forming part of the examinations to enter the service and vacant posts in the judiciary have been filled with the ruling party (AKP) loyalists, which further undermined the confidence in justice and rule of law.
28. Dismissals of public servants were implemented either by a decision of the relevant administrative entity or through the system of “lists” appended to the emergency decree laws. The latter does not require any adversarial proceedings before the dismissals of public servants are ordered. At a minimum, persons should have been able to have access to evidence against them and make their case before a decision is taken.
29. The then deputy president of the Council of Judges and Prosecutor (HSK), Mehmet Yilmaz, suggested in late 2016 that they might consider reinstating judges who giving damaging confessions about the Gulenist network but

¹² <https://www.ft.com/content/0af6ebc0-421d-11e7-82b6-896b95f30f58>

admitted in a later interview that he had said so to entrap them. *“I made that statement solely to encourage confessions and I have been very successful, because, when there was not even one confessor then, there has been a boom following that statement,”* he told the news agency Haberturk. *“Thanks to over 200 confessors, we have obtained evidence about 2,400 judges and prosecutors to prove their membership to [the Gulenists].”*¹³ This is crystal clear evidence that HSK’s dismissals lacked strong evidence but made solely on the intelligence reports and false confessions.

30. The top judges of the European Union member states comprising the presidents of the supreme courts of EU countries echoed the concerns over the dismissals of judges and state prosecutors. The group viewed the dismissal and arrests of thousands of judges and prosecutors as an attack on the independence of the judiciary in Turkey.¹⁴
31. The Turkish government changed the constitution and grasped the full control of Council of Judges and Prosecutors (HSK), which is the body who executed all the dismissals in the judiciary. Venice Commission in its report¹⁵ dated 13 March 2017 criticized the composition of the judicial council and called it *“extremely problematic”* and stressed the fact that independence of judiciary will be in serious jeopardy, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice.

¹³ <https://www.theguardian.com/world/2017/jul/07/march-for-turkeys-jailed-judges-highlights-purge-on-dissidents>

¹⁴ <https://www.reuters.com/article/us-turkey-security-eu-judges/eu-judges-group-says-turkey-crackdown-is-attack-on-judicial-independence-idUSKCN1071SJ>

¹⁵ [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)

32. The Human Rights Commissioner of the Council of Europe in his press release on 07 June 2017¹⁶ shared similar concerns in relation to the new composition of the HSK. He considered that new composition of HSK does not offer adequate safeguards for the independence of the judiciary and considerably increases the risk of it being subjected to political influence.
33. Serving judges have also been subject to widespread intimidation by the media, which has been largely brought under the control of the AKP and its proxies after a broad crackdown on the dissident press. Pro-AKP media harshly criticized the courts after they ordered the release of Atilla Tas, a pop singer who was accused of membership of the Gulen Movement. The opposition and defence lawyers say judges are fearful of ordering the release of detainees lest they be investigated themselves.
34. Another example of the lynching campaign carried out by the government-related media took its place in a recent report published by the Human Rights Watch¹⁷:

“...the court decided to release on bail 21 defendants who had been held in prolonged pretrial detention. However, following criticism of the decision by a pro-government journalist, there was an appeal against the release of eight of the 21, and a new investigation against the other 13. As a result, none were released from detention. The High Council of Judges and Prosecutors

¹⁶ <https://www.coe.int> <https://www.theguardian.com/world/2017/jul/07/march-for-turkeys-jailed-judges-highlights-purge-on-dissidents> /commissioner/country-monitoring/turkey/-/asset_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false

¹⁷ Human Right Watch, World Report 2018, <https://www.hrw.org/world-report/2018/country-chapters/turkey>

subsequently suspended the three judges who had ruled to release the journalists, plus the prosecutor at the hearing.”

35. *“It is horrible. Judges are waiting to hear from the [presidential] palace, and they think the harsher the punishment [the judges hand down], the higher up they will go,”* said Kemal Kılıçdaroğlu, leader of Turkey’s largest opposition party, the Republican People’s party (CHP), who led a march in protest. *“This is our main cause.”*¹⁸
36. There are limited avenues for appeal for the dismissed judges and public prosecutors. Their cases should be examined by the Council of State which means getting a result will take at 1 to 2 years before going to the Constitutional Court and the European Court of the Human Rights. Since they have not been dismissed by the SoE Decree Laws, they have no right to apply to the State of Emergency Inquiry Commission.

1.5 Silencing the Dissident: Arrested Members of the Parliament

37. Turkey's parliament has ratified a bill that striped some legislators of immunity from prosecution. Championed by the ruling Justice and Development Party (AKP), the bill amended the constitution adding a temporary clause to remove the immunity of deputies.
38. PACE expressed serious concerns about the stripping of the immunity of 154 members of parliament (MPs) in May 2016, which the Venice Commission described in October 2016 as an ad hoc “one-shot” and *ad hominem* measure

¹⁸ <https://www.theguardian.com/world/2017/jul/07/march-for-turkeys-jailed-judges-highlights-purge-on-dissidents>

as well as a misuse of the constitutional amendment procedure thus not being in line with the standards of the Council of Europe.¹⁹

39. The international community condemned the on-going detention of parliamentarians since November 2016 and is dismayed by the requests from the Public Prosecutor's Office for respectively 142 years and 83 years of imprisonment for the People's Democratic Party (HDP) co-chairs, Selahattin Demirtas and Figen Yuksekdag.
40. Lifting immunity of the MPs has seriously undermines the democratic functioning and position of the Turkish Parliament. Decision for lifting the immunity of MPs has disproportionately affected the opposition parties and in particular the HDP with 55 out of 59 (or 93%) of its members being stripped of their immunity. This has had a deterrent effect and paved the way for serious restrictions to the already weak democratic debates in the parliament.

¹⁹<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbnCveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzY2NSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRc1BVC1YTUwyUERGlnhzbA==&xsltparams=ZmlsZWlkPTIzNjY1>

CHAPTER 2

PERSPECTIVES OF PACE ON TURKEY IN THE AFTERMATH OF 15 JULY 2016

2. Perspectives of PACE on Turkey in the aftermath of 15 July 2016

41. As the Body representing the people of 47 member states, the Parliamentary Assembly of the Council of Europe (PACE) has for years been following and scrutinizing the developments in Turkey. With its 324 representatives appointed by national parliaments from among their members, works of the PACE are carried out by 9 committees in addition to the Bureau and the Standing Committee. Where necessary, ad hoc committees may also be created and power delegated.

2.1 Information Note dated 12 December 2016

42. In the aftermath of 15 July 2016, like all other international bodies and organs, PACE also conducted some researches and the Monitoring Committee declassified an *“Information Note”* dated 12 December 2016. Prepared by the Co-Rapporteurs Ingebjørg Godskesen (Norway, CE) and Marianne Mikko (Estonia, SOC) on the post-monitoring dialogue with Turkey concerning the *“Failed coup d’Etat of 15 July 2016 in Turkey: some facts and figures”*²⁰, the Note contained important and verifiable information on the aftermath of 15 July 2016.

43. Inter alia, the Co-Rapporteurs underlined that:

²⁰ Declassified information note of 12 December 2016 by the PACE Co-Rapporteurs on Turkey

<http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6460&lang=2&cat=3>

- on 16 July 2016, the High Council of Judges and Prosecutors (HSYK) held an extraordinary meeting and decided to suspend 2745 judges and remove 5 members of the HSYK with alleged links to the Gulen Movement,
- Arrest warrants were issued for 140 members of Supreme Court of Appeal as well as 48 members of the State Council,
- 2836 soldiers, including high-ranking officers, were arrested on the same day,
- 8777 officials from the Ministry of the Interior (including police officers, governors and gendarmerie officers), and 1,500 officials from the Finance Ministry were also suspended immediately,
- As of 18 July 2016 –only in 2 days-, 7,543 people were jailed for having allegedly participated in the coup attempt,
- 2 members of the Constitutional Court, Alparslan Altan and Erdal Tercan, were detained on 16 July 2016 and dismissed by the Constitutional Court from the profession shortly after the decree-law of 23 July 2016,
- On 20 July 2016, Erdogan government declared a three-month state of emergency,
- On 21 July 2016, the Turkish authorities notified its derogation from the European Convention on Human Rights,
- The main opposition party (CHP), the Human Rights Association of Turkey and Amnesty International claimed wide use of ill-treatment and torture during detention. 37,000 complaints about unfair treatment reached the CHP only.
- Mehmet Metiner, AKP Deputy and Chair of Parliamentary Sub-Committee for Prisons, refused the sub-committee conducting visits to the arrestees who were charged with being a member of the “FETÖ”. He also refused running any investigation into the torture and maltreatment claims despite the protests of prominent human rights organisations against this statement.

44. It should be noted that, as of January 2018, 4,560 judges and prosecutors were dismissed since the decision of 16 July 2016 of the High Council of Judges and Prosecutors (HSYK). Nearly, 2,300 out of these 4,560 judges and prosecutors are still in detention, most of them still awaiting the indictment after more than 17 months. Total number of people taken into custody with the same accusation has reached 160,000 whereas 60,000 (17,000 of whom are women) are still in pre-trial detention.
45. Since July 2016, in addition to the judges, prosecutors, police and army officers, hundreds of thousands of civil servants including teachers, doctors, academics, diplomats, etc. have been dismissed and many of them were detained without any means of effective domestic remedy. In response to this, Bernd Fabritius (Germany, EPP/CD) and Raphael Comte (Switzerland, ALDE), rapporteurs of the Council of Europe Parliamentary Assembly (PACE) expressed their concern²¹ at the apparent disproportionality and illegalities, respectively in *“new threats to the rule of law in Council of Europe member States – selected examples”* and *“state of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights.”*
46. Highlighting the exploitation of the state of emergency as a means of social extermination and suspension of the rule of law in Turkey and referring to the fact that thousands of judges and prosecutors including the members of Constitutional Courts as well as the members of other high courts were dismissed, Mr Fabritius stressed 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.”*

²¹ PACE Joint Statement <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6660&lang=2&cat=5>

47. Rapporteur Raphael Comte, in addition to Rapporteur Fabritius, underlined that the then-envisaged Enquiry Commission to review dismissals was still not operational. Mr Comte also noted that the effectiveness of the Constitutional Court remedy was not been demonstrated. Another important point raised by the Rapporteurs was the pre-trial detention of parliamentarians, the rulings on which were inexplicably delayed for months by the Constitutional Court.

2.2 Report on the Functioning of Democratic Institutions in Turkey

48. The Monitoring Committee Co-Rapporteurs on Turkey (Ms Ingebjørg Godsken and Ms Marianne Mikko) drafted another “*Report on the Functioning of Democratic Institutions in Turkey*”²² which was publicised on 8 March 2017. Special attention was paid to the constitutional amendment package which was then scheduled to be voted in a referendum on 16 April 2017. The Report took note that the adoption of a package of constitutional amendments would result in a profound change and a shift from a parliamentary to a presidential system, granting the President of the Republic extensive powers while drastically reducing the supervisory role of the parliament. The Report criticized lack of sufficient information given to the voters and extremely limited time left for public debate. It was also underlined that, under a state of emergency, 500,000 persons displaced in the wake of the curfews and security operations in south-east Turkey also raised serious questions.

²² PACE report on the functioning of democratic institutions in Turkey, 8 March 2017, <http://website-pace.net/documents/19887/3258251/20170308-TurkeyInstitutions-EN.pdf/bbd65de5-86d4-466f-9bc1-185d5218bce7>

49. In the Explanatory memorandum to the Report, the co-rapporteurs drew attention to the fact that the coup attempt, which Erdogan considered to be a “*gift of God*”, was followed by a massive purge not only in the public administration, but also in the private sector by using a strong rhetoric in official statements referring to “a country under occupation”, which should be “liberated” and required a “second war of independence.”
50. Having mentioned the facts and figures regarding those purged/detained as well as the hundreds of media outlets shut down, the report also stated that the concept of “connections” to the Gülen movement was too “loosely defined and did not require a meaningful connection with such organisations” which may reasonably cast doubt in the loyalty of public servants as already pointed out by the Commissioner for Human Rights, the Venice Commission, and Mr Jensen’s ad hoc sub-committee.
51. The Co-Rapporteurs in this report drew the attention of PACE to another point the Venice Commission had also stated as “the evident fact that measures adopted following the coup remove crucial safeguards that protect detainees from abuse, and hence increase the likelihood of ill-treatment and torture”. Indeed, the Venice Commission underscored that the prohibition on torture and cruel, inhuman or degrading treatment or punishment was a non-derogable human rights obligation under both the ECHR and the International Covenant on Civil and Political Rights (ICCPR). Referring to the Venice Commission’s stance, the report repeated that “no emergency situation may justify such abuse”.

2.3 PACE Resolution No. 2156 (2017) of 25 April 2017²³

52. Underpinned by this report in the aftermath of largely-criticised constitutional amendment referendum of 16 April 2017, the Monitoring Committee of the PACE called for the monitoring procedure in respect of Turkey to be re-opened in order to ensure respect for fundamental freedoms, the rule of law and democracy.²⁴ The Monitoring Committee stated that it was concerned to note that there was a “serious deterioration of the functioning of democratic institutions in the country.”
53. Violations of freedom of the media, the number of journalists detained and the pressure exerted on critical journalists “unacceptable in a democratic society”, lifting the immunity of 154 members of parliaments in May 2016, the dismissal of a quarter of judges and prosecutors, a tenth of the police force, more than 5000 academics and 30% of the staff in the Ministry of Foreign Affairs all underpinned this motion.
54. Eventually, the Assembly during the session on 25 April 2017 adopted the Resolution 2156 (2017) and decided 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.”
55. With this Resolution, the Assembly expected Turkey, as a matter of priority, to²⁵:
- *lift the state of emergency as soon as possible;*

²³ PACE Resolution 2156 (2017) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23665&lang=en>

²⁴<http://www.assembly.coe.int/nw/xml/News/News-ViewEN.asp?newsid=6603&lang=2&cat=8>

²⁵ Paragraph 38 of the PACE Resolution 2156 (2017).

- *in the meantime, halt the publication of emergency decree laws which bypass parliamentary procedures, unless strictly needed under the state of emergency, and put an end to the collective dismissal of civil servants through emergency decree laws;*
- *release all the detained parliamentarians and co-mayors pending trial;*
- *release all the imprisoned journalists pending trial;*
- *establish, and launch the work of, the Inquiry Commission on State of Emergency Measures to ensure an effective national judicial remedy for those dismissed through emergency decree laws;*
- *ensure fair trials with respect for due procedural guarantees;*
- *take urgent measures to restore freedom of expression and of the media, in line with Assembly Resolution 2121 (2016) and Resolution 2141 (2017), and with the recommendations of the Commissioner for Human Rights and the Venice Commission;*
- *implement as soon as possible the recommendations of the Venice Commission concerning the constitutional amendments.*

56. The resolution stressed once again that the Erdogan's government had overstretched the state of emergency with *"ruling through decree laws going far beyond what emergency situations require and overstepping the parliament's legislative competence."* The Resolution also reiterated the concerns about Erdogan's promise to discuss reintroducing the death penalty, underlining that it would be incompatible with membership of the Council of Europe.

57. This Resolution (2156) of April 2017 constituted a historic point in Turkey's relations not only with the Council of Europe (CoE) but also with the European Union (EU). With this Resolution, the PACE clearly underlined that Turkey fell behind its situation of 2004 in meeting the Copenhagen Criteria and thus took Turkey back to the Monitoring status after 13 years as a first ever example in the history of the CoE. Nine other Council of Europe countries are being subject

to this kind of monitoring: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Russia, Serbia and Ukraine.

- 58.** It is worth noting that the opening of EU accession talks with Turkey was decided in 2004 by the EU based on the PACE decision which stated that Turkey had met the basic criteria of human rights and democracy. Thus, it looks though that the current Turkish Government -with its track record in recent years- deprived the country of the basis which underpinned the legitimacy of the candidate status for full membership of the EU.
- 59.** The opening of Chapter 23 (Judiciary and Fundamental rights) and Chapter 24 (Justice, Freedom, Security) in Turkey's accession talks with the EU has in fact for long been debated in Brussels in order to anchor Ankara to improve its performance regarding democracy and rule of law. However, following the adoption of the said Resolution, it is no more on the agenda of any EU body. On 6 July 2017, the European Parliament (EP) voted a Resolution which called on the EU Commission and Council to suspend the membership talks with Ankara. Another Resolution followed in November 2017. The message was clear: 'get back to the track of democracy and human rights'. Taking into account the role that the PACE resolution played in deciding on the opening of the accession negotiations in 2004, it would not be wrong to say that the stance and resolutions of the EP were underpinned by the PACE Resolution 2156 (2017).
- 60.** Indeed, the impact of this Resolution was visible in the words of Kati Piri, Rapporteur of the EP on Turkey. Commenting on the Resolution, Ms. Piri said the EU would have to reassess its position on Turkey. *"The time just to wait and hope things will get better ... that strategy has to be abandoned and a clear statement has to be made from EU leaders."* Stating that she was pushing for the EU to freeze Turkey's EU accession talks, rather than abandon them altogether. She said *"If Turkey would meet the criteria that road would be open."*

But this government has proved it has no willingness to move closer to the EU, so that is why I am calling for a suspension.”²⁶

2.4 Observation of the Referendum (16 April 2017) on the Constitutional Amendment in Turkey²⁷

61. In the Election Observation Report (Doc. 14327) dated 29 May 2017, the PACE delegation prepared based on their observation of the referendum of 16 April, it was once again underlined that after the state of emergency declared following the July 2016 failed coup attempt, fundamental freedoms essential to a genuinely democratic process were curtailed.
62. Having been partly touched upon in the Resolution 2156 (2017) of 25 April 2017, the following findings inter alia were included in the report:
- *Emergency decrees that amended referendum-related legislation exceeded the exigencies of the state of emergency and were not subject to appeal,*
 - *Following the attempted coup, 1 583 civil society organisations were dissolved, including some that previously supported observation efforts,*
 - *The dismissal or detention of thousands of citizens negatively affected the political environment. The “Yes” campaign’s dominance in the coverage and restrictions on the media reduced voters’ access to a plurality of views,*

²⁶ <https://www.theguardian.com/world/2017/apr/26/council-of-europe-turkey-human-rights-pace>

²⁷ <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23746&lang=en>

- *The campaign framework was restrictive, and the campaign imbalanced due to the active involvement of the President and several leading national officials, as well as many local public officials, in the “Yes” campaign.*
- *There was obstruction of efforts of several parties and civil society organisations to support the “No” campaign as well as the misuse of administrative resources.*
- *The campaign rhetoric was tarnished by a number of senior officials equating “No” supporters with terrorist sympathisers. In numerous cases, “No” supporters faced police intervention and violent scuffles at their events.*
- *Freedom of expression was further curtailed under the state of emergency; the arrest of an unprecedented number of journalists and the surge of media outlet closures led to widespread self-censorship. The “Yes” campaign dominated the media coverage.*

2.5 Awarding of the 2017 Vaclav Havel Human Rights Prize to Murat Arslan, Former President of YARSAV

- 63.** PACE, in its plenary meeting held on 9 October 2017 announced that the winner of the 2017 Václav Havel Human Rights Prize is Murat Arslan, a Turkish Judge, president of YARSAV, an independent Turkish Judges Association. Judge Murat Arslan was and still is behind bars since 19 October 2016.
- 64.** For this prize, Murat Arslan was nominated by MEDEL (*Magistrats Européens pour la Démocratie et les Libertés*) and UIM (*Union Internationale des Magistrats*). Other leading international associations like *Judges for Judges* and Association of European Administrative Judges that form the *Platform for an Independent Judiciary in Turkey* also supported this nomination. With a view to

defend independence of judiciary which constitutes an integral element of the rule of law, such an inclusive support to this nomination as well as the PACE jury decision to award Judge Murat Arslan was crucial to clarify the stance of PACE vis a vis the Erdogan government's unlawful acts.

65. Not surprisingly, Turkish Ministry of Foreign Affairs in its Press Release²⁸ (Nr: 311) of 9 October 2017 stated : *“ It is wrong and unacceptable to award the Václav Havel Human Rights Prize to a person who is a member of FETO terrorist organization, the perpetrator of the coup attempt of July 15”*. Though mentioning Mr Arslan as a “suspect” in the second paragraph of the statement, Turkish MFA had already declared him a “FETO terrorist” in the very first sentence thereof. Pursuant to this approach, PACE was blamed literally for serving no purpose but “aiding the circles that support terrorism” in the statement.
66. Soon after this, Jagland, Secretary General of the CoE told reporters on November 8 that Turkey decided to end being one of the major contributors to the Council of Europe, while stressing that both the Council and the ECHR needed all sorts of support. Being among the major donors to the Council along with France, Germany, Italy, Russia and the United Kingdom, Turkey's seats in the PACE had increased from 12 to 18. Besides, Turkish language was introduced as one of the official working languages in the CoE thanks to the abandoned status of “major donor”. Now, having followed the footsteps of Russia, it is a question mark if Turkey will possibly be able to preserve the earnings of long years before the rise of authoritarian approach of AKP governments.

²⁸ http://www.mfa.gov.tr/no_-311_-vaclav-havel-insan-haklari-odulunun-eski-yarsav-baskani-murat-arslana-verilmesi-hk_en.en.mfa

2.5 PACE Resolution No. 2188 (2017) of 11 October 2017²⁹

67. Stemming mainly from the newly demotion announced by the PACE in its Resolution 2156 (2017), the Assembly in its Resolution 2188, “*New threats to the rule of law in Council of Europe member States: selected examples,*” reiterated its deepest concern about the scope of measures taken under the state of emergency and the amendments to the constitution approved in the national referendum of 16 April 2017.

68. PACE therefore called on the Turkish government to:

- lift the state of emergency as soon as possible;
- reconsider the constitutional amendments approved in the referendum of 16 April 2017 in line with Opinion No. 875/2017 of the Venice Commission, so that there will again be a functioning separation of powers, especially with respect to the parliament and the Constitutional Court;
- make sure that all emergency decree laws passed by the government under the state of emergency are approved by the parliament and that their constitutionality can be verified by the Constitutional Court;
- put an immediate end to the collective dismissal of judges and prosecutors as well as other civil servants through decree laws and ensure that those who have already been dismissed will have their cases reviewed by a “tribunal” fulfilling the requirements of Article 6 of the European Convention on Human Rights.

69. During the same session on 11 October 2017, PACE also adopted “*Resolution 2187 (2017) on Venice Commission’s Rule of Law Checklist*”.³⁰ Based on the

²⁹ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24214>

³⁰ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24213>

Venice Commission's Report CDL-AD (2016)007³¹ adopted on 11-12 March 2016, PACE in this Resolution approved the Commission's approach that there was a consensus as to the core elements covered by the terms "rule of law", "Rechtsstaat" and "État de droit". These core elements are: 1) legality; including a transparent, accountable and democratic process for enacting law; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice before independent and impartial courts including judicial review of administrative acts; 5) respect for human rights; and 6) non-discrimination and equality before the law. Hence, the Monitoring Committee of the PACE is now equipped with the relevant tools and the criteria when dealing with the current government of Turkey in this new phase of relations.

³¹ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

CHAPTER 3

VENICE COMMISSION'S PERSPECTIVES ON TURKEY

3.1 Venice Commission's Perspectives on Turkey in the Aftermath of the July 15 2016

70. The Venice Commission has published five paramount opinions in its response to the measures taken by the Turkish government in the aftermath of the 15 July 2016 attempted coup. Each opinion addresses different but interlinked aspects of the rule of law and human rights situation in Turkey:

- Venice Commission's Opinion on Turkey's Emergency Decree Laws
- Venice Commission's Opinion on Turkey's Constitutional Amendment
- Venice Commission's Opinion on Turkey's Criminal Peace Judgeships
- Venice Commission's Opinion on Media Freedom in Turkey
- Venice Commission's Opinion on Local Democracy in Turkey

71. The opinions provide an updated account of how the rule of law and human rights situation is viewed in Turkey since the attempted coup of the July 2016. The analysis may provide an authoritative statement of the current situation with respect to the rule of law and human rights from the perspectives of an independent international body.

3.2 Venice Commission's Opinion on Turkey's Emergency Decree Laws

72. The Venice Commission's opinion on Turkey's emergency decree laws is its first and foremost response to the measures taken by the Turkish government in

the aftermath of the July 15, 2016 coup attempt.³² The opinion is prepared to monitor the overall compatibility of the implementation of the state of emergency in Turkey, in particular all the subsequent emergency decree laws, with the standards of the Council of Europe (para 1).

73. The Venice Commission condemns the attempted overthrow of the government and declares that “*military coup against a democratic government, by definition, denies the values of democracy and the rule of law,*” (para 7). The Commission also reminds that the state of emergency regime should remain within the limits set by the Constitution, domestic and international obligations of the State (para 225). The Commission nevertheless underlines that the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law (para 226). It is important to stress that the Commission pointed this very clearly out as early as December 2016.

74. The Commission’s main concerns in the opinion concerning the state of emergency may be summarised as follows (see para 227):

- The Government was de facto permitted to legislate alone without any control by the Parliament or the Constitutional Court,
- The Government took permanent measures which went beyond a temporary state of emergency; civil servants were dismissed, not merely suspended, organisations and bodies were dissolved and their property confiscated instead of being put under temporary state control. The

³² [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)

Government also made a number of structural legislative changes which should normally be done through ordinary legislative process,

- The Government implemented its emergency powers through ad hominem legislation; tens of thousands of public servants were dismissed by the emergency decree laws. These collective dismissals were not individualised;
- Basic rights of administrative due process of the public servants dismissed by the decree laws have not been respected;
- Collective dismissals were ordered because of the alleged connections of public servants to the Gülenist network or other organisations considered “terrorist”, but this concept was loosely defined and did not require a meaningful connection with such organisations;
- Some of the measures associated with the dismissals unduly penalised family members of the dismissed public servants;
- In the area of criminal procedures, extensive time-limits for pre-trial detention without judicial control up to 30 days (reduced to 14 days) is highly problematic; arrests of suspects should be ordered only on the basis of “reasonable suspicion” against them; limitations on the right of access to a lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, for a very limited lapse of time and, ultimately, should be subject to judicial supervision;
- The Government has removed crucial safeguards that protect detainees from abuses which increases the likelihood of ill-treatment;
- It is unclear whether the Constitutional Court will be able to review the constitutionality of the emergency decree laws in abstracto and in

concreto. The Venice Commission considers that the Constitutional Court should have this power.

- Collective dismissals “by lists” attached to the decree laws (and similar measures) appear to have arbitrarily deprived thousands of people of judicial review of their dismissals.

75. The Venice Commission is particularly concerned by the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws, and those legal entities which have been liquidated by the decree laws. The Venice Commission supported the proposal concerning the creation of an independent ad hoc body for the examination of individual cases of dismissals, subject to subsequent judicial review (para 228). The state of emergency commission established by the encouragement of the Council of Europe has not yet produced any meaningful or effective remedy.

76. The Venice Commission recalls by way of conclusion (para 229) that the main purpose of the state of emergency is to restore the democratic legal order. The emergency regime should not be unduly protracted; if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy. During the course of the emergency, non-derogable rights cannot be restricted, and any other restrictions on rights must be demonstrated to be strictly necessary in light of the exigencies of the emergency.

3.2 Venice Commission’s Opinion on Turkey’s Constitutional Amendment

77. The Turkish constitutional amendment approved by a public referendum on 16 April 2017 with a slim margin caused the Venice Commission to put forward

one of its strongest criticisms for the deterioration of the rule of law in Turkey.³³ The principles of the separation of powers and the rule of law require that sufficient checks and balances be inbuilt in the designed political system and each constitution is a complex array of checks and balances and needs to be examined in view of its merits for the balance of powers as a whole (para 124).

78. When a presidential system is chosen as in the case of Turkey, particular caution is needed, as presidentialism carries an intrinsic danger of degenerating into an authoritarian rule (para 125). In a presidential system, the executive and the legislative powers both derive their powers and legitimacy from the people through elections held at fixed intervals. The two powers are rigidly separate, so that conflicts between the two inevitably arise. According to the Commission, the Turkish constitutional amendments are not based on the logic of separation of powers which is characteristic for democratic presidential systems (para 126).

79. The Commission raises particular concerns especially for the following features of the constitutional amendments with regard to the separation of powers (para 127):

- The president would exercise executive power alone; with an unsupervised power to appoint and dismiss ministers who do not form a collegiate government, and to appoint and dismiss all the high officials on the basis of criteria determined by him or her alone.
- The president would be empowered to choose one or more vice-presidents; without any democratic legitimacy and without validation by

³³ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e)

parliament, who would be called to exercise presidential functions in case of vacancy or temporary absence of the presidential position.

- The president, vice-presidents and ministers would be accountable only by the procedure of impeachment.
- The president would be allowed to be a member and even the leader of his or her political party, which would give him or her influence over the legislature.
- The principle of compulsory synchronization of presidential and parliamentary elections would be introduced.
- The president would be given the power to dissolve parliament on any grounds, which is fundamentally different from democratic presidential systems.
- The president would have the opportunity to obtain a third mandate, if parliament decides to renew elections during his or her second mandate. This is an unjustified exception to the limitation of two presidential mandates generally practiced across the world.
- The president would also have an extensive power to issue presidential decrees without the need for an empowering law which the Constitutional Court could review.
- The president would be given the exclusive power to declare a state of emergency and could issue presidential decrees without any limitation during the state of emergency.

80. The Commission is of the view that, in a presidential regime, a strong and independent judiciary is essential to settle the conflicts between the executive and the legislative powers (para 128). However, the constitutional amendments weaken instead of strengthening the independence of the

Turkish judiciary. The Council of Judges and Prosecutors was immediately reformed by providing that six of the thirteen members would be appointed by the president, while seven members would be chosen by the parliament, over which the president would have influence and which would very probably represent the same political forces as the president. It must be noted that no member of the Council would be elected by peer judges anymore. On account of the Council's important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors, the president's control over the Council would extend to all the judiciary. Control over the Council would also indirectly enhance the president's control over the Constitutional Court.

- 81.** The enhanced executive control over the judiciary and prosecutors which the constitutional amendments would bring about would be even more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary (para 129). The amendments would weaken an already inadequate system of judicial oversight of the executive. In the light of the above, the Venice Commission finds that the constitutional amendments would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one (para 130).
- 82.** In conclusion, the Venice Commission declares that the constitutional amendments represent a dangerous step backwards in the constitutional democratic tradition of Turkey (para 133). The Commission further stresses the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the Commission views that the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum.

3.3 Venice Commission's Opinion on Turkey's Criminal Peace Judgeships

83. The Venice Commission raises numerous concerns over the jurisdiction and practice of the criminal peace judgeships.³⁴ The official purpose of establishing peace judgeships was to enable peace judges to devote sufficient time to the drafting of the reasoning of human rights sensitive matters. However, this goal was not implemented properly and the peace judges are bogged down with work not related to 'protective measures'. Another official purpose of establishing peace judgeships was to avoid that the same judge deciding first on protective measures then on the merits. The Commission questions this reasoning and asks why the criminal peace judgeships are necessary at the investigation phase, while at the prosecution (trial) phase the same judge can take protective measures and then decide on the merits without being biased (para 103).
84. The Commission is of the view that the system of horizontal appeals among a small number of peace judges within each region or courthouse is problematic, prevents the unification of case-law, establishes a closed system and cannot be justified with the need for specialisation (para 104). The Commission maintains that there are numerous instances where peace judges did not sufficiently reason their decisions (para 105). Their heavy workload does not leave them sufficient time to provide sufficiently individualised reasoning, notably in cases of detention and when shutting down Internet sites.
85. The Venice Commission therefore recommends the following (para 106):

³⁴<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDLAD%282017%29004-e>

- The competence of the criminal peace judgeships on protective measures during the investigation phase ('protective measures') should be removed. Ordinary judges should be entrusted with the protective measures on personal liberties during the investigation and prosecutorial phases.
- If the system of criminal peace judgeships were retained, they should be relieved of all duties that do not relate to 'protective measures', notably the blocking of Internet sites and traffic offenses which take up a considerable amount of their time. Consequently, they should no longer have any jurisdiction on the merits and real appeals should be introduced in these matters.
- The horizontal system of appeals between the criminal peace judges should be replaced by a vertical system of appeals to either the criminal courts of first instance or possibly to the courts of appeal.
- For persons who have been detained on the basis of insufficiently reasoned decisions by criminal peace judges, prosecution should request their release as soon as possible, unless a trial court has taken over responsibility for their detention.

3.4 Venice Commission's Opinion on Media Freedom under Turkey's State of Emergency

86. The purpose of the opinion is to examine the effect of the emergency regime on freedom of media in Turkey.³⁵ The Commission reiterates once again that

³⁵ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)007-e)

the freedom of political debate is at the very core of the concept of democratic society as it is firmly embedded in the case-law of the European Court of Human Rights (para 91). The Commission is of the view that the ability to openly discuss political matters in the media becomes even more crucial during the state of emergency and a major constitutional reform.

87. The Commission reminds that the extraordinary measures under state of emergency such as mass liquidations of media outlets on the basis of the emergency decree laws, without individualized decisions, and without the possibility of timely judicial review, are unacceptable in light of international human rights law, and extremely dangerous (para 92). The Commission raises the same concerns for the intensification of criminal prosecutions of journalists based on their writings, under the heading of “membership” of terrorist organisations, and their arrests without relevant and sufficient reasons.
88. The Venice Commission criticises that the Turkish media cannot effectively exercise their public watchdog role and check on the need for the extension of the emergency rule and for the planned changes to the Constitution (para 93). The Venice Commission, therefore, calls the Turkish authorities to:
- supplement Decree Law no. 685 with a provision requiring that individuals and legal entities affected by the emergency measures (including the liquidated media outlets) be made aware of the specific factual reasons for the measures in order to enable them to make their case before the inquiry commission, and that decisions of the inquiry commission be individualised, reasoned and based on verifiable evidence;
 - ensure that the inquiry commission has the powers to restore the status quo ante and that it has the power to grant priority to the most urgent applications, including those filed by the media outlets;

- ensure that the journalists are not prosecuted under the heading of “membership” of terrorist organisations (and alike), where the charges are essentially based on their writings;
- ensure that where journalists are prosecuted essentially due to their publications, pre-trial detention is not imposed on the sole ground of the gravity of the charges derived from the content of their publications; the authorities should be able to demonstrate “relevant and sufficient” reasons for the detention of journalists in line with the ECtHR’s case law;
- Repeal any measure taken by emergency decree laws which is not strictly necessitated by the state of emergency.

3.4 Venice Commission’s Opinion on Local Democracy in Turkey under State of Emergency

89. The Venice Commission has assessed in its opinion³⁶ the provisions of the Decree Law No. 674 in the light of the European and international standards applicable to the state of emergency and to the functioning of local self-government in a democracy taking into account of the rule of law requirements.

90. The Commission recalls that the main purpose of an emergency regime is to restore the democratic legal order and that the emergency regime itself should remain within the limits established by the Constitution and domestic and international obligations of the State (para 94). Therefore, only such measures which are required to deal with the threat necessitating the state of emergency should be taken and for the duration of the state of emergency. The

³⁶ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e)

Commission already concluded in its 2016 on the state of emergency decree laws that the Government had taken measures that went beyond what is permitted by the Turkish Constitution and by international law.

91. According to the Commission, the provisions relating to the functioning of local democracy in Decree Law No. 674 raise similar concerns, both in terms of compliance with the procedural and substantial rules on the state of emergency and with the local self-government principles enshrined in the European Charter of Local Self-Government, to which Turkey is a Party (para 96).
92. The Commission is of particular concern that, through emergency legislation, the central authorities are enabled, in the framework of the fight against terrorism, to appoint unelected mayors, vice mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the respective municipalities (para 97). This is all the more problematic as the new rules are introducing structural changes, which are not limited in time, to the system of local government in place in Turkey, based on the election of local authorities by the local population (para 98).
93. The Commission recalls that local authorities are one of the main foundations of a democratic society and their election by the local population is key to ensuring the people's participation in the political process (para 99). The Venice Commission, therefore, calls the Turkish authorities to:
 - repeal the provisions introduced by the Decree Law No 674 which are not strictly necessitated by the state of emergency, in particular concerning the rules enabling the filling of vacancies in the positions of mayor, vice-mayor, local council member, by way of appointments;
 - ensure that the application of the rules introduced by the Decree Law No 674 is limited to the duration of the state of emergency, and that any

permanent measures affecting local democracy are taken following the ordinary laws and procedures after proper parliamentary debate;

- introduce provisions for adequate judicial review of the measures taken by the governorship in municipalities where special powers are instituted in their respect in the context of the fight against terrorism;
- provide adequate rules and framework for the reinstatement of suspended/dismissed local representatives in case the terrorism-related charges do not lead to a criminal conviction.

CHAPTER 4

RESPONSE OF THE EUROPEAN COMMISSIONER FOR HUMAN RIGHTS

4. Response of the European Commissioner for Human Rights

94. The European Commissioner for Human Rights plays a substantial role in safeguarding human rights as a non-judicial supervisory body alongside the European Court of Human Rights (ECtHR) which is regarded as the most effective human rights protection mechanism in the world by means of its binding rulings and the execution procedure of its judgments. However, this mechanism remains usually insufficient to render full satisfaction in view of the fact that it intervenes only after the violations have occurred. In this regard, the Commissioner performs critical functions through raising awareness about the ongoing violations, urging the respective states to end their disproportionate measures and being the voice of the victims.
95. The Commissioner strongly condemned the 15th July 2016 coup attempt against the democratically elected government in Turkey as expected but also expressed his concerns about the severe human rights violations committed after the declaration of the State of Emergency (SoE). First of all, the commissioner emphasized the importance of the rule of law and the independence of the judiciary in protecting human rights in his statement on 20 July 2016.³⁷ He shared his concerns on detention and suspension of nearly one fifth of all the members of judiciary immediately after the attempted coup in a very short time. He also underlined that the images disseminated in media, showing the traces of torture and ill treatment against suspected perpetrators taken into custody were alarming.
96. The Commissioner's criticisms were very timely and appropriate at the beginning of a never-ending SoE rule in which the legislative power fully delegated in practice to the government, particularly at a time when the

³⁷ <https://www.coe.int/en/web/commissioner/-/situation-in-turkey>

Turkish government was about to suspend the rule of law and the Turkish society seemed to have lost its common sense. The first emergency decree law (No. 667)³⁸ was enacted by the Turkish government on the 23rd of July 2016. It could be depicted as an “introduction to tyranny” with excessive measures it contains. The Commissioner’s statement regarding this emergency decree law was a swift reflection of major concerns raised at the first sight.³⁹

97. The emergency measures taken by relevant administrative authorities according to emergency decree law No. 667 could have been annulled by the judicial bodies. Therefore, the Turkish government elevated the unlawfulness bar and decided to adopt emergency measures directly within the emergency decree laws which would be outside the scope of judicial review. On the basis of a series of emergency decree laws, various types of excessive and disproportionate emergency measures have been taken; in particular, hundreds of thousands of public servants have been permanently dismissed, hundreds of associations, media outlets and over one thousand educational institutions have been closed and their property confiscated.

4.1 Commissioner’s Memorandum on Human Rights Implications of SoE Measures

98. The Commissioner announced a memorandum on 7 October 2016 following his visit to Ankara on human rights implications of the measures taken under the

³⁸ The text of the Decree law no: 667 is reachable at; [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)061-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)061-e)

³⁹ <https://www.coe.int/en/web/commissioner/-/measures-taken-under-the-state-of-emergency-in-turkey>

SoE by the Turkish authorities.⁴⁰ As a very first internationally independent and trustworthy document on the SoE measures adopted in Turkey, the memorandum has ultimate worth and significance. The utter silence in Turkey and abroad against the brutal witch hunt practices was broken officially by a high Council of Europe figure and this document had been a drop of water to the post-coup victims dying in the desert of injustice.

99. The Commissioner made considerable assessments concerning the incompatibility of the SoE measures and judicial practices with the European Convention of Human Rights (ECHR). He criticized the broad discretionary powers attributed to the administrative bodies which erode the rule of law and the prolongation of the SoE rather than return to ordinary legislation.

100. According to the government sources, 31,844 persons were in detention during his visit. The Commissioner highlighted the need to make distinction between persons who engaged in illegal activities and those who were sympathizers or supporters of, or members of legally established entities affiliated with the Gulen movement. He observed that the criminalization of the members of the movement or those having connections which had been entirely legal before the 15 July 2016 shall not be in line with the core criminal justice principles such as the “legality” and “non-retroactivity” of crimes. However, the number of detainees allegedly linked to the Gulen movement have risen to 49,697 as of the end of October 2017.⁴¹ According to the Turkish Justice Minister, only 5,239 of them are accused of involvement in the coup attempt. It should be born in mind that the prominent Gulenists and many of

⁴⁰<https://rm.coe.int/16806db6f1>

⁴¹ <https://www.sabah.com.tr/gundem/2017/10/23/fetonun-iadesi-icin-her-kosul-hazir>

the jailed journalists such as Ahmet Altan are also counted in that five thousand so-called coup plotters.

101. As for the public servant dismissals, the Commissioner noted that a precise differentiation should be made as well between the officers in terms of wielding sovereign power of the state. Yet, the Turkish government applied a unique sanction to all the public servants. Along with the military personnel suspected of involvement in the coup attempt, teachers, academics and any public servant who are clearly unlikely to be associated with the coup attempt share the very same fate. Without conducting neither a disciplinary investigation nor notifying any information on the dismissal grounds, it was quite obvious that a great majority of dismissals of over a hundred thousand public servants had no legal justification.

102. The Commissioner reproached the measures taken against the civil society and private sector such as the closure of associations, private schools, hospitals and media outlets. He clearly stated that these types of governmental infringements would not be proportionate and legitimate under the European Convention on Human Rights. Unfortunately, the Turkish government has not taken into consideration the Commissioner's valuable guiding comments on SoE measures and persisted the full illegitimate conduct of SoE regime so far.

4.2 Commissioner's Memorandum on Freedom of Expression and Media

103. The Commissioner published a memorandum on freedom of expression and media in Turkey on 15 February 2017⁴² which incorporates significant

⁴² <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961658&SecMode=1&DocId=2397056&Usage=2>

assessments regarding the deterioration of freedom of expression in the country after 2014 which had already reached seriously alarming levels and the SoE practices that have further relapsed the press freedom. He criticized harshly the closure of more than 150 media outlets, including newspapers, television stations, radios and publishing houses, and confiscation of their assets without any judicial decision as well as the detention of 151 journalists at that time.

104. The Commissioner described the recent situation of the media freedom in Turkey as characterized by blatant violations of the European and other international human rights standards which is heading for a self-censorship atmosphere and one-sided public debate. Depicting as a severe blow to other pillars of freedom of expression, the Commissioner also appropriately drew attention to the arrests of DTP MP's and the oppressive reaction of the government against the "Academics for Peace" signature campaign.

105. The Commissioner criticized the detention of journalists and administrators of daily Cumhuriyet, Ahmet Şık and Ahmet Altan as politically motivated and destitute of credibility. By virtue of his particular concern on detention of these journalists, the Commissioner intervened as a third party in their cases brought before the ECtHR and presented his observations.⁴³

106. As a matter of fact, there are 122 journalists behind the bars in Turkey. Obviously, most of them have been jailed as part of the government crackdown on the Gulen Movement⁴⁴ and the Kurdish movement, even the pre-trial

⁴³ <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>

⁴⁴ "79 journalists are in prison due to the FETÖ cases, and 28 journalists are in prison due to the PKK cases." <http://bianet.org/english/media/193364-name-by-name-imprisoned-journalists>

detention period of one case has already gone by over two and a half years.⁴⁵ The abovementioned cases fallen in the distinctive attention of the Commissioner are undoubtedly noteworthy. However, the Commissioner's selective approach in his reports in advocating the rights of jailed journalists would make the dire conditions of jail more unbearable for those put behind the bars merely because of their journalistic work as part of intimidation campaign run by the government.

107. To sum up, the Commissioner's pioneer work in the post failed coup which embodies all legal aspects of the unlawful SoE rule created a significant awareness in the international fora. His observations and advices were deemed as a candle in the dark by the post-coup attempt victims at a time when no critical voice was heard. The Commissioner is further urged to display a more inclusive concern in his forthcoming work of the victims of the government purge and persecution.

⁴⁵ Mehmet Baransu has been in jail since 1 March 2015.

CHAPTER 5

THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR) RESPONSE

5. ECtHR's Response on Turkey in the Aftermath of 15 July 2016

108. Since the recognition of compulsory jurisdiction of the European Court of Human Rights by Turkey in 1990, the Court has played a significant role in the protection and promotion of human rights in Turkey. Although its judgments had been controversial in many political and sensitive cases, the ECtHR has long been regarded with great respect due to the fact that its assessments have purported to elevate the minimum standards of fundamental rights and liberties at the European level. Unfortunately, the ECtHR did not live up to its reputation and expectations with its decisions in the post 15th July 2016 period regarding the SoE victims' applications.

5.1 Post-Coup Attempt Purges and Persecutions in Turkey

109. Following the 15th July coup-attempt which is not duly investigated until now, the government has initiated an unprecedented purge and persecution against the perceived opponents, namely followers of the Gulen community. This annihilation scheme has been based on some unsubstantiated assumptions which have been considered as absolute truth against which any dissident idea could not be voiced in the intimidation atmosphere of the SoE rule. According to this narrative, Gulenist movement is the sole responsible of the thwarted coup and by extension, its members and sympathizers should be rooted out from the state offices. However, the purge practice has not been limited to the Gulen community. Thanks to the "gift from God"⁴⁶, the Erdogan

⁴⁶ <https://www.bloomberg.com/news/articles/2016-07-17/coup-was-a-gift-from-god-says-erdogan-who-plans-a-new-turkey>

government benefited from the SoE powers to cleanse all non-loyalists from public institutions.

110. That purge scheme might have been considered legitimate provided that;

- the first assumption was certified by an independent judicial body,
- the scope of responsibility was limited and differentiated,
- and a due lustration procedure was conducted.

111. First of all, material facts of the coup have not been clarified intentionally as mentioned above and no judicial decision on the coup attempt would ever be convincing⁴⁷ unless at least testimonies of the top figures of the military and the intelligence service and the prominent politicians have been taken⁴⁸. Contrarily, judicial investigations and the parliamentary inquiry regarding the coup attempt have not been satisfactory in terms of their credibility and effectivity up to now⁴⁹.

112. Secondly, supposing that the government's narrative is true, there is no doubt that the purgees have not been considered to have been involved in violence and terrorist activities before the 15th July 2016.⁵⁰ Thus, none of them

⁴⁷ Barkey, Henri, "One year later, the Turkish coup attempt remains shrouded in mystery", July 14, 2017. https://www.washingtonpost.com/news/democracy-post/wp/2017/07/14/one-year-later-the-turkish-coup-attempt-remains-shrouded-in-mystery/?utm_term=.f9fa10b7d1a8

⁴⁸ <http://www.jamesinturkey.com/unasked-questions-general-akars-15-july-coup-testimony/>

⁴⁹ https://www.huffingtonpost.com/yavuz-baydar/why-did-erdoan-askparlia_b_13543936.html

⁵⁰ The Commissioner for Human Rights' memorandum, para. 20-22 Moreover, during an extremely stressful process of purge and arrest of tens of thousands of military and police officers and civilian victims, neither an incident of violence nor even a passive resistance has been recorded

can be subject to any administrative, civil or criminal sanction by virtue of their legal and tolerable private relations before that time.

113. Last but not least, administrative measures against those who are considered to have relations which are incompatible with the obligation of loyalty required from a public servant should be individualized, proportionate and taken following a due procedure.⁵¹

114. All these fundamental conditions should be met in the dismissal procedure of public servants in order to depict a legitimate lustration process. However, the government's main concern was not rendering justice, but retaliating against its opponents believed to be behind the Gezi protests and the 17-25 December 2013 graft probes. Thus, the government initiated to enforce a preconceived wipe out plan for the dissidents including the Kurdish movement, non-loyal academics, peaceful philanthropists and Gulenists at the right time using the extraordinary SoE powers.

115. After the Gezi protests and the 17-25 December 2013 graft probe, seizing the control of the judiciary become a top priority for the government. This was achieved in the first place through the creation of Criminal Peace Judgeships and the amendments in the law on the High Council of Judges and Prosecutors in 2014.⁵² Therefore, it was not quite possible to mention of an independent judiciary for the dissidents after those novelties. After the coup attempt, more than 4,000 judges and prosecutors have been permanently removed from their office⁵³ and the Constitutional Court pledged allegiance to

⁵¹ The Venice Commission's opinion on the state of emergency measures taken in Turkey, para. 132, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)03-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)03-e)

⁵² See the Venice Commission report on Peace Judgeships in Turkey, para. 42-52; [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)004-e)

⁵³ See PPJ's report on non-independence and non-impartiality of Turkish Judiciary, <http://www.platformpj.org/wp-content/uploads/NON-INDEPENDENCE-OF-TURKISH-JUDICIARY.pdf> and also

the government by sacrificing its two own members⁵⁴ although they were enjoying a security of tenure. Therefore, the entire judiciary were aligned with the government especially on such high sensitive matters. Therefore, there was no independent and impartial judiciary for the dissidents under the SoE rule as it has become obvious in the recent case of Sahin Alpay and Mehmet Altan.

116. As pointed above, the government opted to dismiss more than hundred thousand public servants directly by emergency decree laws in order not to be subject to judicial control. That choice was a blatant suspension of the rule of the law.⁵⁵

5.2 Tens of Thousands of Purged Are Facing Civil Death

117. Under the above-mentioned circumstances, the victims dismissed from the public service directly through an emergency decree law who have been subjected to civil death⁵⁶ have brought their cases to the ECtHR as a final recourse. The first ruling of the Court regarding this type of cases was the Zihni

“Turkey’s Politicized Judiciary” by Tolga Kunter, <http://www.platformpj.org/opinion-turkeys-politicized-judiciary/>

⁵⁴ The Constitutional Court dismissed two of its members based solely on “the information from the social circle” and “the common conviction formed by the members of the TCC” in a decision of 9 August 2016. See the article of Emre Turkut, “The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?”, <https://strasbourgothers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/>

⁵⁵ In the same vein, Faruk Ozcan, *ibid.*

⁵⁶ See Amnesty International’s report “No End in Sight – Purged Public Workers Denied a Future in Turkey”, <https://www.amnestyusa.org/wp-content/uploads/2017/05/No-End-In-Sight-ENG.pdf>

decision⁵⁷ adopted on 8 December 2016. The Court rejected the application of Mr. Zihni, a dismissed teacher by the emergency decree law No. 672 on grounds of non-exhaustion of domestic remedies, despite many critical views that emergency decree laws were out the judicial and constitutional review.⁵⁸

118. The Court's impatience to declare this case inadmissible were understood four days later by the Venice Commission's opinion on the emergency decree laws which reveals that the Secretary General of the Council of Europe and Turkish government had been discussing on a special body tasked for the review of the emergency decrees.⁵⁹ Besides, according to the Venice Commission, the Turkish government had already accepted that there was no legal remedy against emergency decree laws a month before the Zihni decision.⁶⁰ By the latent incentive effect of this decision and the ongoing dialogue with the Secretary General, the government found the appropriate ambiance to deepen and enlarge the purge practice to a far-reaching extent. Thus, the signatories of the "Academics for Peace" campaign have been dismissed from their post by the decree-law No. 686.

⁵⁷ Akif Zihni v. Turkey, App. no° [59061/16](#)

⁵⁸ Emre Turkut, "Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?" <https://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/>; Faruk Ozcan, Ibid.; Ihsan Gumus, "ECHR: A New Solution Partner of Erdogan Regime?", <http://www.platformpj.org/echr-new-solution-partner-erdogan-regime/>; "The Case of Zihni v. Turkey: Is the ECtHR taking its task to fight against violation of Human Rights serious or just trying to avoid a flood of appeals?", <http://www.platformpj.org/evaluations-respect-echr-decision/>

⁵⁹ Venice Commission's opinion on the state of emergency measures taken in Turkey, para. 221, [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)

⁶⁰ Ibid, para. 201, 207 and footnote n. 134 "[...] 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." (the Government's Memorandum, CDL-REF(2016)067, p. 35, dated 3-4 November 2016).

- 119.** In response to the advices of the Venice Commission and the Secretary General, the Turkish government promulgated the decree law No. 685 which announces the creation of a State of Emergency Inquiry Commission which will be subject to judicial control and individual application to the Constitutional Court.⁶¹ Taking into account the text of the said decree law, academics and law practitioners unanimously considered that this commission could not be seen as an effective remedy⁶² and was established only to gain time.⁶³ However, the ECtHR certified this mechanism for the moment as a remedy to be exhausted before lodging an application to the Court in its Köksal decision.⁶⁴
- 120.** Pursuant to Köksal decision, the ECtHR rejected more than 12,600 applications⁶⁵ in advance and 25,000 applications in total as of November 2017.⁶⁶ Thanks to this jurisprudence, the Turkish Constitutional Court also

⁶¹ The text of the Decree law no:685 is reachable at; [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)014-e)

⁶² Kerem Altıparmak, Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy? (February 23, 2017). Available at SSRN: <https://ssrn.com/abstract=2943518> or <http://dx.doi.org/10.2139/ssrn.2943518> or <http://www.ihop.org.tr/en/wp-content/uploads/2017/03/IS-THE-STATE-OF-EMERGENCY-INQUIRY-COMMISSION.pdf> ; and also E mre Turkut, The Köksal case... <https://strasbourgothers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/> ;

See, para 61-67, the Opinion on the Impact of the State of Emergency on Freedom of Association in Turkey, by Expert Council on NGO Law, CONF/EXP(2017)2, <https://rm.coe.int/expert-council-conf-exp-2017-2-opinion-impact-state-of-emergency-on-fr/168076cf14>

⁶³ Kerem Altıparmak, *ibid.*, Ihsan Gumus, *ibid.*, Faruk Ozcan, *ibid.*

⁶⁴ Gökhan Köksal v. Turkey, App. No. [70478/16](https://www.echr.coe.int/ViewDoc.aspx?id=70478/16)

⁶⁵ <http://bianet.org/english/politics/188304-ecthr-turns-down-12-600-applications-concerning-statutory-decrees>

⁶⁶ http://www.inhak.adalet.gov.tr/duyurular/faaliyet_duyurular/2017/Kas%C4%B1m/ilan2/duyuru.html

dismissed 70,771 cases addressing the Inquiry Commission.⁶⁷ The emergency decree law victims should have to wait to lodge an application to ECtHR at least five years in the best-case scenario⁶⁸ if they will be able to survive for such a long time under these circumstances unless the ECtHR dissents from this decision. In this vein, the Court gave a message to the government in Köksal decision that the effectivity of this remedy has not been endorsed definitively and the burden of proof would be on the government in the coming cases.

5.3 Tens of Thousands of People Are Behind the Bars

121. As a direct consequence of the governmental policy that each dissident should be considered terrorist, almost fifty thousand detainees were put behind the bars as of end of the October 2017 on grounds of being one of them.⁶⁹ This figure is rising day by day as the progressive cruelty of the government gains pace. In the wake of the coup attempt, numerous personalities known as Gulen follower and journalists who worked for the pro-Gulen and pro-Kurdish media outlets have been jailed. However, in the Mercan case,⁷⁰ the ECtHR evaluated that there are still effective remedies in Turkey that need to be exhausted in detention matters.

122. Owing to the ECtHR's policy of abstaining from being a "first instance" in Turkish cases and the dead silence against these arrests in Turkey and abroad,

⁶⁷ <https://bianet.org/english/law/188906-constitutional-court-rejects-70-771-applications-regarding-state-of-emergency>

⁶⁸ Kerem Altiparmak argues that exhaustion of this mechanism would last 10 years.

⁶⁹ <https://www.sabah.com.tr/gundem/2017/10/23/fetonun-iadesi-icin-her-kosul-hazir>

⁷⁰ Zeynep Mercan v. Turkey App. no: [56511/16](#)

the government has expanded audaciously the scale of oppression and crackdown towards other dissidents. In this context, Cumhuriyet daily journalists were put behind bars on 31 October 2016. On top of that, the co-presidents of the HDP, Selahattin Demirtaş and Figen Yüksekdağ and 8 other Kurdish MPs were also arrested on 4 November 2016.

123. By virtue of the updated priority policy of the ECtHR,⁷¹ the cases of the journalists of Cumhuriyet daily and nine others mentioned in the Commissioner for Human Rights' third-party intervention report⁷² have been accorded to priority examination by the Court. Four months after the submission of the communication report of the ECtHR to the government,⁷³ some of these journalists were released on 24 October 2017.⁷⁴ Besides, most probably aiming not to be declared as an ineffective remedy by the ECtHR in forthcoming judgements of these cases, the Constitutional Court ordered the release of journalists Sahin Alpay and Mehmet Altan on 11 January 2018⁷⁵. Thus, the ECtHR's swift reactivity in these cases made impact on the government and obtained a modest but remarkable positive result. In addition, the cases of the

⁷¹ http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf

⁷² <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>

⁷³ <http://hudoc.echr.coe.int/eng?i=001-174684>

⁷⁴ <http://www.hurriyetdailynews.com/istanbul-court-releases-journalist-aksoy-singer-tas-teacher-aydin-in-gulen-linked-probe-121397>

⁷⁵ However, the former Justice Minister and incumbent Vice Prime Minister Bekir Bozdag criticized the Constitutional Court for crossing the constitutional borders with these judgements. Consequently, 13th Assize Court of Istanbul did not comply with these judgments and ruled the continuation of the detention of the said journalists. http://bianet.org/english/media/193240-courts-don-t-release-alpay-altan-despite-constitutional-court-s-decision?bia_source=rss

Kurdish MPs seem to have also been granted priority as expected yet no ruling has been issued so far concerning their situation.⁷⁶

124. On the other hand, it is disappointing not to give similar priority to any of the cases involving alleged Gulenists, whereby only “offence” is “alleged membership.” Almost fifty thousand have been jailed over evidences such as depositing money to a legal bank, participating to or financing charitable activities, using a messaging app, membership to NGOs and trade unions or subscription to or having worked for a daily. Arrest of anyone on such grounds ought to be considered as “direct consequence of violation of rights”⁷⁷ enshrined in articles 8, 9, 10, and 11 of the European Convention on Human Rights. If the priority policy is applied fairly, thousands of innocent followers of the movement should be evaluated in the urgent category from which some journalists have benefited.

5.4 Blurred Boundaries Between Political Dialogue and Judicial Behaviour

125. If the ECtHR decided that there had been no effective legal remedy under the SoE rule in Turkey, they would have to deal with hundreds of thousands of applications like as a “first instance” court. It is comprehensible that the ECtHR may be hesitant to open the floodgate of cases stemming from Turkey. Furthermore, encouraging the Turkish government to establish a mechanism tasked to eliminate the unjust and unlawful decisions taken during the SoE

⁷⁶ <http://hudoc.echr.coe.int/eng?i=001-175731>

⁷⁷ As stipulated in the urgent category of the priority policy document. http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf

would be a wise approach unless the Turkish government's mind-set behind the SoE measures makes the correction of illegalities an unattainable goal.

126. According to the government narrative, being a sympathizer, supporter or member of the Gulen movement is a sufficient criterion to subject them to administrative or criminal sanctions. The emergency decree law on the establishment of the SoE Inquiry Commission⁷⁸ and the communiqué regarding the working procedure and principles of the Commission dated 12 July 2017⁷⁹ precisely state that the Commission will perform its examination in terms of "having membership of, affiliation, link or connection with terrorist organizations or structures" over a desk-review without taking cross observations of the applicants.

127. The Commission has no authority to examine the applications on the criteria set forth by the Venice Commission and the Commissioner for Human Rights or to discuss whether the relationship of the victim is incompatible with his/her loyalty obligation as a public servant. Further, judging and rendering a less severe sanction than permanent dismissal from the public service is not under the jurisdiction of the Commission. Therefore, the Commission will not decide the reinstatement of any public servant who has no involvement in any violent behaviour or no inconsistent feature with yielding the sovereign power of the state. Especially after the promulgation of the Communiqué, the ECtHR should reconsider its ruling regarding the in abstracto effectivity of the Commission.

128. Indeed, in an eventual ECtHR examination, various other grounds of illegality should be taken into consideration such as the legitimacy of the extensions of the SoE regime several times, the legality and the

⁷⁸ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)014-e)

⁷⁹ <http://www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm>

constitutionality of the measures taken in the SoE regime according to relevant domestic and international law, the foreseeability of these provisions, their proportionality and necessity in a democratic society and legitimacy in terms of their aim. The Turkish SoE measures will certainly be caught as incompatible with the European human rights law as regards to any of the abovementioned criteria. Yet, the ECtHR opted to reject the post-coup applications on procedural pretexts without examination on the merits.

129. Apart from the judicial approach, it is not far from doubt that the ECtHR's rejection of the post-coup victims might have served political expediencies. The Secretary General's stance alongside with the Turkish government's post-coup policy probably related to Turkey's increased contribution to the Council of Europe in the last years⁸⁰ is worth noting in this context. According to the statements made during his visit conducted two weeks after the coup attempt, the Secretary General criticized the European understanding of the coup⁸¹ and endorsed the Erdogan government's witch hunt proceeded under the guise of emergency necessities.⁸² The Secretary General's approach appears to neglect the Erdogan's oppression against certain dissidents.

⁸⁰ Finally, Turkey decided to withdraw to be a major contributor on the pretext that the PACE awarded Vaclav

Pavel Human Rights Prize to the ex-president of YARSAV. <http://www.hurriyetdailynews.com/turkey-no-longer-major-council-of-europe-donor-minister-122219>

⁸¹ https://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/secretary-general-jagland-in-ankara/16695?inheritRedirect=false

⁸² <https://www.reuters.com/article/us-turkey-security-europe/turkey-needs-to-follow-human-rights-in-crackdown-on-coup-plotters-council-of-europe-head-idUSKCN10E1A4>; <https://www.express.co.uk/news/world/696176/Outrageous-EU-head-human-rights-Thorbjorn-Jagland-blasts-Turkey-over-coup>; <https://www.opendemocracy.net/can-europe-make-it/kirill-koroteev-sergey-golubok/erdogan-s-unexpected-ally>; <http://www.euractiv.com/section/justice-home-affairs/news/council-of-europe-chief-backs-turkey-clean-up-after-coup/>

130. In addition, it should also be pointed out that the Secretary General made statements on behalf of the ECtHR concerning the applications before the Court.⁸³ Under these circumstances, the non-interference principle to the judicial work of the ECtHR which should retain an absolute neutrality between the applicants and the defendant governments may not be duly respected.

131. Moreover, an important extraordinary language probably due to a lack of diligence in the ECtHR's post-coup rulings is the usage of the "FETO"⁸⁴ acronym with its expansion as exactly the same as the Turkish government's usage.⁸⁵ Thus, in these rulings the "terrorist" expression is likely to be endorsed for the Gulen movement since there is no reservation that this usage solely reflects the government's approach. It should be borne in mind that none of the international organizations shares the Turkish government's identification for the Gulen movement. It must be recalled that no incident of violence has been recorded during an extremely stressful process of purge and arrest of tens of thousands of military and police officers and civilian victims.

⁸³https://www.coe.int/en/web/portal/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=23655743&_101_type=content&_101_urlTitle=press-statement-by-secretary-general-thorbj-rn-jagland-on-the-occasion-of-the-visit-of-mr-bekir-bozdag-minister-of-justice-of-turkey&inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fportal%2Fhome%3Fp_p_id%3D101%26p_p_lifecycle%3D0%26p_p_state%3Dmaximized%26p_p_mode%3Dview%26_101_struts_action%3D%252Fasset_publisher%252Fview

⁸⁴ FETO is attributed by the Turkish government to the Gulenist movement as acronym of "Fethullahist Terror Organization". This acronym has never been accepted and used by any independent international authority since it suggests the movement is a terror organization. See statement of the head of EU Counter-Terror Chief <https://www.politico.eu/article/fethullah-gulen-gilles-de-kerchove-eu-anti-terror-chief-gulen-network-not-terrorist-organization/>

⁸⁵ Gulen movement linked cases (Zeynep Mercan v. Turkey App. No. [56511/16](#); Akif Zihni v. Turkey, App. No. [59061/16](#); Gökhan Köksal v. Turkey, App. No. [70478/16](#); Kadriye Çatal v. Turkey App. No. [2873/17](#); Ayhan Bora v. Turkey App. No. [30647/17](#))

132. The Turkish government and the judiciary has always attached the expression of “terrorist” with the PKK and the Ergenekon. However, opposing to the Turkish judicial bodies’ identifications, the ECtHR prefers to use a mild language for them such as “PKK (*Workers’ Party of Kurdistan*), an armed illegal organization” and “Ergenekon criminal organization.”⁸⁶ This choice of the ECtHR in the Gulen movement linked cases may be perceived as a reflection of a biased subconscious unless that choice would be rectified by a future editorial revision.

133. All these oddities might have been caused by the appeasement and engagement policy of the Secretary General with the Turkish government.⁸⁷ Unfortunately, this policy has not produced a positive outcome as regards addressing human rights violations so far. On the contrary, time gaining and palliative measures like the genius adhoc commission mechanism advice as a fruit of dialogue between the Council of Europe and the Turkish government has not served as solution but further deepened the victimization in Turkish society on a vast scale from Kurds to liberals and Gulenists to extreme leftists.⁸⁸ Despite the alarming human rights situation in Turkey, the Justice Ministry

⁸⁶ Exemples for Ergenekon cases (Tuncay Özkan v. Turkey, App. No. [15869/09](#); Karacabeyoğlu v. Turkey App. No. [30083/10](#); Ayfer Erdoğan v. Turkey, App. No. [6656/10](#)); PKK cases (Tarman v. Turkey App. no : [63903/10](#); Nuray Kılınç v. Turkey App. No. [73954/11](#); Işıkırık v. Turkey App. No. [41226/09](#))

⁸⁷ Abdullah Bozkurt, “Council of Europe faces a daring challenge from Turkey”, <https://www.turkishminute.com/2017/01/19/opinion-council-of-europe-faces-a-daring-challenge-from-turkey/>

⁸⁸ Mesut Akman, “Poisonous Dialogue Between the ECtHR and the Turkish Government”, <http://www.platformpj.org/opinion-poisonous-dialogue-ecthr-turkish-government/>

celebrated the decrease in the ECtHR application figures as a result of “*legal reforms realized in conformity with international obligations*” under the SoE.⁸⁹

5.5. Are the Long Arms Extended Towards Strasbourg?

134. After the thwarted coup, the Turkish government arrested more than a hundred thousand and jailed almost seventy thousand⁹⁰ persons and confiscated 11 billion dollars of assets⁹¹ including also those of a former CHP MP.⁹² The figure of the dismissed judges and prosecutors has risen to 4,560⁹³ and almost half of them are arrested. Hence, the Turkish judiciary totally lost its independence and impartiality in favour of the government particularly after the declaration of SoE. Without risking their post, judges or prosecutors cannot

⁸⁹ http://www.inhak.adalet.gov.tr/duyurular/faaliyet_duyurular/2017/Kas%C4%B1m/ilan2/duyuru.html

⁹⁰ According to the latest data provided by the government, the figure of the detainees is almost fifty thousand. But this figure does not include the numbers of the sentenced persons, released ones and the recent huge wave of arrests.

⁹¹ <http://www.hurriyetdailynews.com/asset-volume-of-seized-companies-hits-over-11-billion-in-turkey-deputy-pm-110910>

⁹² <http://www.hurriyetdailynews.com/assets-of-former-chp-mp-aykan-erdemir-seized-over-zarab-case-123659>

⁹³ <http://www.haberturk.com/hsk-39-hakim-ve-savciyi-ihrac-etti-hsk-ihrac-edilen-isimler-1661286>

dare to hold an unpleasing decision for the government.⁹⁴ Nevertheless, the crackdown on the judiciary has not only been limited to Turkish jurists.

135. The case of the UN Mechanism for International Criminal Tribunals' (UN MICT) Judge Sefa Akay is a remarkable one.⁹⁵ Judge Akay was detained on 21 September 2016 on the grounds of using a smart phone app called Bylock although he was covered with the high diplomatic immunities enshrined in the Convention on the Privileges and Immunities of the UN. In spite of an order of release by the UNMICT to the Turkish government,⁹⁶ he was not released until the verdict of the first instance court which sentenced him to an imprisonment of seven and a half years.⁹⁷ Briefly, enjoying diplomatic immunities relating to an international judicial work does not suffice to be free from the Turkish government's persecution.

136. In addition, the Erdogan government never hesitates to task the Turkish diplomats, bureaucrats and other public servants assigned to foreign countries to perform as regime's long arms. In accordance with the secondment policy of the Council of Europe, Turkish government assigns several jurists to the order of the ECtHR. These jurists whose all pecuniary rights are provided by the Turkish government cannot be dispensed to be committed with their allegiance to the government. The existence of Turkish secondment at the very heart of

⁹⁴ Ibid., and <http://www.hurriyetdailynews.com/turkeys-board-of-judges-prosecutors-temporarily-suspends-four-for-ordering-release-of-gulen-suspects.aspx?pageID=238&nID=111576&NewsCatID=509>

⁹⁵ Emrah Aksu, "Strange Case of Akay: Bylock, Turkey's Coup and Rwanda's Genocide Trial", <http://www.platformpj.org/opinion-strange-case-akay-bylock-turkeys-coup-rwandas-genocide-trial/>

⁹⁶ <http://www.unmict.org/en/news/mechanism-orders-turkey-release-judge-aydin-sefa-akay>

⁹⁷ <http://www.dw.com/en/turkey-hands-jail-sentence-to-un-judge-aydin-sefa-akay/a-3926277>

the judicial work in these highly politically divisive cases not only damages the impartial character of the court but also creates a chilling effect by the government on the Turkish staff.

137. On the other hand, the esteemed national Judge Işıl Karakaş's situation is another genuine point of concern. She continues to work on a temporary basis after the end of her usual term, because of the rejection by the PACE of the Turkish government's nominees to replace her. Her husband, a respected economist Professor Eser Karakaş is one of the academics who have been dismissed from the public service by the emergency decree law No. 675. He had been sharing his democratic views on a Gulen movement linked TV channel with his friends Mehmet Altan and Şahin Alpay who have been put behind the bars after the coup attempt. He is potentially under a high risk of persecution. It is not an insignificant possibility that this makes Judge Karakaş vulnerable in performing her duties.⁹⁸

138. Taking into full account that Erdogan regime does not abstain from using any leverage against its interlocutors even if not compatible with diplomatic customs or contradictory to international obligations. Besides, cruel and unlawful practices of the Turkish government against its opponents make Turkish jurists fragile even if they live abroad or enjoy diplomatic immunities. Under these circumstances, the more Turkish staff contributes to or incumbent national judge seats in the cases of post-coup victims, the more these cases would unavoidably be questionable in terms of equity.

139. Consequently, the ECtHR is urged to take appropriate precautions in order to guarantee its neutrality towards the applicants and not to be affected from the Turkish government's concealed interference endeavours. To this end, it would be ideal to assign an internal task force preferably consisting of

⁹⁸ <https://odatv.com/hakimin-esine-dikkat-1706171200.html>

non-Turkish jurists in decisive positions in order to deal with the post-coup cases.

140. Furthermore, given the ongoing oppression of the government intensifying more day by day, the ECtHR should hold back the blank check given to the Turkish government to pursue its persecution by its recent jurisprudence. It is vital to give a very strong message to the Turkish government by ruling on severe human rights violations within “pilot case procedure” and refer these cases to the Committee of Ministers. This would be a more appropriate solution which would reveal the court from the fear of flood of applications from Turkey.

141. Last but not least, the ECtHR is urged to implement the priority policy in a non-discriminative and comprehensive manner in order to deal with the systematic violations on the basis of pure political motivations. Hence, the ECtHR would resume its venerable duty to protect the fundamental liberties and promote the human rights standards in Europe.

CONCLUSION

142. The state of emergency temporarily declared in Turkey has soon become a “de facto permanent” emergency regime as a matter of convenience for the government. The government under the direction of the President prefers to govern through the emergency decree laws. These decree laws do not go through the review of the parliament as they are mostly still waiting for the parliamentary proceedings. They are not made subject to judicial review either. The Constitutional Court refuses to examine the constitutionality of the new order established by the SoE decree laws.
143. The Council of Europe, to which Turkey is a party, through its various bodies, has put forward its views and responses as an authoritative benchmark on a great number of occasions in connection with the state of emergency practices in Turkey.
144. Within this context, the Parliamentary Assembly of the Council of Europe (PACE) has underlined that the dismissal and arrests of thousands of judges and prosecutors *“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.”*
145. PACE has warned that lifting the immunity of the MPs has seriously undermined the democratic functioning of the Turkish Parliament. PACE has also noted that the adoption of new constitutional amendments would result a shift from a parliamentary to a presidential system, granting the President extensive powers while drastically reducing the supervisory role of the parliament.
146. PACE furthermore decided on 25 April 2017 in its Resolution 2156 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 Assembly in its Resolution 2188 also reiterated

its deepest concern about the scope of measures taken under the state of emergency and the amendments to the constitution.

- 147.** The Venice Commission, another specialised body of the Council of Europe, has also published numerous opinions as regards Turkey's state of emergency practices. The Commission's opinion on emergency decree laws has warned against the danger of pro-longed emergency regime and of the measures not strictly necessary by the emergency.
- 148.** The Commission's opinion on Turkey's Constitutional Amendment has further pointed to the danger of a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one.
- 149.** The Commission's Opinion on Turkey's Criminal Peace Judgeships has moreover criticised the system of horizontal appeals among a small number of peace judges, establishing a closed-circuit system which raises issues of fairness and non-independence.
- 150.** The Venice Commission's Opinion on Media Freedom in Turkey has underlined that the Turkish media cannot effectively exercise their public watchdog role and check on the extension of the emergency rule and for other matters of public concern.
- 151.** The Commission's Opinion on Local Democracy in Turkey has pointed that the current practices under emergency laws undermines the functioning of local authorities in Turkey, a key to ensuring the people's participation in the political process.
- 152.** Similar to Venice Commission, European Human Rights Commissioner's opinions made significant assessments concerning the incompatibility of the SoE measures and judicial practices with the European Convention of Human Rights (ECHR). The Commissioner has criticized the broad discretionary powers attributed to the administrative bodies which erode the rule of law and the prolongation of the SoE rather than return to ordinary legislation.

- 153.** The Commissioner has also described the situation of the media freedom in Turkey as characterized by blatant violations of the European and other international human rights standards. The Commissioner has further observed that the retroactive criminalization of people for having membership or connections which had been entirely legal before the 15 July 2016 shall not be in line with the core criminal justice principles such as the “legality” and “non-retroactivity” of crimes.
- 154.** The ECtHR’s overall response did not live up to the expectations with its decisions in the post 15th July 2016 period regarding the SoE victims’ applications. The Court rejected the application of Mr. Zihni who was dismissed by the emergency decree law No. 672 on grounds of non-exhaustion of domestic remedies, despite many critical views that emergency decree laws were out the judicial and constitutional review.
- 155.** The ECtHR has certified the State of Emergency Inquiry Commission as a remedy to be exhausted before lodging an application to the Court in its Köksal decision, even though independent academics and lawyers unanimously considered that this commission could not be seen as an effective remedy and was established only to gain time. As a result, the ECtHR rejected tens of thousands of applications from Turkey for not having exhausted domestic remedies.
- 156.** The ECtHR evaluated in the Mercan case that there are still effective remedies in Turkey that need to be exhausted in detention matters. This has caused the Erdogan regime to expand the scale of oppression and crackdown towards other dissidents.
- 157.** The legitimacy of the repeated extensions of the SoE regime, the legality and the constitutionality of the measures, the foreseeability, proportionality and necessity of these measures in a democratic society are the grounds by which the SoE measures would be caught as incompatible with the European human rights norms. Yet, the ECtHR has opted to reject the post-coup applications on procedural pretexts without examination of the merits.

158. Apart from the judicial approach, it is suspected that the ECtHR's rejection of the post-coup victims might have served political expediencies. However, under the persistent and deteriorating human rights situation in the country, it is vital that the Court sends a strong message to the Turkish government by ruling on human rights violations within "pilot case procedure" and refer these cases to the Committee of Ministers.



PLATFORM FOR PEACE & JUSTICE

Platform for Peace and Justice (PPJ) is a platform that monitors and reports the developments in the fields of peace, justice, democracy, the rule of law and human rights, with a special focus on Turkey.

PPJ is currently an online intellectual medium undertaking its work by generating and disseminating news, articles, op-eds, and reports as well as by organizing activities and initiating campaigns.

PPJ is an initiative of a group of dedicated scholars, lawyers, journalists and civil society activists.

PPJ's work is primarily based on democratic and human rights principles enshrined in the international human rights instruments and understood through the prism of the European best practices.

PPJ strongly believes that a worldwide peace and justice can only be achieved through the advancement of these values and principles across the borders.

Mission

PPJ aims to promote peace, justice, democracy, the rule of law and human rights in the world, particularly in Turkey, through;

- Raising awareness and sensibility for upholding these values and principles,
- Monitoring and reporting human rights violations,
- Generating and diffusing knowledge on conducive policies and practices,
- Defending basic human rights and democratic principles against infringements,
- Campaigning against human rights violations affecting individuals and groups,
- Serving as a common and open platform for advocating human rights and democratic principles,
- Strengthening respect for human dignity and civil right consciousness,
- Encouraging good policies and practices for building peace among people and nations.

Vision

PPJ's vision is to become a prominent civil society organization for defending and fostering universal democratic and human rights principles in Europe striving for peace and justice for all.