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WRITTEN STATEMENT

Venice Commission's "Rule of Law Checklist"¹

As the Venice Commission explains, the Rule of Law Checklist is neither exhaustive nor final. While aiming at covering the core elements of the Rule of Law, this Checklist could change over time as new problems arise, or to develop certain points in greater detail in future. However, the core elements of rule of law as of today in an average state member to the CoE are rearded to be the following:

- legality,
- legal certainty,
- prohibition of arbitrariness,
- respect for human rights,
- non-discrimination and equality before the law,
- access to justice.

Access to justice (before independent and impartial courts)

As the Venice Commission set forth on each and every possible opportunity, independence of judiciary means that *“the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation.”*⁴⁶ *Impartial means that the judiciary is not - even in appearance - prejudiced as to the outcome of the case.*^{2”}

Inter alia, this criterion covers also the right to a fair trial, starting with the right of access to justice and the presumption of innocence. ³

¹ REPORT ON THE RULE OF LAW Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) CDL-AD(2011)003

² [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

³ PACE Resolution 2077 (2015) : Abuse of pretrial detention in States Parties to the European Convention on Human Rights, PACE Resolution 2098 (2016) “Judicial corruption: urgent need to implement the Assembly’s proposals”.

Current situation in Turkey:

While Turkey was:

- a model for Arab spring with democratisation,
- a model for candidate countries with its improvement in judiciary and fundamental rights (POSITIVE AGENDA)
- a country getting rid of well-deserved reputation of human rights breaches of '90s
- got so close to solve the decades-lasting Kurdish problem through a wider understanding of human rights,
- a big regional power and major ally for NATO countries, EU and US,
- a country discussing the deepening and updating the customs union and eventually full accession to the EU,

TR now seems like a Middle East country in all terms.

In TR case, we see the chain of independence of judiciary/rule of law/transparency and accountability is essential not only for democracy in the country, but also for economy (foreign investment) and ability to give direction to international politics (NATO, CoE, EU).

In today's Turkey after the coup attempt of July 2016, 4560 judges/prosecutors have been dismissed, appr. 2800 of them are still being kept in detention for more than 16 months as of today, 680 of them are still in solitary confinement, 1311 conditionally released on probation after months of detention, 3 dead under arrest without an indictment.

According to the data based on the work by CPJ, Turkey is keeping around 170 journalists behind the bars who are insistingly classified by the government as terrorists, bank robbers or spies rather than being journalists. At this point, it should be noted that the government cancelled almost 900 yellow press cards which is the sole criterion for the government to name a journalist as a journalist. Most of these `terrorists and thieves` are among those whose press cards were cancelled without due process after July 2016 taking the advantage of state of emergency.

History /Basis of Crackdown in short

- ▶ 2016, July 20: Law on State of Emergency enacted with the support of nationalist party
- ▶ 2016, July 21: Human rights agreements suspended (Derogation from ECHR, UNDHR)
- ▶ 2016, July 23: All (remaining) members of High Courts were illegally dismissed and the new recruitments were made by the new HSYK (High Council of Judges)

and Prosecutors) which was formed and fully controlled by the ruling party. This resulted in:

- extermination of independence of the Supreme Courts,
 - eradication of Principles of "judicial independence", "legal guarantee of judgement" and "rule of law",
 - recruitment of new members to HSYK and YSK (!!!Supreme Board of Election!!!)
- 2016, April 16: Referendum on Constitutional Amendment was held under the control of newly created YSK, the conduct of which was found in breach of law and internationally accepted standards by the OSCE observers⁴.

The Erdogan Government extended the crackdown beyond the Military to include all Government Departments and purged almost 150,000 state officials at various levels, detained around 125,000 people, and imprisoned almost 60,000. These purges and arrests were only possible through the extraordinary authorities provided by the declaration of the State of Emergency, which was later extended multiple times with a strand of constitutionally illegal Emergency Decrees. These Decrees bypass the scrutiny by the Turkish Parliament and the Turkish Supreme Court. Many decrees passed contain measures that conflict with basic human rights safeguards and Turkey's obligations under the international and domestic law. As of now two Supreme Court members, several Members of the Parliament, thousands of judges and prosecutors, elected mayors, more than 150 journalists, and even many U.S. and EU citizens are arbitrarily imprisoned in Turkey.⁵

It's worth noting that the Constitutional Court rejected to review the misconduct related to the Emergency Decrees. At this point, systematic, wide-spread, and deliberate practices of torture and abuse in detention centers and prisons received the open support from the Government and sincere ignorance from the top judicial authorities.

On 23 July 2016, Erdogan's Justice and Development Party (AKP) Government passed Emergency Decree 667 to perpetuate impunity and legal protection to the security services involved in the fight against terrorist groups.⁶ The decree states "*individuals who make decisions and perform their duty in the context of this decree bear no legal, administrative, financial or criminal responsibility for those duties performed.*" Eventually, appeals of such cases were not investigated by prosecutors at all, and if any probe is launched by chance/accident, it is not properly or thoroughly conducted. In January 2017, the Trabzon Office of Chief Public Prosecutor rejected a torture appeal (2016/15056E- 2017/123K), in the rejection statement of which, he

⁴ Turkey, Constitutional Referendum, 16 April 2017: Final Report (OSCE)
<http://www.osce.org/odihr/elections/turkey/324816>

⁵ The Collapse of Rule of Law in Turkey, <https://purgednato.wordpress.com/2017/10/11/the-collapse-of-rule-of-law-in-turkey/>

⁶ <https://www.hrw.org/news/2016/07/26/turkey-rights-protections-missing-emergency-decree>

stated that he could not investigate the torture case because the Emergency Decree 667 had provided impunity to the police officers.⁷ This sends a clear signal to police officers, law enforcement officials, and judiciary officials that they can abuse detainees and violate their rights without fear of legal or other consequences. It is of course, a clear breach of Turkey's non-derogable duty under international law to prevent and punish acts of torture and ill-treatment as well.

DEROGATION FROM THE UNDERTAKINGS OF ECHR

The state of emergency declared in Turkey and the derogation of ECHR can lawfully affect the fundamental rights of suspects stated in Articles 5 and 6 `within the limits enshrined by the Convention itself`.⁸ On the other hand, Article 15 of the convention by its very nature cannot be used to erase them under international law.⁹ However, one of the first things the Erdogan Government after declaration of STATE OF Emergency was issuing a decree extending the maximum length of detention by the police from 4 to 30 days, an act in itself contrary to Article 5 of ECHR. The failed coup, attempted by a group of soldiers and the necessity of a state of emergency to deal with this criminal organization, does in no sense not give the Turkish Government carte blanche to crush fundamental rights and freedoms. As stated by the Court of Human Rights, a period of 14 days is already too long for an unsupervised detention, where violations to Article 3 may occur (Aksoy v. Turkey, Demir and Others v. Turkey, Bilen v. Turkey).¹⁰

Recalling its [Resolution 2156 \(2017\)](#)¹¹ on the functioning of democratic institutions in Turkey, the Parliamentary Assembly of the Council of Europe (PACE) reiterated its deepest concern about the scope of measures taken under the state of emergency and the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and approved in the national referendum of 16 April 2017. PACE in its Resolution 2188 (2017)¹² therefore called on the Turkish authorities to:

1. lift the state of emergency as soon as possible;
2. 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

⁷ <http://odatv.com/polis-sizi-tehdit-de-etse-darp-da-etse-bir-sey-yapamazsiniz-1501171200.html>

⁸ http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf

⁹ Enemies of the State, <https://www.linkedin.com/pulse/enemies-state-claudia-pina>

¹⁰ www.ictu.ie/download/pdf/case_of_demir_baykara_v_turkey_apr_09.pdf
<http://echr.ketse.com/doc/34482.97-en-20060221/>

¹¹ <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=23665&lang=en>

¹² <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24214&lang=en>

again be a functioning separation of powers, especially with respect to the parliament and the Constitutional Court;

3. 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;

4. 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.

Conclusion

Though underlined to be among the most important and integral elements of rule of law, access to justice before independent and impartial courts in today's Turkey is a lost cause at all. With 4600 judges and prosecutors having been dismissed and 2600 still being kept under arrest without indictment, rule of law in Turkey is bleeding, wounded and comatose today. However, we believe that it will eventually heal and make its comeback. We are sure of that. Because, history proved there has been no exception to this.

Because, we believe in justice and as prominent writer and novelist Ahmet Altan perfectly stated, we believe that "Rightful men can win the fight even while in jail. Wrongful men will lose even in the palace."